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WHEN: Tuesday, September 15, 2009
9:00 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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# Presidential Documents

**Title 3—**

**The President**

**Proclamation 8397 of July 23, 2009**

## 35th Anniversary of the Legal Services Corporation, 2009

**By the President of the United States of America**

**A Proclamation**

Every day the Legal Services Corporation (LSC) breathes life into the timeless ideal, ''equal justice under law.'' It reaches those who cannot afford the assistance they need and those who would otherwise go without vital representation. Today we recognize the 35 years during which the LSC has moved our Nation and our legal system towards greater equality.

The LSC brings legal counsel to every corner of the Nation. As the largest provider of civil legal aid to the poor, it supports programs that touch families in every State. Persons of all ethnic and racial backgrounds know its great work, and women, who represent 75 percent of LSC-supported clients, especially benefit from its expertise.

The Legal Services Corporation's work helps improve lives. It allows more people to access the public benefits they deserve, more domestic violence victims to secure the protections they desperately need, and more workers to receive the compensation they have been promised and earned.

During an economic crisis, the work of the LSC is especially important. When families face foreclosure, eviction, or bankruptcy, or when communities are targeted by predatory lenders, they need the help of legal professionals. These scenarios are far too common today. Fortunately, the LSC stands ready to meet these demands.

Because economically vulnerable communities continue to face an unmet need for legal services, my Administration has supported increased funding for the LSC. I have also recommended lifting several unnecessary restrictions on funding so that more people can receive assistance. These changes are critical to the organization's mission and work.

We have made great progress in protecting the legal rights of our citizens, and the Legal Services Corporation has played a vital role in this story for more than 3 decades. With continued support, it will serve those in need and help our Nation live out its highest ideals.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim July 25, 2009, as the 35th Anniversary of the Legal Services Corporation. I call upon legal professionals and the people of the United States to honor the contributions of this vital organization.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of July, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. E9–18085
Filed 7–27–09; 8:45 am]
Billing code 3195–W9–P

# Rules and Regulations

Federal Register

Vol. 74, No. 143

Tuesday, July 28, 2009

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

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

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

**[Notice 2009–13]**

### Civil Monetary Penalties Inflation Adjustments; Correction

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules; correction.

**SUMMARY:** The Federal Election Commission published in the **Federal Register** on July 1, 2009, a document concerning the application of inflation adjustments to certain civil monetary penalties under the Federal Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act. The Commission inadvertently entered the signature date on the document as March 25, 2009. This document removes that signature date and inserts the correct date, which is June 25, 2009. The Commission is also correcting two typographical errors.

**DATES:** *Effective Date:* This correction is effective on July 28, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or Ms. Cheryl A.F. Hemsley, or Ms. Jessica Selinkoff, Attorneys, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Commission published final rules adjusting certain civil monetary penalties for inflation in the **Federal Register** on July 1, 2009 (74 FR 31345) (Notice 2009–09), which inadvertently included an incorrect issuance date. This correction removes that date and inserts the correct date of issuance by the Commission. The Commission is also rectifying two typographical errors found in this document since the publication date.

In Notice 2009–09, published on July 1, 2009 (74 FR 31345), make the following correction.

1. On page 31349, in the third column, replace the date ''March 25, 2009'' which appears after the word ''Dated,'' with ''June 25, 2009.''

**List of Subjects in 1 CFR Part 111**

Administrative practice and procedures, Elections, Law enforcement, Penalties.

■ In addition, the FEC makes the following correcting amendments to 11 CFR part 111:

### PART 111—COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))

■ 1. The authority citation for part 111 continues to read as follows:

**Authority:** 2 U.S.C. 432(i), 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

**§ 111.43 [Corrected]**

■ 2. Section 111.43 is corrected—

■ A. In the table in paragraph (a), in the first column, in the second row from the bottom, by removing the figures ''$8,50,000–949,999.99'' and adding in their place the figures ''$850,000–949,999.99''; and

■ B. In paragraph (c) by removing the figure ''$6,500'' and adding in its place the figure ''$6,050''.

On behalf of the Commission.

Dated: July 22, 2009.

**Steven T. Walther,**

*Chairman, Federal Election Commission.*

[FR Doc. E9–17870 Filed 7–27–09; 8:45 am]

BILLING CODE 6715–01–P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2009–0062; Airspace Docket No. 09–AGL–2]**

### Amendment of Class E Airspace; Minneapolis, MN

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace at Minneapolis, MN. Additional controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Anoka County-Blaine Airport (Janes Field), Minneapolis, MN. This action also updates the geographic coordinates of the Anoka County-Blaine Airport (Janes Field) and Minneapolis-St. Paul International Airport to coincide with the FAA's National Aeronautical Charting Office, and makes minor corrections to the legal description published in the Notice of Proposed Rulemaking. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at Anoka County-Blaine Airport (Janes Field).

**DATES:** 0901 UTC, October 22, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

**History**

On April 21, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Minneapolis, MN, adding additional controlled airspace at Anoka County-Blaine Airport (Janes Field), Minneapolis, MN. (74 FR 18168, Docket No. FAA–2009–0062). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

**The Rule**

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace at Minneapolis, MN, adding additional controlled airspace extending upward from 700 feet above the surface at Anoka

County-Blaine Airport (Janes Field), Minneapolis, MN, for the safety and management of IFR operations. This action also updates the geographic coordinates of the Anoka County-Blaine Airport (Janes Field) and Minneapolis-St. Paul International Airport to coincide with the FAA's National Aeronautical Charting Office, and makes minor corrections to the legal description published in the Notice of Proposed Rulemaking.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it adds additional controlled airspace at Anoka County-Blaine Airport (Janes Field), Minneapolis, MN.

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### Adoption of the Amendment

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

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

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

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

### § 71.1 [Amended]

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

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

* * * * *

**AGL MN E5 Minneapolis, MN [Amended]**

Minneapolis-St. Paul International Airport (Wold-Chamberlain) Airport DME Antenna
(Lat. 44°52′28″ N., long. 93°12′24″ W.)
Minneapolis, Anoka County-Blaine Airport (Janes Field), MN
(Lat. 45°08′42″ N., long. 93°12′37″ W.)
St. Paul, Lake Elmo Airport, MN
(Lat. 44°59′51″ N., long. 92°51′20″ W.)
Minneapolis, Airlake Airport, MN
(Lat. 44°37′40″ N., long. 93°13′41″ W.)
Farmington VORTAC
(Lat. 44°37′51″ N., long. 93°10′55″ W.)

That airspace extending upward from 700 feet above the surface within a 20-mile radius of the Minneapolis-St. Paul International Airport (Wold-Chamberlain) Airport DME antenna, and within a 6.5-mile radius of the Anoka County-Blaine Airport (Janes Field), and within 4 miles each side of the 001° bearing from the Anoka County-Blaine Airport (Janes Field) extending from the 6.5-mile radius to 9.9 miles north of the airport, and within a 6.3-mile radius of the Lake Elmo Airport, and within a 6.4-mile radius of the Airlake Airport, and within 3.3 miles each side of the 084° bearing from the Farmington VORTAC extending from the 6.4-mile radius to 14.8 miles east of the Airlake Airport.

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Issued in Fort Worth, Texas, on July 16, 2009.

**Anthony D. Roetzel,**

*Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. E9–17850 Filed 7–27–09; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2009–0187; Airspace Docket No. 09–ACE–3]**

## Amendment of Class E Airspace; Ankeny, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace at Ankeny, IA. Cancellation of NDB approaches at Ankeny Regional Airport has made it necessary to reconfigure Class E airspace. Controlled airspace is necessary to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Ankeny Regional Airport, Ankeny, IA. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at Ankeny Regional Airport. This action also updates the geographic coordinates of the airport to coincide with the FAA's National Aeronautical Charting Office.

**DATES:** Effective 0901 UTC, October 22, 2009. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

### History

On April 27, 2009, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace at Ankeny, IA, reconfiguring controlled airspace at Ankeny Regional Airport, Ankeny, IA. (74 FR 19029, Docket No. FAA–2009–0187). Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraphs 6002 and 6005 of FAA Order 7400.9S signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order. Subsequent to publication, the

FAA found that the cite for the Class E2 airspace was omitted. With the exception of editorial changes, and the changes described above, this rule is the same as that proposed in the NPRM.

### The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace at Ankeny, IA, reconfiguring controlled airspace at Ankeny Regional Airport, Ankeny, IA, for the safety and management of IFR operations. This action also updates the geographic coordinates of the airport to coincide with the FAA's National Aeronautical Charting Office. This rule also cites the correct paragraph in which the Class E2 airspace is found in FAA Order 7400.9S.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Ankeny Regional Airport, Ankeny, IA.

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### Adoption of the Amendment

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

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

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

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

### § 71.1 [Amended]

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

*Paragraph 6002 Class E airspace designated as surface areas.*

* * * * *

**ACE IA E2 Ankeny, IA [Amended]**

Ankeny Regional Airport, IA
(Lat. 41°41′29″ N., long. 93°33′59″ W.)

Within a 4-mile radius of Ankeny Regional Airport, excluding that portion within the Des Moines Class C airspace area.

* * * * *

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

* * * * *

**ACE IA E5 Ankeny, IA [Amended]**

Ankeny Regional Airport, IA
(Lat. 41°41′29″ N., long. 93°33′59″ W.)

That airspace extending upward from 700 feet above the surface within a 7.1-mile radius of Ankeny Regional Airport, and within 2 miles each side of the 045° bearing from the airport extending from the 7.1-mile radius to 9.3 miles northeast of the airport, and within 2 miles each side of the 012° bearing from the airport extending from the 7.1-mile radius to 11.1 miles north of the airport, excluding that portion within the Des Moines Class C airspace area.

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Issued in Fort Worth, Texas, on July 16, 2009.

**Anthony D. Roetzel,**

*Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. E9–17863 Filed 7–27–09; 8:45 am]

BILLING CODE 4910–13–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 314

[Docket No. FDA–2008–N–0341]

RIN 0910–AG19

## Applications for Food and Drug Administration Approval To Market a New Drug; Postmarketing Reports; Reporting Information About Authorized Generic Drugs

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending its regulations to require that the holder of a new drug application (NDA) submit certain information regarding authorized generic drugs in an annual report. We are taking this action as part of our implementation of the Food and Drug Administration Amendments Act of 2007 (FDAAA). FDAAA requires that FDA publish a list of all authorized generic drugs included in an annual report since 1999, and that the agency update the list quarterly.

**DATES:** This final rule is effective January 25, 2010.

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

**FOR FURTHER INFORMATION CONTACT:** Michelle D.D. Bernstein, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6362, Silver Spring, MD 20993–0002, 301–796–3601.

**SUPPLEMENTARY INFORMATION:**

### I. Background

In the **Federal Register** of September 29, 2008 (73 FR 56487), FDA published a direct final rule to amend § 314.3 (21 CFR 314.3) to add a definition of ''authorized generic drug'' and § 314.81 (21 CFR 314.81) to require that an NDA holder specifically report that it has marketed an authorized generic drug during the applicable time period. We explained that we issued this rule as a direct final rule because we believed it was noncontroversial and that there was little likelihood of receiving significant

adverse comments. We concurrently published in the **Federal Register** of September 29, 2008 (73 FR 56529) a companion proposed rule, identical in substance to the direct final rule, that provided a procedural framework from which to proceed with standard notice-and-comment rulemaking in the event we were required to withdraw the direct final rule because of significant adverse comments. A significant adverse comment is defined as a comment that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. Any comments received under the companion proposed rule were treated as comments regarding the direct final rule and vice versa. A full description of FDA's policy on direct final rule procedures may be found in a guidance document published in the **Federal Register** of November 21, 1997 (62 FR 62466).

We received four comments on the proposed rule, which included several comments that were arguably significant adverse comments. Therefore, in the **Federal Register** of February 10, 2009 (74 FR 6541), we withdrew the direct final rule. This final rule summarizes and responds to the comments received on the direct final rule and proposed rule. See section III of this document for a discussion of the comments and FDA's responses.

On September 27, 2007, the President signed into law FDAAA (Public Law 110–85, 121 Stat. 823). Section 920 of FDAAA adds new section 505(t) to the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(t)). Section 505(t) of the act requires that FDA take the following actions:

- Publish on its Internet site a complete list of all authorized generic drugs included in an annual report submitted to the agency after January 1, 1999, consisting of the drug trade name, the brand company manufacturer, and the date the authorized generic drug entered the market;
- Update the list quarterly; and
- Notify relevant Federal agencies, including the Centers for Medicare and Medicaid Services and the Federal Trade Commission, that the list has been published and will be updated quarterly.

For purposes of publishing the list, section 505(t)(3) of the act defines the term ''authorized generic drug'' as a ''listed drug (as that term is used in [section 505(j) of the act]) that has been approved under [section 505(c) of the act] and is marketed, sold, or distributed directly or indirectly to retail class of trade under a different labeling, packaging (other than repackaging as the listed drug in blister packs, unit doses, or similar packaging for use in institutions), product code, labeler code, trade name, or trade mark than the listed drug.'' On June 27, 2008, based on information available to FDA at that time, the agency initially published the list of authorized generic drugs on FDA's Web site at *http://www.fda.gov/cder/ogd/AG_Listing.htm*.

*A. The Proposed Rule*

Currently, there is no requirement that an NDA holder specifically report that it is marketing an ''authorized generic drug.'' NDA holders are required to include information about distribution or certain changes to manufacturing or labeling in annual reports, which may indicate that an authorized generic is being marketed. However, annual reports may not include all the information necessary for FDA to publish the list required by FDAAA. For example, sponsors rarely include the date the authorized generic entered the market.

As stated in the proposed rule, to allow FDA to accurately report a complete list of all authorized generic drugs included in annual reports and to update the list in a timely fashion, we proposed to add a requirement that annual reports specifically and clearly include the information we are required to report. In addition, we proposed that the NDA holder report the date the authorized generic drug ceased being distributed to ensure that the list is as accurate and up-to-date as possible. The first annual report submitted after implementation of this regulation must provide information regarding any authorized generic drug that was marketed during the time period covered by an annual report submitted after January 1, 1999.

*B. Changes to the Proposed Rule*

We received a number of comments on the proposed rule regarding submission of the required information. Some of the comments requested clarification about electronic submission of the information and urged speedy adoption of an electronic means for submission of the information. One comment opposed the provision requiring separate submission of the information by mail in either hard copy or electronic format in addition to submission as part of the annual report. We address all of the comments in section III of this document.

After considering the comments, we have concluded that it is appropriate to make a revision to the proposed rule to permit e-mail submission of the required information in addition to regular mail, including courier delivery. The final rule revises proposed § 314.81(b)(2)(ii)(b) to allow NDA holders to send the required information to the Authorized Generics electronic mailbox at *AuthorizedGenerics@fda.hhs.gov* with ''Authorized Generic Submission'' indicated in the subject line.

We also revised the last line of that section to clarify when separate submission of the authorized generics information is required by this rule. When information is included in an annual report about an authorized generic drug, the final rule requires that a copy of that portion of the annual report be sent to a central office in the agency that will compile the list of authorized generic drugs and update it quarterly. At such time as FDA requires electronic submission of annual reports through a system that allows for the extraction of relevant information from annual reports, separate submission of the information will no longer be required.

Finally, on our own initiative, we have also revised § 314.81(b)(2)(ii)(b) to provide a new mailing address (street address) for submissions made by regular mail.

## II. Description of the Final Rule

We are amending our regulations in § 314.3 (21 CFR 314.3) to add a definition for the term ''authorized generic drug.'' The definition provides that an authorized generic drug is a listed drug (as defined in § 314.3 (21 CFR 314.3)) that has been approved under section 505(c) of the act and is marketed, sold, or distributed directly or indirectly to retail class of trade with either labeling, packaging (other than repackaging as the listed drug in blister packs, unit doses, or similar packaging for use in institutions), product code, labeler code, trade name, or trade mark that differs from that of the listed drug.

We are also amending our regulations in § 314.81 (21 CFR 314.81) to require that an NDA holder specifically report that it has marketed an authorized generic drug during the applicable time period. Section 314.81(b)(2) requires that an NDA holder submit an annual report within 60 days of the anniversary date of approval of an NDA for every NDA it holds. We are amending § 314.81 by redesignating paragraph (b)(2)(ii) regarding distribution data as paragraph (b)(2)(ii)(a), and adding a new paragraph (b)(2)(ii)(b) regarding marketing of authorized generic drugs. Under this new paragraph, if an authorized generic drug was marketed under an NDA, or

ceased to be marketed, during the reporting year, the annual report must list the date the authorized generic drug entered the market, or the date the authorized generic drug ceased being distributed, and the corresponding trade or brand name. Each dosage form and/or strength is a different authorized generic drug and should be listed separately. The first annual report submitted after implementation of this regulation must include the required marketing information for any authorized generic drug that was marketed during the time period covered by an annual report submitted after January 1, 1999.

If information is included in the annual report with respect to any authorized generic drug, a copy of the portion of the annual report with that information must be sent to the Food and Drug Administration, Center for Drug Evaluation and Research, Office of New Drug Quality Assessment, Bldg. 21, rm. 2562, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, and marked ''Authorized Generic Submission''; or to the Authorized Generics electronic mailbox at *AuthorizedGenerics@fda.hhs.gov* with ''Authorized Generic Submission'' indicated in the subject line. This final rule assumes that the copy of the relevant portion of the annual report may currently be submitted in one of several different formats (e.g., a paper copy, a PDF document on a computer disc, or an e-mail containing the required information). Although annual reports may currently be submitted in electronic format to the relevant division responsible for reviewing a particular NDA, current capabilities do not permit us to create a centralized authorized generics database by extracting information from the relevant portion of the annual reports submitted in that format. However, FDA is committed to adapting its business practices to evolving technology, including using the significant advancements in Web-based, electronic systems. In anticipation of the future changes, this final rule provides that once an electronic submission format is mandated for annual reports and new requirements for electronic submission to the agency of annual reporting information are established, the authorized generics information will then be required to be submitted as part of the annual report submission in accordance with the new requirements. Separate submission of the information will no longer be required when FDA has a method of extracting the relevant information from annual reports.

## III. Comments on the Proposed Rule and FDA's Responses

We received four comments in response to the proposed rule. Comments were received from individual consumers and industry organizations. A summary of the comments received and our responses follow.

### *A. General Comments*

(Comment 1) Two comments generally supported the proposed rule. One of these comments urged FDA to require submission of additional information, such as the brand name associated with the authorized generic drug and whether a prescription is required, for inclusion on the list of authorized generic drugs.

(Response) FDA appreciates the supportive comments. Regarding the submission of additional information suggested by the commenter, note that this final rule requires, as we proposed, that annual reports list the date each authorized generic drug entered the market, the date each authorized generic drug ceased being distributed, and the corresponding trade or brand name. We do not believe it is necessary to also require prescription status to be reported to FDA and included on the list because such information is easily obtained from product labeling or other publicly available sources if the trade name is known. The information required to be reported under new § 314.81(b)(2)(ii)(b) of the regulations tracks the requirements of section 505(t) of the act and adequately informs the public of the marketing of an authorized generic drug. Thus, we decline to adopt the suggestion to require submission of prescription status information.

(Comment 2) One comment requested that we clarify the contents of the required submission, particularly with regard to distribution data that is required to be submitted under current § 314.81(b)(2)(ii) with the annual report.

(Response) As stated in section II of this document, the information we are requiring be submitted separately for authorized generic drugs is the date each authorized generic drug entered the market, the date each authorized generic drug ceased being distributed, and the corresponding trade or brand name. Current § 314.81(b)(2)(ii) requires that distribution data about a drug product marketed under an approved NDA be submitted with the annual report. In the codified of this final rule, § 314.81(b)(2)(ii) is renumbered as § 314.81(b)(2)(ii)(a), but otherwise remains unchanged. Distribution data is not required to be separately submitted under this rule for inclusion on the authorized generic drug list.

### *B. Comments on Electronic Submission*

(Comment 3) One comment requested clarification about electronic submission of the required information. Another comment urged speedy adoption of an electronic means for submission of the required information.

(Comment 4) One comment opposed the provision requiring separate submission of the required information by mail in either hard copy or electronic format. The comment stated that this provision is contrary to FDA's long-standing record of encouraging and facilitating electronic regulatory submissions and to its goal to use information technology to facilitate the application and review processes. The commenter believes that for annual reports currently submitted in electronic format, FDA should not require separate submission of the authorized generic information to the Office of Pharmaceutical Science.

(Response) The purpose of this rule is to facilitate FDA's obligation to accurately report a complete list of all authorized generic drugs included in annual reports and to update the list in a timely fashion. To fulfill our obligation, we need ready access to the required information. Therefore, in this final rule, we are requiring that the section 505(t) of the act information be separately sent to us, as proposed. However, in response to the comments, we have modified the language in § 314.81(b)(2)(ii)(b) to provide that the authorized generics information may also be submitted to FDA using e-mail, in lieu of sending the information by regular mail or courier. FDA believes this will provide an alternative method of submission that may be more convenient for some sponsors. We encourage sponsors that currently elect to submit their annual reports in electronic format to continue to do so. At such time that electronic submission of annual reports is mandated by FDA and FDA develops the capability to readily retrieve information it needs to comply with section 505(t) of the act, separate submission of the authorized generic information will no longer be necessary, and the language in § 314.81(b)(2)(ii)(b) of the codified has been clarified to reflect this. Until electronic submission of annual reports is required and FDA can readily retrieve the authorized generics information from the annual reports database, sponsors must submit the authorized generics information separately by regular mail or e-mail (regardless of

what format the sponsor currently uses to submit its annual report).

*C. Comment on Effective Date*

(Comment 5) One comment opposed the proposed rule because it does not ''prioritize collection of information on currently distributed authorized generic drugs.'' The commenter suggested that FDA first require sponsors to report information about currently distributed authorized generic drugs and, at a later stage, require reporting of information on authorized generic drugs marketed after 1999 but subsequently discontinued. The same commenter requested that FDA provide for an effective date that would allow sponsors time for advance planning, revision of operating procedures governing preparation of annual reports, and review of historical records.

(Response) We have adopted an effective date of 6 months after publication of this final rule. We believe that 6 months will allow time for advance planning, revision of operating procedures, and any review of historical records that would be necessary to collect the required information on marketing of authorized generic drugs since 1999 that must be reported under new § 314.81(b)(ii)(b) of the regulations. Because we have adopted an effective date that permits adequate time for manufacturers/sponsors to collect and report information on both currently marketed authorized generic drugs and authorized generic drugs marketed since 1999, it is not necessary to adopt the two-stage reporting process recommended by the commenter. Accordingly, we decline to revise the final rule to adopt such a process.

*D. Comment on Definition*

(Comment 6) One comment stated that the definition of authorized generic drugs adopted in this rule has the effect of requiring the reporting of certain products (and capturing these products on the published list) that Congress did not intend to be reported as authorized generic drugs or included on a list of authorized generic drugs. The comment further stated that capturing and listing products that Congress does not consider authorized generic drugs complicates and slows the efficient and timely use of the information. The commenter urged FDA to exercise its enforcement discretion to collect information only for products that Congress considers authorized generic drugs.

(Response) The definition of authorized generic drugs we proposed is substantially identical to the definition Congress provided in section 505(t) of the act. Absent some clear indication that Congress did not intend to include in the scope of section 505(t) certain products which clearly fall within the plain language of the definition, it would be inappropriate for FDA to narrow or otherwise alter the statutory definition of authorized generic drug. FDA's mandate is to publish a complete list of authorized generic drugs as defined in section 505(t) of the act, and to update the list quarterly. Accordingly, we decline to adopt the commenter's suggestion to revise the definition of authorized generic drugs to collect information about a narrower range of products than Congress specified in the act.

## IV. Legal Authority

The act, as amended by FDAAA, provides authority for FDA to issue this final rule. Section 505(t) of the act requires that FDA publish a complete list of all authorized generic drugs included in an annual report submitted to the agency after January 1, 1999, and to update that list quarterly. In addition, section 701(a) of the act (21 U.S.C. 371(a)) provides general authority for FDA to issue regulations for the efficient enforcement of the act. This final rule amends FDA's existing regulations regarding annual reports to ensure that the information necessary for the agency to fulfill its obligation under section 505(t) is clearly reported.

## V. Environmental Impact

The agency has determined under 21 CFR part 25 that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## VI. Analysis of Impacts

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

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this final rule imposes only minimal regulatory obligations, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $130 million, using the most current (2007) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1–year expenditure that would meet or exceed this amount.

The only costs of this final rule are associated with the Paperwork Reduction Act of 1995 (the PRA) burden, described in section VII of this document. If we assume an average hourly wage plus benefits of $56 for the reporting personnel, the annual cost is about $29,000 ($56 per hour × 520 hours).

## VII. The Paperwork Reduction Act of 1995

This final rule contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the PRA (44 U.S.C. 3501–3520). The title, description, and respondent description of the information collection provisions are shown with an estimate of the annual reporting and recordkeeping burden in table 1 of this document. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

*Title:* Applications for FDA Approval to Market a New Drug; Postmarketing Reports; Reporting Information About Authorized Generic Drugs

*Description:* This rulemaking requires the holder of an NDA to notify the agency if an authorized generic drug is marketed by clearly including this information in annual reports in an easily accessible place and by sending a copy of the relevant portion of the annual reports to a central contact point. We are taking this action as part of our implementation of FDAAA, which

requires that FDA publish a list of all authorized generic drugs included in an annual report after January 1, 1999, and that the agency update the list quarterly. We initially published this list on June 27, 2008, on the Internet and notified relevant Federal agencies that the list was published, and we will continue to update it.

*Description of Respondents:* Current holders of an NDA under which an authorized generic drug was marketed during the time period covered by an annual report submitted after January 1, 1999.

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

| 21 CFR 314.81(b)(2)(ii)(b) | Number of respondents | Annual frequency per response | Total annual responses | Hours per response | Total hours |
|---|---|---|---|---|---|
| Authorized generic drug information in the first annual report submitted after the implementation of § 314.81(b)(2)(ii)(b) | 60 | 6.7 | 400 | 1 hour | 400 |
| Authorized generic drug information submitted in each subsequent annual report | 60 | 6.7 | 400 | 15 minutes | 100 |
| The submission of a copy of that portion of each annual report containing authorized generic drug information | 60 | 6.7 | 400 | 3 minutes | 20 |

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

During the past several years, FDA has been reviewing annual reports it has received under § 314.81(b)(2) to discern whether an authorized generic drug is being marketed by the NDA holder. Based on information learned from this review and based on the number of annual reports the agency currently receives under § 314.81(b)(2), we estimate that, after the implementation of § 314.81(b)(2)(ii)(b), we will receive approximately 400 annual reports containing the information required under § 314.81(b)(2)(ii)(b) for authorized generic drugs that were marketed during the time period covered by an annual report submitted after January 1, 1999. Based on the number of sponsors that currently submit all annual reports, we estimate that approximately 60 sponsors will submit these 400 annual reports with authorized generics. As indicated in table 1 of this document, we are estimating that the same number of annual reports will be submitted each subsequent year from the same number of sponsors containing the information required under § 314.81(b)(2)(ii)(b), and that the same number of copies of that portion of each annual report containing the authorized generic drug information will be submitted from the same number of sponsors. Concerning the hours per response, based on our estimate of 40 hours to prepare each annual report currently submitted under § 314.81(b)(2), we estimate that sponsors will need approximately 1 hour to prepare the information required under § 314.81(b)(2)(ii)(b) for each authorized generic drug that was marketed during the time period covered by an annual report submitted after January 1, 1999; approximately 15 minutes to prepare the information required under § 314.81(b)(2)(ii)(b) for each subsequent annual report; and approximately 3 minutes to submit to FDA a copy of that portion of each annual report containing the authorized generic drug information.

The information collection provisions of this final rule have been submitted to the Office of Management and Budget (OMB) for review, as required by section 3507(d) of the PRA. Prior to the effective date of this final rule, FDA will publish a notice in the **Federal Register** announcing OMB's decision to approve, modify, or disapprove the information collection provisions in this final rule. 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.

## VIII. Federalism

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

## List of Subjects in 21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 314 is amended as follows:

## PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG

■ 1. The authority citation for 21 CFR part 314 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 355, 356, 356a, 356b, 356c, 371, 374, 379e.

■ 2. Section 314.3 is amended in paragraph (b) by alphabetically adding the definition for ''authorized generic drug'' to read as follows:

**§ 314.3 Definitions.**

* * * * *

(b) * * *

*Authorized generic drug* means a listed drug, as defined in this section, that has been approved under section 505(c) of the act and is marketed, sold, or distributed directly or indirectly to retail class of trade with labeling, packaging (other than repackaging as the listed drug in blister packs, unit doses, or similar packaging for use in institutions), product code, labeler code, trade name, or trademark that differs from that of the listed drug.

* * * * *

■ 3. Section 314.81 is amended by redesignating paragraph (b)(2)(ii) as

paragraph (b)(2)(ii)(a) and by adding new paragraph (b)(2)(ii)(b) as follows:

**§ 314.81 Other postmarketing reports.**

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(b) *Authorized generic drugs.* If applicable, the date each authorized generic drug (as defined in § 314.3) entered the market, the date each authorized generic drug ceased being distributed, and the corresponding trade or brand name. Each dosage form and/or strength is a different authorized generic drug and should be listed separately. The first annual report submitted on or after January 25, 2010 must include the information listed in this paragraph for any authorized generic drug that was marketed during the time period covered by an annual report submitted after January 1, 1999. If information is included in the annual report with respect to any authorized generic drug, a copy of that portion of the annual report must be sent to the Food and Drug Administration, Center for Drug Evaluation and Research, Office of New Drug Quality Assessment, Bldg. 21, rm. 2562, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, and marked ''Authorized Generic Submission'' or, by e-mail, to the Authorized Generics electronic mailbox at *AuthorizedGenerics@fda.hhs.gov* with ''Authorized Generic Submission'' indicated in the subject line. However, at such time that FDA has required that annual reports be submitted in an electronic format, the information required by this paragraph must be submitted as part of the annual report, in the electronic format specified for submission of annual reports at that time, and not as a separate submission under the preceding sentence in this paragraph.

* * * * *

Dated: April 7, 2009.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E9–17963 Filed 7–27–09; 8:45 am]

**BILLING CODE 4160–01–S**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2009–0303(a); FRL–8936–2]**

## Approval and Promulgation of Implementation Plans; South Carolina; Transportation Conformity Memorandum of Agreement Update

**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) submitted on November 28, 2008, through the South Carolina Department of Health and Environmental Control (SC DHEC). This revision consists of transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. The intended effect of this approval is to update the transportation conformity criteria and procedures in the South Carolina SIP.

**DATES:** This direct final rule is effective September 28, 2009 without further notice, unless EPA receives adverse comment by August 27, 2009. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2009–0303, by one of the following methods:

a. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

b. *E-mail: Wood.amanetta@epa.gov.*

c. *Fax:* (404) 562–9019.

d. *Mail:* EPA–R04–OAR–2009–0303, Air Quality Modeling and Transportation 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.

e. *Hand Delivery or Courier:* Amanetta Wood, Air Quality Modeling and Transportation 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–2009–0303. 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 Air Quality Modeling and Transportation 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:** Amanetta Wood, Air Quality Modeling and Transportation 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. Ms. Wood's telephone number is 404–562–9025. She can also be reached via electronic mail at *Wood.amanetta@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

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II. Background for This Action
A. Federal Requirements
B. York County Conformity SIP
III. State Submittal and EPA Evaluation
IV. Public Comment and Final Action
V. Statutory and Executive Order Reviews

## I. Transportation Conformity

Transportation conformity (hereafter referred to as ''conformity'') is required under section 176(c) of the Clean Air Act (''CAA'' or ''Act'') to ensure that Federally supported highway, transit projects, and other activities are consistent with (''conform to'') the purpose of the SIP. Conformity currently applies to areas that are designated nonattainment, and to areas that have been redesignated to attainment after 1990 (maintenance areas) with plans developed under section 175A of the Act, for the following transportation related criteria pollutants: Ozone, particulate matter (*e.g.,* $PM_{2.5}$ and $PM_{10}$), carbon monoxide, and nitrogen dioxide.

Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant criteria pollutants, also known as national ambient air quality standards (NAAQS). The conformity regulation is found in 40 CFR part 93 and provisions related to conformity SIPs are found in 40 CFR 51.390.

## II. Background for This Action

### *A. Federal Requirements*

EPA promulgated the Federal transportation conformity criteria and procedures (''Conformity Rule'') on November 24, 1993 (58 FR 62188). Among other things, the rule required States to address all provisions of the conformity rule in their SIPs frequently referred to as ''conformity SIPs.'' Under 40 CFR 51.390, most sections of the conformity rule were required to be copied verbatim. States were also required to tailor all or portions of the following three sections of the conformity rule to meet their State's individual circumstances: 40 CFR 93.105, which addresses consultation procedures; 40 CFR 93.122(a)(4)(ii), which addresses written commitments to control measures that are not included in a metropolitan planning organization's (MPO's) transportation plan and transportation improvement program that must be obtained prior to a conformity determination, and the requirement that such commitments, when they exist, must be fulfilled; and 40 CFR 93.125(c), which addresses written commitments to mitigation measures that must be obtained prior to a project-level conformity determination, and the requirement that project sponsors must comply with such commitments, when they exist.

On August 10, 2005, the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users'' (SAFETEA–LU) was signed into law. SAFETEA–LU revised section 176(c) of the CAA transportation conformity provisions. One of the changes streamlines the requirements for conformity SIPs. Under SAFETEA–LU, States are required to address and tailor only three sections of the rule in their conformity SIPs: 40 CFR 93.105, 40 CFR 93.122(a)(4)(ii), and, 40 CFR 93.125(c), described above. In general, States are no longer required to submit conformity SIP revisions that address the other sections of the conformity rule. These changes took effect on August 10, 2005, when SAFETEA–LU was signed into law.

### *B. South Carolina Transportation Conformity SIP*

Effective June 15, 2004, EPA designated Rock Hill, a portion of York County, as a nonattainmnet area for the 1997 8-hour ozone standard as part of the bi-State Charlotte-Gastonia-Rock Hill NC-SC nonattainment area. The current designation status for the bi-State Charlotte-Rock Hill Area for the 1997 8-hour ozone standard is nonattainment. *See,* 40 CFR 81 for more information on designations.

The Rock Hill-Fort Mill Area Transit Study (RFATS) is the MPO for the entire portion of York County that is included in the 1997 8-hour ozone area. Per the Transportation Conformity Rule, the MPO's conformity determination is not complete without a regional analysis that considers the projects in the MPO area. For the purposes of 8-hour conformity, the RFATS MPO serves as the lead agency for the preparation, consultation, and distribution of the conformity determinations.

Previously, South Carolina had established a conformity SIP. In 2004, EPA approved the State of South Carolina's SIP revision which incorporated by reference 40 CFR 93 Subpart A, 67 FR 50808, and customized 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c) for all of the MPOs in the entire State and for the South Carolina Department of Transportation (SC DOT). Specifically, the State of South Carolina established a Memorandum of Agreement (MOA) for implementing the conformity Criteria and Consultation Procedure for all transportation-related pollutants. The new conformity SIP (the subject of this rulemaking) removed any incorporation by reference and has revised the MOA to be consistent with the SAFETEA–LU revisions to the CAA (Pub. L. 109–59) and subsequent regulations published on January 24, 2008 (73 FR 4420). While South Carolina currently has only one nonattainment area (*i.e.* a portion of York County) for the 1997 standard its MOA covers all of the MPOs in the State should new areas become subject to conformity requirements for a transportation-related pollutant in the future.

The State of North Carolina will establish conformity procedures for the counties that make up the North Carolina portion of the bi-State Charlotte-Rock Hill nonattainment area in the individual conformity SIPs.

## III. State Submittal and EPA Evaluation

On November 19, 2008, the State of South Carolina, through SC DHEC, submitted the Statewide conformity and consultation interagency SIP, based on an MOA signed by all of the MPOs in the State and SC DOT, to EPA as a revision to the SIP. The South Carolina conformity SIP establishes procedures for interagency consultation and supersedes the November 19, 2003, incorporation into the SIP of the MOA (which included previous procedures for interagency consultation). Prior to today, the MOA incorporated EPA regulations in 40 CFR 93 Subpart A (July 1, 1997), and 62 FR 43780 (August 15, 1997) by reference. The revision to the MOA that EPA is approving now no longer incorporates the Federal conformity rules by reference. Additionally, as was the case with the previous MOA, it applies to all counties in South Carolina.

The State of South Carolina developed its consultation SIP based on the elements contained in 40 CFR 93.105, 93.122(a)(4)(ii), and 93.125(c) and included it in the SIP. As a first step, the State worked with the existing transportation planning organization's interagency committees that included representatives from the SC DHEC; SC DOT; all of the MPOs in the State; Federal Highway Administration—South Carolina Division; Federal Transit Administration; and the Region 4 office of EPA. The interagency committee met regularly and drafted the consultation procedures considering elements in 40 CFR Part 93.105, 93.122(a)(4)(ii), and 93.125(c), and integrated the local procedures and processes into the MOA. The resulting consultation process developed is unique to the State of South Carolina. On April 28, 2008, SC DHEC held a public hearing for the transportation conformity MOA. The final MOA was issued by South Carolina on November 19, 2008, and subsequently submitted to EPA as a SIP revision.

EPA has evaluated this SIP revision and has determined that the State has met the requirements of Federal transportation conformity rules as described in 40 CFR Part 51, Subpart T and 40 CFR Part 93, Subpart A. SC DHEC has satisfied the public participation and comprehensive interagency consultation requirement during development and adoption of the MOA at the local level. Therefore, EPA is approving the MOA as a revision to the South Carolina SIP. EPA's rule requires the States to develop their own processes and procedures for interagency consultation among the Federal, State, and local agencies and resolution of conflicts meeting the criteria in 40 CFR 93.105. The SIP revision must include processes and procedures to be followed by the MPO, State DOT, and U.S. DOT in consulting with the State and local air quality agencies and EPA before making conformity determinations. The conformity SIP revision must also include processes and procedures for the State and local air quality agencies and EPA to coordinate the development of applicable SIPs with MPOs, State DOTs, and the U.S. DOT.

EPA has reviewed the submittal to assure consistency with the CAA as amended by SAFETEA–LU and EPA regulations (40 CFR part 93 and 40 CFR 51.390) governing State procedures for transportation conformity and interagency consultation and has concluded that the submittal is approvable. Details of our review are set forth in a technical support document (TSD), which has been included in the docket for this action. Specifically, in the TSD, we identify how the submitted procedures satisfy our requirements under 40 CFR 93.105 for interagency consultation with respect to the development of transportation plans and programs, SIPs, and conformity determinations, the resolution of conflicts, and the provision of adequate public consultation, and our requirements under 40 CFR 93.122(a)(4)(ii) and 93.125(c) for enforceability of control measures and mitigation measures.

## IV. Public Comment and Final Action

For the reasons set forth above, EPA is taking action under section 110 of the Act to approve the rule implementing the conformity criteria and consultation procedures revision to the South Carolina SIP pursuant to the CAA, as a revision to the South Carolina SIP. As a result of this action, South Carolina's previously SIP-approved conformity procedures for South Carolina 69 FR 4245, January 29, 2004, will be replaced by the procedures submitted to EPA on November 19, 2008 for approval and adopted by the State of South Carolina on November 28, 2008. This action also establishes consultation procedures for all counties in South Carolina.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal 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 comments be filed. This rule will be effective September 28, 2009 without further notice unless the Agency receives adverse comments by August 27, 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. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on September 28, 2009 and no further action will be taken on the proposed rule.

## V. 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).

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 September 28, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**; rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

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

Dated: July 8, 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 at the end of the table for ''Transportation Conformity SIP'' to read as follows:

**§ 52.2120 Identification of plan.**

* * * * *

(e) * * *

EPA-APPROVED SOUTH CAROLINA NON-REGULATORY PROVISIONS

| Provision | State effective date | EPA approval date | Explanation |
|---|---|---|---|
| * * * * | | * * | * |
| South Carolina Transportation Conformity Air Quality Implementation Plan. | 11/28/2008 | 7/28/2009 [Insert citation of publication]. | ..... |

[FR Doc. E9–17818 Filed 7–27–09; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2008–0812, EPA–RO5–OAR–2009–0292; FRL–8932–4]**

## Approval and Promulgation of Implementation Plans; Ohio; Volatile Organic Compound Emission Control Measures for Cleveland

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving several volatile organic compound (VOC) control rules that were submitted on September 4, 2008, and March 23, 2009, into the Ohio State Implementation Plan (SIP). The purpose of these rules is to satisfy the VOC reasonably available control technology (RACT) requirement for the Cleveland-Akron 8-hour ozone nonattainment area. These rules are approvable because they satisfy the control and enforceability requirements of RACT, including Ohio's requirement to adopt VOC RACT rules for the Control Technique Guideline (CTG) documents issued by EPA in 2006 and 2007. EPA proposed these rules for approval on May 7, 2009, and received no comments.

**DATES:** This final rule is effective on August 27, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Nos. EPA–R05–OAR–2008–0812 and EPA–RO5–OAR–2009–0292. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (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 through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal, Environmental Engineer, at (312) 886–6052 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Steven Rosenthal, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052, *rosenthal.steven@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. What Public Comments Were Received on the Proposed Approval and What Is EPA's Response?
II. What Action Is EPA Taking?
III. What Is the Purpose of This Action?
IV. Statutory and Executive Order Reviews

### I. What Public Comments Were Received on the Proposed Approval and What Is EPA's Response?

No comments were received.

### II. What Action Is EPA Taking?

EPA is approving several revised and new VOC rules into the Ohio SIP.

Several rule revisions expand applicability to include sources in the Cleveland-Akron 8-hour ozone nonattainment area, in particular for commercial bakery oven facilities, synthetic organic chemical manufacturing industry (SOCMI) reactors and distillation units, process vents in batch operations, wood furniture manufacturing operations, and industrial wastewater operations. Ohio adopted new rules for aerospace manufacturing and rework facilities, ship building and ship repair operations, plastic parts coating, and the storage of volatile organic liquids. In addition, Ohio adopted new rules and revisions to existing rules to address the CTGs issued by EPA in 2006 and 2007. These CTG categories are lithographic printing, industrial solvent cleaning, flat wood paneling, paper coating, metal furniture coating, large appliance coating, and flexible package printing. Ohio adopted several other minor revisions.

## III. What Is the Purpose of This Action?

The primary purpose of these rules is to satisfy the requirement in section 182(b) of Part D of title I of the Clean Air Act (CAA) that VOC RACT rules be adopted for the Cleveland-Akron 8-hour ozone nonattainment area. These rules satisfy the requirement for VOC RACT rules for existing, pre-2006, CTG and major non-CTG source categories which were due on September 15, 2006, as well as the requirement to adopt VOC RACT rules for the CTG documents issued by EPA in 2006 and 2007.

On March 24, 2008, (73 FR 15416) EPA made a finding that Ohio failed to submit those VOC RACT rules, which were due on September 15, 2006, for the Cleveland-Akron 8-hour ozone nonattainment area. Ohio submitted the fully adopted required VOC RACT rules to EPA on September 4, 2008. In a November 19, 2008, letter to Ohio, EPA confirmed that Ohio's September 4, 2008, submittal satisfies the requirement for submitting VOC RACT rules for existing, pre-2006, CTG and major non-CTG source categories which were due on September 15, 2006. Failure to submit a complete VOC RACT submittal would have triggered the offset sanction identified in CAA section 179(b)(2) on September 24, 2009, and the highway funding sanction in accordance with CAA section 179(b)(1) on March 24, 2010. EPA would have been required by CAA section 110(c) to promulgate a Federal Implementation Plan (FIP) if it had not approved these VOC RACT rules into Ohio's SIP by March 24, 2010. Approval of these rules ends any obligation for EPA to promulgate a FIP addressing this VOC RACT requirement. Ohio's submittal of March 23, 2009, incorporates the rule revisions which address the CTGs issued in September 2006 and September 2007.

## 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 CAA 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).

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 September 28, 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, Intergovernmental relations, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 8, 2009.

**Walter W. Kovalick Jr.,**

*Acting Regional Administrator, Region 5.*

■ 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 KK—Ohio

■ 2. Section 52.1870 is amended by adding and reserving paragraphs (c)(144) and (c)(145) and by adding paragraph (c)(146) to read as follows:

### § 52.1870 Identification of plan.

* * * * *

(c) * * *

(144) [Reserved]

(145) [Reserved]

(146) On September 4, 2008, and March 23, 2009, the Ohio Environmental Protection Agency submitted several volatile organic compound rules for approval into the Ohio State Implementation Plan. Only those paragraphs in 3745–21–09 that were revised in the September 4, 2008, and/or March 23, 2009, submittals have been incorporated into the SIP.

(i) Incorporation by reference.

(A) Ohio Administrative Code Rule 3745–21–01 ''Definitions.'', adopted March 23, 2009, effective April 2, 2009.

(B) Ohio Administrative Code Rule 3745–21–02 ''Ambient air quality standards and guidelines.'', adopted August 15, 2008, effective August 25, 2008.

(C) Ohio Administrative Code Rule 3745–21–03 ''Methods of ambient air quality measurement.'', adopted August 15, 2008, effective August 25, 2008.

(D) Ohio Administrative Code Rule 3745–21–04 ''Attainment dates and compliance time schedules.'', adopted March 23, 2009, effective April 2, 2009.

(E) Ohio Administrative Code Rule 3745–21–06 ''Classification of Regions.'', adopted August 15, 2008, effective August 25, 2008.

(F) Ohio Administrative Code Rule 3745–21–08 ''Control of carbon monoxide emissions from stationary sources.'', adopted August 15, 2008, effective August 25, 2008.

(G) Ohio Administrative Code Rule 3745–21–09 ''Control of emissions of volatile organic compounds from stationary sources and perchloroethylene from dry cleaning facilities'': (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (O), (P), (R), (S), (T), (U)(1)(a), (U)(1)(b), (U(1)(c), (U)(1)(d), (U)(1)(e), (U)(1)(f), (U)(1)(g), (U)(1)(i), (U)(2)(f), (U)(2)(j), (U)(2)(k), (U)(2)(l), (W), (X), (Y), (Z), (DD), (HH), (NN), (RR), (SS), (TT), (VV), (YY), (DDD), adopted March 23, 2009, effective April 2, 2009.

(H) Ohio Administrative Code Rule 3745–21–10 ''Compliance test methods and procedures.'', adopted August 15, 2008, effective August 25, 2008.

(I) Ohio Administrative Code Rule 3745–21–12 ''Control of volatile organic compound emissions from commercial bakery oven facilities.'', adopted August 15, 2008, effective August 25, 2008.

(J) Ohio Administrative Code Rule 3745–21–13 ''Control of volatile organic compounds from reactors and distillation units employed in SOCMI chemical production.'', adopted August 15, 2008, effective August 25, 2008.

(K) Ohio Administrative Code Rule 3745–21–14 ''Control of Volatile organic compound emissions from process vents in batch operations.'', adopted March 23, 2009, effective April 2, 2009.

(L) Ohio Administrative Code Rule 3745–21–15 ''Control of volatile organic compound emissions from wood furniture manufacturing operations.'', adopted August 15, 2008, effective August 25, 2008.

(M) Ohio Administrative Code Rule 3745–21–16 ''Control of volatile organic compound emissions from industrial wastewater.'', adopted March 23, 2009, effective April 2, 2009.

(N) Ohio Administrative Code Rule 3745–21–18 ''Commercial Motor Vehicle and Mobile Equipment Refinishing Operations.'', adopted March 23, 2009, effective April 2, 2009.

(O) Ohio Administrative Code Rule 3745–21–19 ''Control of volatile organic compound emissions from aerospace manufacturing and rework facilities.'', adopted August 15, 2008, effective August 25, 2008.

(P) Ohio Administrative Code Rule 3745–21–20 ''Control of volatile organic compound emissions from shipbuilding and ship repair operations.'', adopted August 15, 2008, effective August 25, 2008.

(Q) Ohio Administrative Code Rule 3745–21–21 ''Storage of volatile organic liquids in fixed roof tanks and external floating roof tanks.'', adopted March 23, 2009, effective April 2, 2009.

(R) Ohio Administrative Code Rule 3745–21–22 ''Lithographic and letterpress printing.'', adopted March 23, 2009, effective April 2, 2009.

(S) Ohio Administrative Code Rule 3745–21–23 ''Industrial cleaning solvents.'', adopted March 23, 2009, effective April 2, 2009.

(T) Ohio Administrative Code Rule 3745–21–24 ''Flat wood paneling coatings.'', adopted March 23, 2009, effective April 2, 2009.

(U) August 15, 2008, ''Director's Final Findings and Orders'', signed by Chris Korleski, Director, Ohio Environmental Protection Agency.

(V) March 23, 2009, ''Director's Final Findings and Orders'', signed by Chris Korleski, Director, Ohio Environmental Protection Agency.

[FR Doc. E9–17829 Filed 7–27–09; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

### 48 CFR Parts 1537 and 1552

[EPA–HQ–OARM–2007–1115; FRL–8935–6]

RIN 2030–AA96

## Acquisition Regulation: Guidance on Technical Direction

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

**ACTION:** Final rule.

**SUMMARY:** EPA is amending the EPA Acquisition Regulation (EPAAR) to revise the prescription for and the content of a clause that addresses issuing technical direction in contracts. This revision incorporates and supersedes several class deviations to the EPAAR and updates terminology and procedures related to issuing technical direction.

**DATES:** This final rule is effective August 12, 2009.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–OARM–2007–1115. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Office of Environmental (OEI) Information Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

**FOR FURTHER INFORMATION CONTACT:** Donna S. Blanding, Policy, Training, and Oversight Division, Office of Acquisition Management (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–1130; fax number: 202–565–2475; e-mail address: *blanding.donna@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does This Action Apply to Me?*

Entities potentially affected by this action include firms that are performing

or will perform under contract for the EPA. This includes firms in all industry groups.

## II. Background

Under certain contracts the Contracting Officer authorizes a designated individual, e.g., the Contracting Officer Technical Representative (COTR), to issue technical direction to the contractor. The technical direction clause in the contract defines what constitutes technical direction, which officials are authorized to issue technical direction, and procedures for issuing technical direction.

Since the EPAAR technical direction guidance was originally issued, several class deviations to the clause have been approved. (A class deviation is a change to the EPAAR necessary to meet specific contract requirements.) This revision incorporates and supersedes the class deviations and makes additional revisions to the technical direction guidance as specified below.

## III. Final Rule

This rule amends the EPAAR to revise the prescription for using the Technical Direction clause and the wording of the clause itself. The current prescription states the clause is used in cost reimbursement type solicitations and contracts. The revised prescription allows COs to use the clause, or a clause substantially the same, in solicitations and contracts where the CO will delegate authority to issue technical direction to the COTR.

The EPAAR clause entitled ''Technical Direction'' adds and defines these two new terms ''contracting officer technical representative'' and ''task order''. These two terms will standardize titles and terminology used at EPA with terms used in the Federal Acquisition Regulation (FAR) and other Federal procurement policy.

## IV. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993); therefore, no review is required by the Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB). Order.

### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* No information is collected under this action.

### *C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.*

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 will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of today's final rule on small entities, ''small entity'' is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified 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 rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action revises a current EPAAR clause and does not impose requirements involving capital investment, implementing procedures, or record keeping. This rule will not have a significant economic impact on small entities.

### *D. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Local, and Tribal governments and the private sector.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, Local, and Tribal governments or the private sector. The rule imposes no enforceable duty on any State, Local or Tribal governments or the private sector. Thus, the rule is not subject to the requirements of Sections 202 and 205 of the UMRA.

### *E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and Local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This 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. Today's rule on technical direction provides guidance on the interaction between contracting officials and contractors only. Thus, Executive Order 13132 does not apply to this rule. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and Local governments, EPA specifically solicited comments from State and Local officials on this rule and no comments were received.

### *F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. This rule on technical direction provides guidance on the interaction between contracting officials and contractors only. This Executive Order 13175 does not apply to this rule. EPA specifically solicited additional comments on this rule from tribal officials and no comments were received.

### *G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045, entitled ''Protection of Children From

Environmental Health and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12886, and (2) concerns an environmental health or safety risk that may have a proportionate effect on children. This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions on environmental health or safety risks.

*H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution of Use'' (66 FR 28335 (May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act of 1995 (NTTAA)*

Section 12(d) (15 U.S.C 272 note) of NTTA, Public Law 104–113, 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. The NTTA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

*J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898, (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This proposed rulemaking does not involve human health or environmental effects.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule, for purposes of 5 U.S.C. 804(3).

This rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

**List of Subjects in 48 CFR Parts 1537 and 1552**

Environmental protection, Government procurement.

Dated: July 10, 2009.

**John C. Gherardini III,**

*Acting Director, Office of Acquisition Management.*

■ Therefore, 48 CFR Chapter 15 is amended as set forth below:

## PART 1537—SERVICE CONTRACTING

■ 1. The authority citation for part 1537 continues to read as follows:

**Authority:** Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

■ 2. Amend 1537.110 by revising paragraph (b) to read as follows:

### § 1537.110 Solicitation provisions and contract clauses.

* * * * *

(b) The contracting officer shall insert a clause substantially the same as the clause in 1552.237–71, Technical Direction, in solicitations and contracts where the contracting officer intends to delegate authority to issue technical direction to the contracting officer technical representative(s).

* * * * *

## PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. The authority citation for part 1552 continues to read as follows:

**Authority:** 5 U.S.C. 301: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 4. Revise 1552.237–71 to read as follows:

### 1552.237–71 Technical direction.

As prescribed in 1537.110, insert a clause substantially the same as the following:

**TECHNICAL DIRECTION (AUG 2009)**

(a) Definitions.

*Contracting officer technical representative (COTR),* means an individual appointed by the contracting officer in accordance with Agency procedures to perform specific technical and administrative functions.

*Task order,* as used in this clause, means work assignment, delivery order, or any other document issued by the contracting officer to order work under a service contract.

(b) The contracting officer technical representative(s) may provide technical direction on contract or work request performance. Technical direction includes:

(1) Instruction to the contractor that approves approaches, solutions, designs, or refinements; fills in details; completes the general descriptions of work shifts emphasis among work areas or tasks; and

(2) Evaluation and acceptance of reports or other deliverables.

(c) Technical direction must be within the scope of work of the contract and any task order there under. The contracting officer technical representative(s) does not have the authority to issue technical direction which:

(1) Requires additional work outside the scope of the contract or task order;

(2) Constitutes a change as defined in the ''Changes'' clause;

(3) Causes an increase or decrease in the estimated cost of the contract or task order;

(4) Alters the period of performance of the contract or task order; or

(5) Changes any of the other terms or conditions of the contract or task order.

(d) Technical direction will be issued in writing or confirmed in writing within five (5) days after oral issuance. The contracting officer will be copied on any technical direction issued by the contracting officer technical representative.

(e) If, in the contractor's opinion, any instruction or direction by the contracting officer technical representative(s) falls within any of the categories defined in paragraph (c) of the clause, the contractor shall not proceed but shall notify the contracting officer in writing within 3 days after receiving it and shall request that the contracting officer take appropriate action as described in this paragraph. Upon receiving this notification, the contracting officer shall:

(1) Advise the contractor in writing as soon as practicable, but no later than 30 days after receipt of the contractor's notification, that the technical direction is within the scope of the contract effort and does not constitute a change under the ''Changes'' clause of the contract;

(2) Advise the contractor within a reasonable time that the government will issue a written modification to the contract; or

(3) Advise the contractor that the technical direction is outside the scope of the contract and is thereby rescinded.

(f) A failure of the contractor and contracting officer to agree as to whether the technical direction is within the scope of the contract, or a failure to agree upon the contract action to be taken with respect thereto, shall be subject to the provisions of the clause entitled ''Disputes'' in this contract.

(g) Any action(s) taken by the contractor, in response to any direction given by any person acting on behalf of the government or any government official other than the contracting officer or the contracting officer technical representative, shall be at the contractor's risk.

(End of clause)

[FR Doc. E9–17938 Filed 7–27–09; 8:45 am]

BILLING CODE 6560–50–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 571

**[Docket No. NHTSA–2009–0116]**

**RIN 2127–AK35**

### Federal Motor Vehicle Safety Standards; Door Locks and Door Retention Components, Correction

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule; correction.

**SUMMARY:** NHTSA published in the **Federal Register** of July 20, 2009, a document delaying the compliance date of the sliding door provisions of a February 6, 2007 final rule. The regulatory text adopted by that document contained errors. This document corrects those errors.

**DATES:** Effective on September 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Sarah Alves, NHTSA Office of the Chief Counsel, DOT, 1200 New Jersey Avenue, SE., Washington, DC 20590, telephone (202) 366–2992, fax (202) 366–3820.

**SUPPLEMENTARY INFORMATION:**

#### Background

NHTSA published in the **Federal Register** of July 20, 2009 (74 FR 35131), a document delaying the compliance date of the sliding door provisions of a February 6, 2007 final rule (FR Doc. E9–17078). In the regulatory text adopted by that document, in S4.2.2.3, a statement erroneously reads: ''This S4.2.2.3 applies to vehicle manufactured on or after September 1, 2010.'' The statement should read: ''This S4.2.2 applies to vehicles manufactured on or after September 1, 2010.'' This document corrects that error.

#### Correction of Publication

In rule FR Doc. E9–17078 published on July 20, 2009 (74 FR 35131), make the following correction. On page 35135, in the third column, S4.2.2.3 is corrected to read as follows:

S4.2.2.3 This S4.2.2 applies to vehicles manufactured on or after September 1, 2010.

Issued: July 23, 2009.

**Stephen R. Kratzke,**

*Associate Administrator for Rulemaking.*

[FR Doc. E9–17918 Filed 7–27–09; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

**[Docket No. 090428799–9802–01]**

**RIN 0648–XQ39**

### Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Closure of the Primary Pacific Whiting Season for the Shore-Based Sector

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

**ACTION:** Fishing closure restrictions.

**SUMMARY:** NMFS announces the closure of the primary season for the Pacific whiting fishery for the shore-based sector at 10 a.m. local time (l.t.) July 7, 2009. This action is authorized by regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California. This action is intended to keep the harvest of Pacific whiting at the 2009 allocation levels.

**DATES:** Effective from 10 a.m. l.t. July 7, 2009, until the start of the 2010 primary season for the shore-based sector, unless modified, superseded or rescinded by notification in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Becky Renko at 206–526–6110.

**SUPPLEMENTARY INFORMATION:** This action is authorized by regulations implementing the Pacific Coast Groundfish Fishery Management Plan (FMP), which governs the groundfish fishery off Washington, Oregon, and California. Regulations at 50 CFR 660.323(a) established separate allocations for the catcher/processor, mothership, and shore-based sectors of the Pacific whiting fishery. The 2009 Optimum Yield (OY) for Pacific whiting is 135,939 mt. The 2009 commercial OY is 81,939 mt. The commercial OY is calculated by deducting the 50,000–mt tribal set-aside and 4,000–mt for research catch and bycatch in non-groundfish fisheries from the 135,939 mt total catch OY. Each sector receives a portion of the commercial OY, with the catcher/processors getting 34 percent (27,859 mt), motherships getting 24 percent (19,665 mt), and the shore-based sector getting 42 percent (34,414 mt). When each sector's allocation is reached, the primary season for that sector is ended.

If the Regional Administrator determines that a portion of the tribal set aside or another sector's allocation will not be used during the year, regulations at 50 CFR 660.323(c) allow the Regional Administrator to reapportion that Pacific whiting to other sectors in proportion to their initial allocations. At the Pacific Fishery Management Council's March 2009 meeting, the Makah Tribal representatives stated their intent to harvest only 23,789 mt of their 42,000 mt set aside and asked that the remaining 18,211 mt be reapportioned to the non-tribal sectors of the fishery. Therefore, the shore-based sector received an additional 7,649 mt, resulting in a harvest guideline of 42,063 mt.

The shore-based sector is composed of vessels that harvest Pacific whiting for delivery to land-based processors. The primary season for the shore-based sector is the period or periods when the large-scale target fishery is conducted, and when ''per trip'' limits are not in effect for vessels targeting Pacific whiting with mid-water gear.

The best available information on July 6, 2009 indicated that 32,933 mt of Pacific whiting had been taken through July 3, 2009, and the 42,063 mt allocation for the shore-based sector would be reached by 10 a.m. on July 7, 2009. This **Federal Register** notice announces the date that the primary season for the shore-based sector was ended. Regulations at 50 CFR 660.323(b)(4) allow this action to be taken. To prevent an allocation from being exceeded, regulations at 50 CFR 660.323(e) allow closure of the commercial Pacific whiting fisheries by actual notice to the fishery participants. Actual notice includes e-mail, internet, phone, fax, letter or press release. NMFS provided actual notice by e-mail and fax on July 6, 2009.

#### NMFS Action

This document announces achievement of the shore-based sector allocation specified at 50 CFR 660.323(a) and in the final rule published on May 5, 2009 (74 FR 20620). The best available information on July 6, 2009, indicated that 32,933 mt

of Pacific whiting had been taken through July 3, 2009 and that the shore-based allocation would be reached by 10 a.m. on July 7, 2009. For the reasons stated here and in accordance with the regulations at 50 CFR 660.323(b)(4), NMFS herein announces: Effective 10 a.m. July 7, 2009 the Pacific whiting shoreside fishery was closed.

## Classification

This action is authorized by the regulations implementing the groundfish FMP. The determination to take this action was based on the most recent data available. The aggregate data upon which the determinations were based are available for public inspection at the office of the Regional Administrator (see **ADDRESSES**) during business hours.

The Assistant Administrator for Fisheries (AA), NMFS, finds good cause to waive the requirement to provide prior notice and opportunity for comment on this action pursuant to 5 U.S.C. 553(3)(b)(B), because providing prior notice and opportunity would be impracticable. It would be impracticable because if this restriction were delayed in order to provide notice and comment, it would allow the allocation for the shore-based sector to be exceeded, which would either reduce the amount available to the catcher/processor sector or cause the OY to be exceeded.

A delay to provide a cooling off period also would be expected to cause the fishery to exceed its allocation. Therefore, good cause also exists to waive the 30-day delay in effectiveness requirement of 5 U.S.C. 553(d)(3).

This action is taken under the authority of 50 CFR 660.323(b)(4), and is exempt from review under Executive Order 12866.

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

Dated: July 22, 2009.

**James P. Burgess,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E9–17930 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 660

**[Docket NO. 080226308–9700–02]**

**RIN 0648–AW50**

# Fisheries Off West Coast States; Highly Migratory Species Fisheries

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues a final rule to initiate collection of a permit fee for vessel owners participating in commercial and charter recreational fishing for highly migratory species (HMS) in the Exclusive Economic Zone (EEZ) off the West Coast of California, Oregon, and Washington. The HMS permits are issued under implementing regulations for the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP).

**DATES:** This final rule is effective August 27, 2009.

**ADDRESSES:** Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802 4213. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to the Southwest Region and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

**FOR FURTHER INFORMATION CONTACT:** Chris Fanning, Permits Coordinator, Sustainable Fisheries Division, NMFS, 562–980–4198.

**SUPPLEMENTARY INFORMATION:** On April 7, 2004, NMFS published a final rule to implement the HMS FMP (69 FR 18444) that included mandatory permit requirements at 50 CFR 660.707. The HMS FMP permit requirements included authority to collect permit fees which NMFS opted not to exercise at that time. NMFS is now exercising the option to charge an administrative fee for the recovery of HMS permit processing and issuance expenses as authorized under Section 303(b)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1853(b)(1). Section 304(d) of the MSA specifies that such fees may not exceed the administrative costs of issuing the permits. This final rule specifies that an application for an HMS permit, including the renewal of an existing permit, must include a fee payable by the vessel owner. The amount of the fee will be determined in accordance with the NOAA Finance Handbook available at (*http://www.corporateservices.noaa.gov/~finance/FinanceHandbook.htm)* and specified on the application form. At this time, the fee amount is expected to be approximately $30. The proposed rule to require a permit fee was published in the **Federal Register** on December 19, 2008 (73 FR 77589), soliciting public comment through January 20, 2009.

## Comments and Responses

NMFS did not receive any public comment on the proposed rule.

## Classification

The Administrator, Southwest Region, NMFS, determined that this regulation is necessary for the conservation and management of the U.S. West Coast Fisheries for Highly Migratory Species and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

This final rule has been determined to be significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) which has been approved by OMB as an amendment to OMB Control No. 0648–0204. Public reporting burden for the payment of HMS permit fees is estimated to average 5 minutes or less per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285. Notwithstanding any

other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: July 23, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 660 is amended as follows:

## PART 660—FISHERIES OFF THE WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

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

■ 2. A new paragraph (e) is added to § 660.707 to read as follows:

**§ 660.707 Permits.**

* * * * *

(e) *Fees.* An application for a permit, or renewal of an existing permit under paragraph (b)(1) of this section will include a fee for each vessel. The fee amount required will be calculated in accordance with the NOAA Finance Handbook and specified on the application form.

[FR Doc. E9–17936 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 74, No. 143
Tuesday, July 28, 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 ELECTION COMMISSION

### 11 CFR Part 110

**[Notice 2009–16]**

### Candidate Debates

**AGENCY:** Federal Election Commission.

**ACTION:** Notice of Disposition of Petitions for Rulemaking.

**SUMMARY:** The Commission announces its disposition of two Petitions for Rulemaking regarding the Commission's candidate debate regulations. The first petition, filed on May 25, 1999 by Mary Clare Wohlford, William T. Wohlford, and Martin T. Mortimer (''Wohlford Petition''), urged the Commission to amend its rules so that the objective criteria for inclusion in Presidential and Vice Presidential debates would be established by the Commission itself, and not left to the discretion of debate staging organizations. The second petition, filed on April 10, 2002 by several major news organizations, urged the Commission to amend its rules to state explicitly that the sponsorship by a news organization (or a related trade association) of a debate among candidates does not constitute an illegal corporate campaign contribution or expenditure in violation of the Federal Election Campaign Act of 1971, as amended (''the Act'') and that the Commission would have no jurisdiction over such sponsorship. The Commission has decided not to initiate a rulemaking in response to either of these petitions. The petitions are available for inspection in the Commission's Public Records Office, and on its Web site, *http://www.fec.gov*.

**DATES:** July 28, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or Ms. Esther D. Heiden, Staff Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** On May 25, 1999, the Commission received a Petition for Rulemaking from Mary Clare Wohlford, William T. Wohlford, and Martin T. Mortimer. On April 10, 2002, the Commission received a Petition for Rulemaking from CBS Broadcasting Inc.; American Broadcasting Companies Inc.; Belo Corp.; Cox Enterprises, Inc.; Gannett Co., Inc.; the National Association of Broadcasters; National Broadcasting Co., Inc.; News America Incorporated; The New York Times Company; Post-Newsweek Stations, Inc.; the Radio and Television News Directors Association; the Society of Professional Journalists; and Tribune Company (''News Media Petition''). Both petitions concern the Commission's candidate debate regulations at 11 CFR 110.13. Section 110.13(c) states, *inter alia,* that ''[f]or all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate.''

The Wohlford Petition asserts that the objective criteria for inclusion in Presidential and Vice Presidential debates should be established by the Commission itself, and not left to the discretion of debate staging organizations. The petition urges the Commission to revise section 110.13(c) to set forth mandatory criteria for participation in Presidential and Vice Presidential debates. Specifically, the Wohlford Petition recommends that the debates be open to any candidate that: (1) Has the mathematical potential to win the election in that he or she is on the ballot in enough states to earn 270 Electoral College votes; and (2) has proven his or her viability by having spent at least $500,000 on the campaign by the end of the month preceding the date of the first scheduled debate held on or after September 1 of the election year. In addition, the Wohlford Petition urges that candidates have equal access to debates held before September 1 without regard to the above requirements.

The News Media Petition asserts that 11 CFR 110.13(c) should be amended or repealed. Specifically, it asserts that any regulation of the sponsorship by a news organization (or a related trade association) is: (1) Contrary to the clear intent of Congress in adopting the Act; (2) irreconcilable with the Commission's own decisions that media entities do not violate the Act by providing free time to candidates; and (3) in conflict with long-established policies of the Federal Communications Commission concerning the presentation of campaign debates by broadcasters. Finally, the News Media Petition asserts that 11 CFR 110.13(c) is unconstitutional because it does not advance the purpose of preventing corruption or the appearance of corruption in the political process, which the Supreme Court has held are 'the only legitimate and compelling government interests thus far identified for restricting [First Amendment rights in the regulation] of campaign finances.' '' (quoting *FEC* v. *National Conservative Political Action Committee,* 470 U.S. 480, 96–97 (1985). The News Media Petition urges the Commission to draft new regulations that explicitly declare that sponsorship of a candidate debate by a news organization or a related trade association is legal under the Act and to refrain from any further regulatory jurisdiction over such sponsorship.

The Commission published a Notice of Availability (''first NOA'') on June 10, 1999, to seek comment on the Wohlford Petition, 64 FR 31159 (June 10, 1999), and subsequently extended the comment period on July 21, 1999, 64 FR 39095 (July 21, 1999). The Commission received approximately 1,000 comments in response to the first NOA. Most of the comments expressed support for the Wohlford Petition. Several comments, however, expressed opposition to the establishment of mandatory objective criteria by the Commission for participation in Presidential and Vice Presidential debates.

The Commission published a second Notice of Availability (''second NOA'') on May 9, 2002 to seek comment on the News Media Petition. 67 FR 31164 (May 9, 2002). The Commission received one substantive comment in response to the second NOA, which generally supported the News Media Petition. The Commission also received a response from the IRS indicating it did not have substantive comments. Copies of comments on both NOAs are available on the Commission's Web site at *http://www.fec.gov* and in the Commission's Public Records Office.

A significant period of time has passed since the petitions were filed. During that time many Presidential and Vice Presidential debates have taken place. Additionally, with the advent of new ways to communicate, including

the Internet and the new methods of communication it affords, there are now many new ways that issues are debated among candidates. The factors that precipitated the filing of the petitions may now be viewed much differently by some or all of the petitioners. Further, the many comments that were received from the public may no longer, in the view of those commenters, accurately represent positions they would now advocate to the Commission on the issues. Moreover, no formal requests have been made by the petitioners in recent times to activate the petitions or to invoke the jurisdiction of the Commission to consider the petitions.

In view of the passage of time, the events which have transpired, as well as other factors discussed above, the Commission believes that any consideration of the issues raised in the Wohlford Petition and the News Media Petition should be based on newly filed petitions. Accordingly, the Commission declines to open a new rulemaking and will not issue a Notice of Proposed Rulemaking in response to either of the petitions. The Commission emphasizes that its decision not to initiate a rulemaking at this time does not foreclose the Commission from considering future petitions seeking the same or similar relief.

On behalf of the Commission.

Dated: July 22, 2009.

**Steven T. Walther,**

*Chairman, Federal Election Commission.*

[FR Doc. E9–17868 Filed 7–27–09; 8:45 am]

**BILLING CODE 6715–01–P**

## DEPARTMENT OF THE INTERIOR

## National Indian Gaming Commission

## 25 CFR Part 515

**RIN 3141–AA21**

## Privacy Act Procedures

**AGENCY:** National Indian Gaming Commission, Department of the Interior.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The purpose of this document is to propose to amend the procedures followed by the National Indian Gaming Commission (Commission) when processing a request under the Privacy Act of 1974. The proposed amendments make the following changes to the current regulations. Section 515.3 changes the address of the Commission, provides a list of items to include in requests to the Commission, and provides the necessary requirements for third party requests. Section 515.4 includes the Commission policy for dealing with other agencies and designates an individual responsible for making initial Privacy Act determinations. Section 515.5 explains what constitutes an adverse determination. Section 515.6 changes the time for appeals of adverse determinations from 180 days to 30 days. Section 515.8 details when the Commission is required to provide an accounting of the records it discloses. Finally, Section 515.12 updates the list of records that are exempt from disclosure under the Privacy Act.

**DATES:** Written comments on this proposed rule must be received on or before September 11, 2009.

**ADDRESSES:** Comments may be mailed to the National Indian Gaming Commission, FOIA/PA Officer, 1441 L Street, NW., Suite 9100, Washington, DC 20005, delivered to that address between 8:30 a.m. and 5:30 p.m., Monday through Friday, or faxed to (202) 632–7066 (this is not a toll free number). Comments may be inspected between 9 a.m. and noon and between 2 p.m. and 5 p.m., Monday through Friday, at the above address. Comments may also be submitted electronically at *http://www.regulations.gov* or e-mailed to *pacomments@nigc.gov.*

**FOR FURTHER INFORMATION CONTACT:** Jeannie McCoy at (202) 632–7003 or by fax (202) 632–7066 (these numbers are not toll free).

**SUPPLEMENTARY INFORMATION:** The Indian Gaming Regulatory Act (IGRA), enacted on October 17, 1988, established the National Indian Gaming Commission. Congress enacted the Privacy Act, Public Law 93–579, 5 U.S.C. 552a, in 1974. The Commission originally adopted Privacy Act procedures on January 22, 1993. Now, the Commission has decided that the procedures need to be updated.

*Regulatory Flexibility Act:* The Commission certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The factual basis for this certification is as follows: This rule is procedural in nature and will not impose substantive requirements that would be considered impacts within the scope of the Act. For this reason, the Commission has concluded that the proposed rule will not have a significant impact on those small entities subject to the rule.

*Unfunded Mandates Reform Act:* The Commission is an independent regulatory agency, and, as such, is not subject to the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

*Small Business Regulatory Enforcement Fairness Act:* The proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The proposed rule will not result in an annual effect on the economy of more than $100 million per year; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S. based enterprises.

*Paperwork Reduction Act:* The proposed rule does not contain any information collection requirements for which the Office of Management and Budget approval under the Paperwork Reduction Act (44 U.S.C. 3501–3520) would be required.

*National Environmental Policy Act:* The Commission has determined that the proposed rule does not constitute a major Federal Action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

### List of Subjects in 25 CFR Part 515

Administrative practice and procedure, Privacy, Reporting and recordkeeping.

Accordingly for the reasons set forth above, the Commission is proposing to revise Part 515 of Title 25 to read as follows:

## PART 515—PRIVACY ACT PROCEDURES

Sec.
515.1 Purpose and scope.
515.2 Definitions.
515.3 Request for access to records.
515.4 Responsibility for responding to requests.
515.5 Responses to requests for access to records.
515.6 Appealing denials of access.
515.7 Request for amendment or correction of records.
515.8 Requests for an accounting of record disclosure.
515.9 Fees.
515.10 Penalties.
515.11 General exemptions [Reserved]
515.12 Specific exemptions.

**Authority:** 5 U.S.C. 552a.

### § 515.1 Purpose and scope.

This part contains the regulations the National Indian Gaming Commission (Commission) follows in implementing the Privacy Act of 1974. These

regulations should be read together with the Privacy Act, which provides additional information about records maintained on individuals. These regulations apply to all records in systems of records maintained by the Commission that are retrieved by an individual's name or personal identifier. They describe the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records by the Commission. The Commission shall also process all Privacy Act requests for access to records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, which gives requesters maximum disclosure.

**§ 515.2 Definitions.**

For the purposes of this part:

(a) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) *Maintain* means store, collect, use, or disseminate.

(c) *Record* means any item, collection, or grouping of information about an individual that is maintained by the Commission, including education, financial transactions, medical history, and criminal or employment history, and that contains the individual's name, or identifying number, symbol, or other identifier assigned to the individual, such as social security number, finger or voice print, or photograph.

(d) *System of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifier assigned to the individual.

(e) *Routine use* means use of a record for a purpose that is compatible with the purpose for which it was collected.

(f) *Working day* means a Federal workday that does not include Saturdays, Sundays, or Federal holidays.

**§ 515.3 Request for access to records.**

(a) *How made and addressed.* You may make a request to the Commission for access to records about yourself. Your request may be made in writing to the Commission at 1441 L Street, NW., Suite 9100, Washington, DC 20005, or in person during the hours of 9 a.m. to noon and 2 p.m. to 5 p.m., Monday through Friday.

(b) *Description of records sought.* You must describe the records sought in enough detail to enable Commission personnel to locate the system of records containing them with a reasonable amount of effort. Whenever possible, your request should describe the records sought, the time periods in which you believe they were compiled, and the name or identifying number of each system of records in which you believe they are kept.

(c) *Agreement to pay fees.* If you make a Privacy Act request for access to records it shall be considered an agreement by you to pay all applicable fees charged under § 515.9, up to $25.00. When making a request you may specify a willingness to pay a greater or lesser amount.

(d) *Verification of identity.* When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted under 28 U.S.C. 1746, which is a law that permits statements to be made under penalty of perjury as a substitute for notarization.

(e) *Verification of guardianship.* When you make a request as a parent or guardian for records pertaining to another individual you must establish:

(1) The identity of the individual who is the subject of the record by stating the name, current address, date and place of birth of the individual;

(2) Your own identity, as required in paragraph (d) of this section;

(3) That you are the parent or guardian of the individual and proof of such relationship by providing a birth certificate showing your parentage or a court order establishing guardianship.

(f) *Verification in the case of third party information requests.* If you are making a request for records concerning an individual on behalf of that individual, you must provide a statement from the individual verifying the identity of the individual as provided in paragraph (d) of this section. You must also provide a statement from the individual certifying the individual's agreement that records concerning the individual may be released to you.

**§ 515.4 Responsibility for responding to requests.**

(a) *In general.* In determining which records are responsive to a request, the Commission ordinarily will include only records in its possession as of the date it begins its search for records. If any other date is used, the Commission shall inform you of that date.

(b) *Authority to grant or deny requests.* The officer designated by the Chairman of the Commission shall make initial determinations either to grant or deny in whole or in part access to records.

(c) *Consultations and referrals.*

(1) When a requested record has been created by another Federal Government agency that record shall be referred to the originating agency for direct response to the requester. The requester shall be informed of the referral unless otherwise instructed by the originating agency. This is not a denial of a Privacy Act request and thus no appeal rights accrue to the requester.

(2) When a requested record contains information originating with another Federal Government agency, the record shall be referred to the originating agency for review and recommendation on disclosure. The originating agency shall respond to the Commission with its recommendation. The Commission shall not release any such record without prior consultation with the originating agency.

**§ 515.5 Response to requests for access to records.**

(a) *Acknowledgement of requests.* Requests for a determination under § 515.3(a) of this part shall be acknowledged by the Commission within 10 working days after the date on which the Commission receives the request.

(b) *Grants of requests for access.* Once the Commission makes a determination to grant a request for access in whole or in part, it shall notify you in writing, informing you of any fees charged for the request. Once fees are paid, the Commission will release the records to you. If a request is made in person, the Commission will disclose the records to you in a manner not unreasonably disruptive of its operations. A written record will be made of the disclosure. If you are accompanied by another individual, you must authorize in writing any discussion of the records in the presence of the other person.

(c) *Adverse determinations of requests for access.* If the Commission makes an adverse determination denying a request for access in any respect, it shall notify you of that determination in writing. Adverse determinations or denial of requests consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that the requested record is not a record subject to the Privacy Act; a determination on any disputed fee matter; and a denial of request for expedited processing. The notification letter shall be signed by the Chairman of the Commission or the Chairman's designee and include:

(1) The name and title of the person responsible for the denial;

(2) A brief statement of the reason(s) for the denial, including any Privacy Act exemption(s) applied to the denial;

(3) A statement that the denial may be appealed under § 515.6 and a description of the requirements of § 515.6.

**§ 515.6 Appealing denials of access.**

(a) *Appeals.* If your request for access has been denied in whole or in part, you may appeal the decision to the Commission no later than 30 business days after the adverse decision is rendered. The appeal shall be in writing and describe the determination decision that is being appealed. Mark both the appeal letter and envelope ''Privacy Act Appeal.''

(b) *Responses to appeals.* The decision on your appeal will be made in writing within 30 business days of receipt of the appeal by the Commission. For good cause shown, however, the Commission may extend the 30 business day period. You shall be promptly notified of such extension and the anticipated date of a decision. A decision affirming an adverse determination in whole or in part will include a brief statement of the reason(s) for the determination, including any Privacy Act exemption(s) applied, and will inform you of the Privacy Act provisions for court review of the decision. If the adverse determination is reversed in whole or in part, you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision. You shall also be advised of your right to institute a civil action in a Federal district court for judicial review of the decision.

(c) *When appeal is required.* If you wish to seek review by a court of any adverse determination or denial of a request, you must first appeal it under this section.

**§ 515.7 Request for amendment or correction of records.**

(a) *Amendment.* You may make a request for an amendment or correction to a Commission record about you by writing directly to the Privacy Act Officer. Your request should identify each particular record in question, state the amendment or correction that you seek, and state why you believe that the record is not accurate, relevant, timely, or complete. You may include any documentation you think would be helpful.

(b) *Privacy Act Officer Response.* The Privacy Act Officer shall, not later than 10 working days after receipt of a request for an amendment or correction of a record, acknowledge receipt of your request and notify you whether your request is granted or denied. If your request is granted in whole or in part, the Privacy Act Officer shall describe the amendment or correction made and shall advise you of your right to obtain a copy of the amended or corrected record. If the request is denied in whole or in part, the Privacy Act Officer shall send you a letter signed by the Chairman of the Commission or the Chairman's designee stating:

(1) The reason(s) for the denial; and

(2) The procedure for appeal of the denial under paragraph (c) of this section, including the name and address of the official who will act on your appeal.

(c) *Appeals.* You may appeal a denial of a request for an amendment or correction in the same manner as a denial of a request for access to records in § 515.6. If your appeal is denied, you shall be advised of your right to file a Statement of Disagreement as described in paragraph (d) of this section and of your right under the Privacy Act for court review of the decision.

(d) *Statement of Disagreement.* If your appeal under this section is denied in whole or in part, you have the right to file a Statement of Disagreement that states your reason(s) for disagreeing with the Commission's denial of your request for an amendment or correction. Statements of Disagreement must be concise, must clearly identify each part of any record that is disputed, and should be no longer than one typed page for each fact disputed. Your Statement of Disagreement shall be placed in the system of records in which the disputed record is maintained and the record shall be marked to indicate a Statement of Disagreement has been filed.

(e) *Notification of amendment, correction, or disagreement.* Within 30 working days of the amendment or correction of the record, the Commission shall notify all persons, organizations, or agencies to which it previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. If you filed a Statement of Disagreement, the Commission shall append a copy of it to the disputed record whenever the record is disclosed and may also append a concise statement of its reason(s) for denying the request to amend the record.

(f) *Records not subject to amendment.* Section 515.12 lists the records that are exempt from amendment or correction.

**§ 515.8 Requests for an accounting of record disclosure.**

(a) *How made and addressed.* Except where accountings of disclosures are not required to be kept (as stated in paragraph (b) of this section), you may make a request for an accounting of any disclosure that has been made by the Commission to another person, organization, or agency of any record about you. This accounting contains the date, nature and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. Your request for an accounting should identify each particular record in question and should be made in writing to the Commission.

(b) *Where accountings are not required.* The Commission is not required to provide an accounting to you where they relate to:

(1) Disclosures for which accountings are not required to be kept, such as disclosures that are made to employees within the agency and disclosures that are made under the FOIA;

(2) Disclosures made to law enforcement agencies for authorized law enforcement activities in response to written requests from those law enforcement agencies specifying the law enforcement activities for which the disclosures are sought; or

(3) Disclosures made from law enforcement systems of records that have been exempted from accounting requirements.

(c) *Appeals.* You may appeal a denial of a request for an accounting within 30 business days after the adverse decision is rendered in the same manner as a denial of a request for access to records in § 515.6 and the same procedures will be followed.

**§ 515.9 Fees.**

The Commission shall not charge you for the costs of making a search for a record or the costs of reviewing the record. When the Commission makes a copy of a record as a necessary part of reviewing the record, the Commission shall not charge you for the cost of making that copy. Otherwise, the Commission may charge a fee sufficient to cover the cost of duplicating a copy for you.

**§ 515.10 Penalties.**

Any person who makes a false statement in connection with any request for a record, or an amendment thereto, under this part, is subject to the penalties prescribed in 18 U.S.C. 494 and 495.

**§ 515.11 General exemptions. [Reserved]**

**§ 515.12 Specific exemptions.**

(a) The following systems of records are exempt from 5 U.S.C. 552a(c)(3), (d), (e)(1) and (f):

(1) Indian Gaming Individuals Records System.

(2) Management Contract Individuals Record System.

(b) The exemptions under paragraph (a) of this section apply only to the extent that information in these systems is subject to exemption under 5 U.S.C. 552a(k)(2). When compliance would not appear to interfere with or adversely affect the overall responsibilities of the Commission, with respect to licensing of key employees and primary management officials for employment in an Indian gaming operation, the applicable exemption may be waived by the Commission.

(c) Exemptions from the particular sections are justified for the following reasons:

(1) From 5 U.S.C. 552a(c)(3), because making available the accounting of disclosures to an individual who is the subject of a record could reveal investigative interest. This would permit the individual to take measures to destroy evidence, intimidate potential witnesses, or flee the area to avoid the investigation.

(2) From 5 U.S.C. 552a(d), (e)(1), and (f) concerning individual access to records, when such access could compromise classified information related to national security, interfere with a pending investigation or internal inquiry, constitute an unwarranted invasion of privacy, reveal a sensitive investigative technique, or pose a potential threat to the Commission or its employees or to law enforcement personnel. Additionally, access could reveal the identity of a source who provided information under an express promise of confidentiality.

(3) From 5 U.S.C. 552a(d)(2), because to require the Commission to amend information thought to be incorrect, irrelevant, or untimely, because of the nature of the information collected and the length of time it is maintained, would create an impossible administrative and investigative burden by continually forcing the Commission to resolve questions of accuracy, relevance, timeliness, and completeness.

(4) From 5 U.S.C. 552a(e)(1) because:

(i) It is not always possible to determine relevance or necessity of specific information in the early stages of an investigation.

(ii) Relevance and necessity are matters of judgment and timing in that what appears relevant and necessary when collected may be deemed unnecessary later. Only after information is assessed can its relevance and necessity be established.

(iii) In any investigation the Commission may receive information concerning violations of law under the jurisdiction of another agency. In the interest of effective law enforcement and under 25 U.S.C. 2716(b), the information could be relevant to an investigation by the Commission.

(iv) In the interviewing of individuals or obtaining evidence in other ways during an investigation, the Commission could obtain information that may or may not appear relevant at any given time; however, the information could be relevant to another investigation by the Commission.

Dated: June 21, 2009.

**Philip N. Hogen,**

*Chairman.*

**Norman DesRosiers,**

*Vice Chairman.*

[FR Doc. E9–17745 Filed 7–27–09; 8:45 am]

BILLING CODE 7565–01–P

## DEPARTMENT OF THE TREASURY

### Office of the Secretary

### 31 CFR Part 10

**[REG–113289–08]**

**RIN 1545–BH81**

## Contingent Fees Under Circular 230

**AGENCY:** Office of the Secretary, Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document proposes modifications of the regulations governing practice before the Internal Revenue Service (Circular 230). These proposed regulations affect individuals who practice before the IRS. The proposed amendments modify the rules relating to contingent fees under Circular 230. This document also provides notice of a public hearing on the proposed regulations.

**DATES:** Written or electronically generated comments must be received by September 10, 2009. Outlines of topics to be discussed at the public hearing scheduled for November 20, 2009 at 10 a.m. must be received by September 10, 2009.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG–113289–08), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–113289–08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS and REG–113289–08). The public hearing will be held in Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Amy L. Mielke at (202) 622–4940; concerning submissions of comments and the public hearing, Regina Johnson at (202) 622–7180; (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

### Background

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate practice before the Treasury Department. The Secretary has published the regulations in Circular 230 (31 CFR part 10). On September 26, 2007, the Treasury Department and the IRS published final regulations in the **Federal Register** (72 FR 54540) modifying rules governing the general standards of practice before the IRS, including the rules relating to contingent fees in § 10.27 of Circular 230. Section 10.27 of the final regulations generally precludes a practitioner from charging a contingent fee for services rendered in connection with any matter before the Internal Revenue Service, including the preparation or filing of a tax return, amended tax return or claim for refund or credit. The final regulations, however, permit a practitioner to charge a contingent fee for services rendered in connection with the IRS examination of, or challenge to: (i) An original tax return, or (ii) an amended return or claim for refund or credit when the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to, the original tax return. The final regulations also permit a practitioner to charge a contingent fee for services rendered in connection with a claim for refund or credit of interest and penalties assessed by the IRS, and for services rendered in connection with a judicial proceeding arising under the Internal Revenue Code. The final amendments to § 10.27 made by the final regulations apply to fee

arrangements entered into after March 26, 2008.

Section 406 of the Tax Relief and Health Care Act of 2006, Public Law 109–432 (120 Stat. 2958) (December 20, 2006) (the Act) amended section 7623 of the Internal Revenue Code concerning the payment of awards to certain persons who detect underpayments of tax. Prior statutory authority to pay awards at the discretion of the Secretary was re-designated as section 7623(a), and a new section 7623(b) was added to the Code. Additional off-Code provisions in section 406 of the Act established a Whistleblower Office within the IRS and addressed reward program administration issues. See Notice 2008–4, 2008–2 IRB 253, for interim guidance applicable to award claims submitted under the authority of section 7623.

After consideration of comments received following the publication of the final regulations on contingent fees and the Act, on March 26, 2008, the Treasury Department and the IRS published Notice 2008–43, 2008–15 IRB 748, providing interim guidance and information concerning contingent fees under Circular 230. The interim guidance in Notice 2008–43 clarified that § 10.27(b)(2)(ii) of Circular 230 does not require the IRS to furnish a written notice of examination to a taxpayer as a prerequisite to a practitioner charging a contingent fee for services rendered in connection with an IRS examination of, or challenge to, an amended return. The interim guidance also clarified that § 10.27 permits practitioners to charge a contingent fee with respect to whistleblower claims under section 7623. The interim rules in Notice 2008–43 are applicable to fee arrangements entered into after March 26, 2008, and will remain in effect until these proposed regulations are finalized.

## Explanation of Provisions

This document proposes modifications to the standards for contingent fees consistent with the interim guidance provided in Notice 2008–43. Section 10.27 generally prohibits a practitioner from charging a contingent fee for services rendered in connection with any matter before the IRS. The primary rationales behind the prohibition on contingent fees is to preclude any fee arrangement that is related to or requires a favorable ruling by the IRS and that has the potential to exploit the audit selection process or compromise a practitioner's duty of independent judgment. Consistent with the interim guidance provided in Notice 2008–43, proposed revisions to § 10.27 provide that a practitioner may charge a contingent fee in three limited exceptions. Under proposed § 10.27(b)(2)(i) and (ii), a practitioner may charge a contingent fee for services rendered in connection with the IRS's examination of, or challenge to: (i) An original tax return; or (ii) an amended return or claim for refund or credit filed before the taxpayer received a written notice of examination of, or a written challenge to, the original tax return (or filed no later than 120 days after the receipt of such written notice or written challenge). The intent of this exception is to discourage the tactical preparation of a refund claim or amended return filed late in the examination process. The exception for contingent fee arrangements with respect to an amended return or claim for refund or credit may be used if the amended return or claim for refund or credit is filed before the taxpayer receives written notice of the examination or written challenge to the original return (or if the taxpayer never receives such notice or writing) or within 120 days of the taxpayer receiving the notice or writing. For purposes of proposed § 10.27(b)(2)(ii), the 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return. Further, under proposed § 10.27(b)(3) and (4), practitioners also may charge a contingent fee for services rendered in connection with a claim for refund or credit of interest and penalties assessed by the IRS, and for services rendered in connection with a claim under section 7623.

In response to comments received following the publication of the final regulations on contingent fees, this document also clarifies the definition of a contingent fee in § 10.27(c)(1) to provide that a contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific tax result attained. The definition in § 10.27(c)(1) states that a contingent fee depends on the specific result attained without directly providing that it is the specific tax result that is relevant to the definition of a contingent fee. Contingent fees based on the closing of a transaction or other non-tax contingencies do not present the same concerns posed by tax-related contingent fees. Accordingly, this document clarifies the existing definition to provide that a contingent fee includes, but is not limited to, any fee that depends on the specific tax result obtained in any given transaction.

The scope of these regulations is limited to the rules relating to contingent fees under the general standards of practice before the IRS. These regulations do not alter or supplant other ethical standards applicable to practitioners.

## Effect on Other Documents

Notice 2008–43, 2008–15 IRB 257, will be obsolete when regulations finalizing these proposed regulations are published in the **Federal Register**.

## Special Analyses

It has been determined that this proposed rule is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Persons authorized to practice before the IRS have long been required to comply with certain standards of conduct. These regulations do not alter the basic nature of the obligations and responsibilities of these practitioners. These regulations clarify when a practitioner may charge a contingent fee under § 10.27(b)(2) in response to public comments. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

## Comments and Public Hearing

Before the regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) and electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying.

The public hearing is scheduled for November 20, 2009, at 10 a.m., and will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to

attend the hearing, *see* the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by September 10, 2009 and an outline of the topics to be discussed and the time to be devoted to each topic by September 10, 2009. A period of 10 minutes will be allocated to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

**Drafting Information**

The principal author of the regulations is Amy L. Mielke of the Office of the Associate Chief Counsel (Procedure and Administration).

**List of Subjects in 31 CFR Part 10**

Accountants, Administrative practice and procedure, Lawyers, Reporting and recordkeeping requirements, Taxes.

**Proposed Amendments to the Regulations**

Accordingly, 31 CFR part 10 is proposed to be amended as follows:

**Paragraph 1.** The authority citation for 31 CFR part 10 continues to read as follows:

**Authority:** Sec. 3, 23 Stat. 258, secs. 2–12, 60 Stat. 237 et seq.; 5 U.S.C. 301, 500, 551–559; 31 U.S.C. 321; 31 U.S.C. 330; Reorg. Plan No. 26 of 1950, 15 FR 4935, 64 Stat. 1280, 3 CFR, 1949–1953 Comp., p. 1017.

**Paragraph. 2.** Section 10.27 is amended by revising paragraphs (b), (c)(1), and (d), and by adding paragraph (e) to read as follows:

**§ 10.27 Fees.**

* * * * *

(b) *Contingent fees*—(1) Except as provided in paragraphs (b)(2), (3), (4), and (5) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

(2) A practitioner may charge a contingent fee for services rendered in connection with the Internal Revenue Service's examination of, or challenge to—

(i) An original tax return; or

(ii) An amended return or claim for refund or credit filed before the taxpayer received a written notice of examination of, or a written challenge to, the original tax return; or filed no later than 120 days after the receipt of such written notice or written challenge. The 120 days is computed from the earlier of a written notice of the examination, if any, or a written challenge to the original return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.

(4) A practitioner may charge a contingent fee for services rendered in connection with a claim under section 7623 of the Internal Revenue Code.

(5) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

(c) * * *

(1) *Contingent fee* is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific tax result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

(2) * * *

(d) *Applicability date.* This section is applicable to fee arrangements entered into after March 26, 2008.

(e) *Effective date.* This section is effective on the date that the final regulations are published in the **Federal Register**.

**Linda E. Stiff,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. E9–17743 Filed 7–27–09; 8:45 am]

BILLING CODE 4830–01–P

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R04–OAR–2009–0303(b); FRL–8936–1]**

## Approval and Promulgation of Implementation Plans; South Carolina; Transportation Conformity Memorandum of Agreement Update

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a revision to the South Carolina State Implementation Plan (SIP) submitted on November 28, 2008, through the South Carolina Department of Health and Environmental Control. This revision consists of transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. The intended effect is to update the transportation conformity criteria and procedures in the South Carolina SIP.

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 August 27, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R04–OAR–2009–0303, by one of the following methods:

a. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

b. *E-mail: Wood.amanetta@epa.gov.*

c. *Fax:* (404) 562–9019.

d. *Mail:* EPA–R04–OAR–2009–0303, Air Quality Modeling and Transportation 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.

e. *Hand Delivery or Courier:* Amanetta Wood, Air Quality Modeling and Transportation 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:** Amanetta Wood of the Air Quality Modeling and Transportation Section at the Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Ms. Wood's telephone number is 404–562–9025. She can also be reached via electronic mail at *Wood.amanetta@epa.gov.*

**SUPPLEMENTARY INFORMATION:** For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**.

Dated: July 8, 2009.

**Beverly H. Banister,**

*Acting Regional Administrator, Region 4.*

[FR Doc. E9–17817 Filed 7–27–09; 8:45 am]

BILLING CODE 6560–50–P

# Notices

Federal Register

Vol. 74, No. 143

Tuesday, July 28, 2009

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

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* National Institute of Standards and Technology (NIST).

*Title:* Generic Clearance for Program Evaluation Data Collections.

*OMB Control Number:* 0693–0033.

*Form Number(s):* None.

*Type of Request:* Regular submission.

*Burden Hours:* 3,022.

*Number of Respondents:* 12,000.

*Average Hours per Response:* Varied dependent upon the individual data collection. Response time could be 2 minutes for a response card or 1 hour for a more structured survey instrument. The average response time is expected to be 30 minutes.

*Needs and Uses:* In accordance with Executive Order 12862, the National Institute of Standards and Technology (NIST), a non-regulatory agency of the Department of Commerce (DoC), proposes to conduct a number of surveys (quantitative and qualitative) designed to evaluate our current program evaluation data collections by means of, but not limited to, focus groups, reply cards that accompany product distributions, and Web-based surveys and dialogue boxes that offer customers the opportunity to express their views on the programs they are asked to evaluate. NIST will limit it inquires to data collections that solicit strictly voluntary opinions and will not collect information that is required or regulated, Steps will be taken to assure anonymity covered under this request.

*Affected Public:* Business or other for-profit organizations, not-for-profit institutions, individuals or households, Federal government, State, Local, or Tribal Government.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Jasmeet Seehra, (202) 395–3123.

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 Jasmeet Seehra, OMB Desk Officer, FAX number (202) 395–5167 or via the Internet at *Jasmeet_K._Seehra@omb.eop.gov.*

Dated: July 22, 2009.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E9–17847 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–13–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 Institute of Standards and Technology (NIST).

*Title:* Generic Clearance for Usability Data Collections.

*OMB Control Number:* 0693–0043.

*Form Number(s):* None.

*Type of Request:* Regular submission.

*Burden Hours:* 1,000.

*Number of Respondents:* 2,000.

*Average Hours per Response:* Response time may vary dependent upon the data collection method used. The response time will vary from 15 minutes to complete a questionnaire or up to three hours to participate in an empirical study. Average response time is expected to be 1 hour.

*Needs and Uses:* In accordance with Executive Order 12862, the NIST, a non-regulatory agency of the Department of Commerce, proposes to conduct a number of data collection efforts, both quantitative and qualitative, to determine requirements and evaluate usability and utility of NIST research for measurement and standardization work. These data collection efforts may include, but may not be limited to electronic methodologies, empharical studies, video and audio data collections, interviews, and questionnaires. For example, data collection efforts may be conducted at search and rescue training exercises for rescue workers using robots. Other planned data collections include evaluations of software for use by the intelligence community. The participation will be strictly voluntary; regulated information will not be collected. The results of the data collected will be used to guide NIST research. Steps will be taken to ensure anonymity of respondents in each activity covered under this request.

*Affected Public:* Individuals or households, State, Local or Tribal Government.

*Frequency:* On occasion.

*Respondent's Obligation:* Voluntary.

*OMB Desk Officer:* Jasmeet Seehra, (202) 395–3123.

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 6625, 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 Jasmeet Seehra, OMB Desk Officer, FAX number (202) 395–5167 or via the Internet at *Jasmeet_K._Seehra@omb.eop.gov.*

Dated: July 22, 2009.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. E9–17848 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–552–801**

### Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Amended Final Results of New Shipper Review

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

**EFFECTIVE DATE:** July 28, 2009.

**FOR FURTHER INFORMATION CONTACT:** Emeka Chukwudebe and Alan Ray, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, DC, 20230; telephone: (202) 482 0219 and (202) 482 5403, respectively.

**SUPPLEMENTARY INFORMATION:**

**Amendment to the Final Results:**

In accordance with sections 751(h) and 777(i)(1) of the Tariff Act of 1930, as amended, (''Act''), on June 15, 2009, the Department of Commerce (''Department'') issued the final results in the antidumping new shipper review of certain frozen fish fillets from the Socialist Republic of Vietnam (''Vietnam'') covering Hiep Thanh Seafood Joint Stock Company (''Hiep Thanh'') and Asia Commerce Fisheries Joint Stock Company (''Acomfish'') (collectively, ''Respondents''). *See Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Third New Shipper Reviews*, 74 FR 29473, (June 22, 2009) (''*Final Results*'').

On June 22, 2009, Petitioners [1] filed a timely allegation that the Department made a ministerial error in the *Final Results* and requested, pursuant to 19 CFR 351.224, that the Department correct the alleged ministerial error in the calculation of the margins for Acomfish and Hiep Thanh. No other party in this proceeding submitted comments on the Department's final margin calculations.

A ministerial error is defined as ''an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the {Department} considers ministerial.'' *See* section 751(h) of the Act; *see also* 19 CFR 351.224(f).

After analyzing petitioner's comments, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that we made a ministerial error in our calculation for the final results with respect to Acomfish and Hiep Thanh.[2] Specifically, we inadvertently excluded the surrogate values for packing materials during the packing stage of the margin calculation.

Additionally, in the *Final Results*, we are correcting a typographical error in Comment 1 of the Final Decision Memo. *See* Final Decision Memo at Comment 1. Specifically, the surrogate financial ratios used were based on Apex's financial statements only, and not on the average of Gemini with Apex as stated in the Final Decision Memo. The text in the Final Decision Memo clearly indicates we only intended to use Apex's financial statements but we inadvertently included Gemini in the context of the last sentence.

The margin for Acomfish did not change following revisions made to the *Final Results*. Accordingly, the margin for Acomfish remains at 0.00 percent. For Hiep Thanh however, the margin increases from 6.68 percent to 13.76 percent. We further note that the errors did not affect the Vietnam–Wide entity rate, and thus it will not be revised.

Therefore, in accordance with section 751(h) of the Act, we are amending the final results in this antidumping duty new shipper review of certain frozen fish fillets from the Vietnam. After correcting the ministerial error, the amended final weighted–average dumping margins are as follows:

Certain Frozen Fish Fillets from Vietnam

| Manufacturer/Exporter | Final Weighted–Average Margin | Amended Final Weighted–Average Margin |
|---|---|---|
| Acomfish | 0.00% | 0.00% |
| Hiep Thanh | 6.68% | 13.76% |

**Assessment Rates**

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (''CBP'') 15 days after the date of publication of these amended final results of review. In accordance with 19 CFR 351.212(b)(1), we have calculated importer–specific assessment rates for merchandise subject to this review.

**Cash Deposit Requirements**

The following deposit requirements will be effective retroactively on any entries made on or after June 22, 2009, the date of publication of the *Final Results*, for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption as provided by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by Hiep Thanh, the cash deposit rate will be the percent listed above, or the equivalent per–unit rate; for subject merchandise produced and exported by Acomfish, the cash deposit rate will be zero; (2) for subject merchandise exported by Hiep Thanh or Acomfish, but not manufactured by Hiep Thanh or Acomfish, the cash deposit rate will continue to be the Vietnam–wide rate of 63.88 percent; and (3) for subject merchandise manufactured by Hiep Thanh or Acomfish, but exported by any party other than Hiep Thanh or Acomfish, the cash deposit rate will be the rate applicable to the exporter. These cash deposit requirements will remain in effect until further notice. In the 2nd administrative review, the Department stated that we would collect cash deposits and issue assessment instructions on a per–unit basis. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Second Administrative Review*, 72 FR 13242, 13244 (March 21, 2007). Therefore, we intend to issue CBP instructions on that basis.

**Notification of Interested Parties**

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate

[1] Catfish Farmers of America and individual U.S. catfish processors.

[2] *See* Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Emeka Chukwudebe, Case Analyst, Office 9, New Shipper Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Analysis for the Final Results for Acomfish Joint Stock Company (''Acomfish'') dated June 15, 2009 (''Acomfish Final Analysis Memo'') at Attachment 2 and Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Alan Ray, Case Analyst, Office 9, Analysis of the Final Results of the New Shipper Reviews of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam (''Vietnam''): Hiep Thanh Joint Stock Company (''Hiep Thanh'') dated June 15, 2009 (''Hiep Thanh Final Analysis Memo'') at Attachment 2.

regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties. This notice also serves as a reminder to parties subject to administrative protective orders (''APOs'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation that is subject to sanction.

We are issuing and publishing these amended final results of review and notice in accordance with sections 751(a) and 777(i) of the Act.

Dated: July 20, 2009.

**Ronald K. Lorentzen,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. E9–17872 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–DS–S

## DEPARTMENT OF COMMERCE

### National Institute of Standards and Technology

### Notice of Invention Available for Licensing

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice of Invention Available for Licensing.

**SUMMARY:** The invention listed below is owned by the U.S. Government, as represented by the Department of Commerce. The invention is available for licensing in accordance with 35 U.S.C. 207 and 37 CFR Part 404 to achieve expeditious commercialization of results of federally funded research and development.

**FOR FURTHER INFORMATION CONTACT:** Technical and licensing information on this invention may be obtained by writing to: National Institute of Standards and Technology, Office of Technology Partnerships, Attn: Mary Clague, Building 222, Room A240, Gaithersburg, MD 20899. Information is also available via telephone: 301–975–4188, fax 301–975–3482, or e-mail: *mary.clague@nist.gov.* Any request for information should include the NIST Docket number and title for the invention as indicated below.

*The invention available for licensing is:* [NIST DOCKET NUMBER: 99–017/–032/–037US]

*Title:* Positioning Stage.

*Abstract:* This invention provides a positioning device and method for positioning objects. The device includes a movable stage and a pair of levers. The pair of levers is symmetric about a first axis of the movable stage. Additionally, the pair of levers is parallel to a second axis of the movable stage. This second axis is perpendicular to the first axis. Each of the pair of levers applies a force to the movable stage. Each of the pair of levers moves in an arc. The two levers move in opposite directions along their respective arc. The two arcs are symmetrical about an axis of the movable stage.

Dated: July 22, 2009.

**Patrick Gallagher,**

*Deputy Director.*

[FR Doc. E9–17913 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–13–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN: 0648–XQ54**

### Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meeting

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

**ACTION:** Notice of a public meeting.

**SUMMARY:** The South Atlantic Fishery Management Council (Council) will hold a meeting of a subgroup of its Golden Crab Advisory Panel (AP) in North Charleston, SC. See **SUPPLEMENTARY INFORMATION**.

**DATES:** The meeting will take place August 24–25, 2009. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

**ADDRESSES:** The meeting will be held at the South Atlantic Fishery Management Council office, 4055 Faber Place Drive, Suite 201, North Charleston, SC; telephone: (843) 571–4366 or toll free: (866) SAFMC–10.

**FOR FURTHER INFORMATION CONTACT:** Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC, 29405; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

**SUPPLEMENTARY INFORMATION:** Members of the subgroup of the Golden Crab Advisory Panel will meet from 8:30 a.m. - 5 p.m. on August 24, 2009, and from 8:30 a.m. until 3 p.m. on August 25, 2009.

A subgroup of the Golden Crab Advisory Panel will meet to discuss Limited Access Privilege Program design features for the commercial golden crab fishery in the South Atlantic Economic Exclusive Zone (EEZ) and provide recommendations to the Council.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Note: The times and sequence specified in this agenda are subject to change.Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Dated: July 22, 2009.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E9–17849 Filed 7–27–09; 8:45 am]

BILLING CODE 3510–22–S

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XQ55**

### Marine Fisheries Advisory Committee

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

**ACTION:** Notice of open public meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Marine

Fisheries Advisory Committee (MAFAC). The members will discuss and provide advice on issues outlined in the agenda below.

**DATES:** The meeting is scheduled for August 11, 2009, from 2 - 3 p.m. Eastern Daylight Time.

**ADDRESSES:** Conference call. Public access is available at SSMC3, Room 14817, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Heidi Lovett, (301) 713–9070 x118; e-mail: *Heidi.Lovett@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** The MAFAC was established by the Secretary of Commerce (Secretary) on February 17, 1971, to advise the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. This committee advises and reviews the adequacy of living marine resource policies and programs to meet the needs of commercial and recreational fisheries, and environmental, State, consumer, academic, tribal, governmental and other national interests. The complete charter and summaries of prior meetings are located online at *http://www.nmfs.noaa.gov/ocs/mafac/*.

**Matters To Be Considered**

This agenda is subject to change.

1. Discussion and consideration of recommendations on a national ocean policy, policy coordination and governance, and implementation strategy to the Federal Interagency Ocean Policy Task Force, submitted to MAFAC by the Governance Work Group.

2. Discussion and consideration of recommended revisions and update to *Vision 2020*, MAFAC's report on the desired future state of U.S. marine fisheries, submitted to MAFAC by the Vision 2020 Work Group.

Dated: July 23, 2009.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

[FR Doc. E9–17939 Filed 7–27–09; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

### Intent To Prepare a Draft and Final Supplemental Environmental Impact Statement for Reaches 1B, 1C and 1D on the Herbert Hoover Dike Major Rehabilitation Project, Martin and Palm Beach Counties

**AGENCY:** Department of the Army, U.S. Army Corps of Engineers, DOD.

**ACTION:** Notice of intent.

**SUMMARY:** The purpose of the project is to reconstruct and rehabilitate Reaches 1B, 1C and 1D of the Herbert Hoover Dike to prevent catastrophic failure of the system to retain the waters of Lake Okeechobee. On July 8 2005, the Jacksonville District, U.S. Army Corps of Engineers (Corps) issued a Final Supplemental Environmental Impact Statement (FSEIS) for the Major Rehabilitation actions proposed for Herbert Hoover Dike (HHD), Reach One. Herbert Hoover Dike is the levee that completely surrounds Lake Okeechobee. On September 23, 2005, a Record of Decision was signed adopting the preferred alternative as the Selected Plan for Reach One.

As plans and specifications were developed for Reach 1, it became apparent that the cut-off wall with seepage berm alternative would not work for all of Reach 1. The alternative for Reaches 1B, 1C and 1D will be a combination of one or more of the following features dependent on the geology and adjacent land factors with the cut-off wall: Seepage Berm, Relief Trench, Soil Replacement Wedge, Relief Wells, Drainage Feature and Sand Columns. Reaches 1B, 1C and 1D of the HHD extends for approximately 17.7 miles within Palm Beach County, from the 10A culvert south to L–14 at Belle Glade, Florida. The final full design of the cutoff wall and landside rehabilitation feature will include lands outside of the existing ROW. Therefore it is necessary to update the July 2005 SEIS for Reach 1 to include these new landside rehabilitation features and any impacts to lands outside of the existing ROW. This study is a cooperative effort between the Corps and the South Florida Water Management District (SFWMD).

**ADDRESSES:** U.S. Army Corps of Engineers, Planning Division, Environmental Branch, P.O. Box 4970, Jacksonville, FL 32232–0019.

**FOR FURTHER INFORMATION CONTACT:** Mr. William Porter at (904) 232–3206 or e-mail at *William.L.Porter2@usace.army.mil*.

**SUPPLEMENTARY INFORMATION:**

a. The proposed action will be the selected plan described in the July 2005 Supplemental Environmental Impact Statement (SEIS) with the additional action of implementing the landside rehabilitation features as needed based on geology and adjacent land factors. The proposed action will not affect the Regulation Schedule for Lake Okeechobee. Land may have to be acquired outside of the existing right-of-way (ROW) and this SEIS will account for any impacts that result due to acquisition of additional real estate.

b. Alternatives to be considered separately for each subdivision of Reach 1 are dependant upon the geology and adjacent land factors with the cut-off wall. Reach 1 is divided into Subreaches A, B, C and D. The alternatives to be implemented include one or more of the following features: Seepage Berm, Relief Trench, Soil Replacement Wedge, Relief Wells, Sand Column and Drainage Feature.

c. A scoping letter will be used to invite comments on alternatives and issues from Federal, State, and local agencies, affected Indian Tribes, and other interested private organizations and individuals. A scoping letter was sent in October 2007 in anticipation of writing a single EIS for Reach 1. An additional scoping letter will be sent out in September 2009 to address the change in the process of the completing the Reach 1 Environmental Impact Statements. A scoping meeting is not anticipated.

d. A public meeting will be held after release of each of the Draft Supplemental EIS's. The public meeting is anticipated to be held in February 2010 for Reaches 1B, 1C and 1D in Clewiston, FL. The exact location, date, and times will be announced in a public notice and local newspapers.

e. A Major Rehabilitation Evaluation Report (MRR) was approved by Congress in the Water Resources Development Act (WRDA) 2000 that addressed the need to repair the aging dike.

Dated: July 15, 2009.

**Eric P. Summa,**

*Chief, Environmental Branch.*

[FR Doc. E9–17903 Filed 7–27–09; 8:45 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### Meeting of the Board of Advisors (BOA) to the President, Naval Postgraduate School (NPS)

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Notice of Open Meeting.

**SUMMARY:** Pursuant to the provisions of The Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meeting of the Board of Advisors (BOA) to the President, Naval Postgraduate School (NPS) will be held. This meeting will be open to the public.

**DATES:** The meeting will be held on Wednesday, September 9, 2009, from 8 a.m. to 4 p.m. and on Thursday, September 10, 2009, from 8 a.m. to 12 p.m. Eastern Time Zone.

**ADDRESSES:** The meeting will be held at the Office of Naval Research, 875 N. Randolph Street, Suite 1435, Arlington, VA.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jaye Panza, Naval Postgraduate School, Monterey, CA, 93943–5001, telephone: (831) 656–2514.

**SUPPLEMENTARY INFORMATION:** The purpose of the meeting is to elicit the advice of the Board on the Naval Service's Postgraduate Education Program and the collaborative exchange and partnership between NPS and the Air Force Institute of Technology (AFIT). The Board examines the effectiveness with which the NPS is accomplishing its mission. To this end, the Board will inquire into the curricula; instruction; physical equipment; administration; state of morale of the student body, faculty, and staff; fiscal affairs; and any other matters relating to the operation of the NPS as the Board considers pertinent.

Individuals without a DoD government/CAC card require an escort at the meeting location. For access, information, or to send written comments regarding the NPS BOA contact Ms. Jaye Panza, Naval Postgraduate School, 1 University Circle, Monterey, CA 93943–5001 or by fax (831) 656–3145 by September 1, 2009.

Dated: July 21, 2009.

**A.M. Vallandingham,**

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

[FR Doc. E9–17891 Filed 7–27–09; 8:45 am]

BILLING CODE 3810–FF–P

## DEPARTMENT OF EDUCATION

### National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs) and Rehabilitation Engineering Research Centers (RERCs)

*Catalog of Federal Domestic Assistance (CFDA) Numbers:* 84.133B Rehabilitation Research and Training Centers and 84.133E Rehabilitation Engineering Research Centers.

**AGENCY:** Office of Special Education and Rehabilitative Services (OSERS), Department of Education.

**ACTION:** Notice of final priorities (NFP) for RRTCs and RERCs.

**SUMMARY:** The Assistant Secretary for Special Education and Rehabilitative Services announces certain funding priorities for the Disability and Rehabilitation Research Projects and Centers Program administered by NIDRR. Specifically, this notice announces four priorities for RRTCs and three priorities for RERCs. The Assistant Secretary may use these priorities for competitions in fiscal year (FY) 2009 and later years. We take this action to focus research attention on areas of national need. We intend these priorities to improve rehabilitation services and outcomes for individuals with disabilities.

**DATES:** *Effective Date:* These priorities are effective August 27, 2009.

**FOR FURTHER INFORMATION CONTACT:** Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., Room 6029, Potomac Center Plaza, Washington, DC 20202–2700. Telephone: (202) 245–7462 or by e-mail: *donna.nangle@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** This NFP is in concert with NIDRR's Final Long-Range Plan for FY 2005–2009 (Plan). The Plan, which was published in the **Federal Register** on February 15, 2006 (71 FR 8165), can be accessed on the Internet at the following site: *http://www.ed.gov/about/offices/list/osers/nidrr/policy.html.*

Through the implementation of the Plan, NIDRR seeks to: (1) Improve the quality and utility of disability and rehabilitation research; (2) foster an exchange of expertise, information, and training to facilitate the advancement of knowledge and understanding of the unique needs of traditionally underserved populations; (3) determine best strategies and programs to improve rehabilitation outcomes for underserved populations; (4) identify research gaps; (5) identify mechanisms of integrating research and practice; and (6) disseminate findings.

This notice announces priorities that NIDRR intends to use for RRTC and RERC competitions in FY 2009 and possibly later years. However, nothing precludes NIDRR from publishing additional priorities, if needed. Furthermore, NIDRR is under no obligation to make an award for each of these priorities. The decision to make an award will be based on the quality of applications received and available funding.

*Purpose of Program:* The purpose of the Disability and Rehabilitation Research Projects and Centers Program is to plan and conduct research, demonstration projects, training, and related activities, including international activities, to develop methods, procedures, and rehabilitation technology, that maximize the full inclusion and integration into society, employment, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities, and to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended.

*Program Authority:* 29 U.S.C. 762(g), 764(a), 764(b)(2), and 764(b)(3).

*Applicable Program Regulations:* 34 CFR part 350.

We published a notice of proposed priorities (NPP) for this program in the **Federal Register** on May 7, 2009 (74 FR 21338). That notice contained background information and our reasons for proposing the particular priorities. This information may be useful for applicants in preparing their applications.

There are several significant differences between the NPP and this NFP, as discussed in the *Analysis of Comments and Changes* section elsewhere in this notice.

*Public Comment:* In response to our invitation in the NPP, 80 parties submitted comments on the proposed priorities.

We discuss substantive issues under the priorities to which they pertain. Generally, we do not address technical and other minor changes or suggested changes the law does not authorize us to make under the applicable statutory authority. In addition, we do not address general comments that raised

concerns not directly related to the proposed priorities.

*Analysis of Comments and Changes:* An analysis of the comments and of any changes in the priorities since publication of the NPP follows.

**General**

*Comment:* One commenter noted that it is important for RRTC and RERC applicants to be aware of the concerns, needs, and strengths of individuals from diverse backgrounds (based on gender, race, ethnicity, and age), and appropriately address these within their proposed programs.

*Discussion:* NIDRR agrees that it is important for grantees in the RRTC and RERC programs to address the needs of individuals with disabilities from diverse backgrounds. In order to maximize the utility of grant products, RRTC and RERC activities should take into account differences in the needs of individuals with disabilities, based on their gender, race, ethnicity, age, and other important characteristics. However, we do not believe it is necessary to require each grantee to address all of these factors. The peer review process will determine the merits of each proposal. We also note that NIDRR requires all RRTCs to demonstrate in their applications how they will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds.

*Changes:* None.

**RRTCs**

*Priority 1—Improved Employment Outcomes for Individuals With Psychiatric Disabilities*

*Comment:* One commenter expressed an interest in implementing statewide supported employment programs that assist people with psychiatric disabilities to enter the workforce.

*Discussion:* Under Title II of the Rehabilitation Act of 1973, as amended, NIDRR has the authority to sponsor research, demonstration projects, training, and related activities. NIDRR does not have the authority to fund the direct implementation of employment programs. However, paragraph (a)(3) of the priority does require applicants to develop, test, and validate adaptations of evidence-based interventions for individuals from traditionally underserved groups, and specifically mentions supported employment as an example of an evidence-based practice. Nothing in the priority precludes an applicant from focusing on supported employment when conducting activities under this priority. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter requested clarification on the phrase ''scientifically based research'' and asked how the definition of this phrase may impact the type of research design permitted in the applications.

*Discussion:* Under this priority, scientifically based research must be used to identify or develop, and test, innovative interventions and employment accommodations. We are using the definition of ''scientifically based research'' from section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended. This definition emphasizes the use of experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments. NIDRR believes that experimental research designs are appropriate for research that involves identifying or developing, and testing, interventions or accommodations, but are not necessarily appropriate for research activities of a more exploratory nature. Therefore, scientifically based research is explicitly required under paragraph (a)(1) of this priority.

*Changes:* None.

*Comment:* One commenter suggested that projects under this priority should conduct research on the full range of transition, systems, and needs (*e.g.,* housing, transportation, money management, and performance of daily life activities) leading up to and supporting employment for people with psychiatric disabilities.

*Discussion:* The priority requires the RRTC to contribute to improved models, programs, and interventions to enable individuals with psychiatric disabilities to obtain, retain, and advance in competitive employment of their choice. Nothing in the priority precludes an applicant from focusing on one or more of the topics identified by the commenter. We do not believe it is necessary to require that an applicant focus on all of those topics. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter stated that occupational therapists could work with vocational rehabilitation (VR) and other professionals to address employment-related factors so that individuals with psychiatric disabilities will be more prepared for tasks related to employment and independent living.

*Discussion:* Nothing in the priority precludes an applicant from including a focus on the role of occupational therapists in the research on improved models, programs, and interventions in paragraph (a)(1) of the priority, or in the research on effective partnerships between VR and other agencies and mental health groups in paragraph (a)(2). The peer review process will determine the merits of each proposal.

*Changes:* None.

*Priority 2—Transition-Age Youth and Young Adults With Serious Mental Health Conditions*

*Comment:* Forty-five commenters noted that the proposed priority did not address questions regarding serious mental health conditions in children younger than the age of 14. These commenters stated that many mental, emotional, and behavioral disorders have their onset before this age.

*Discussion:* We recognize that many mental, emotional, and behavior disorders begin when children are much younger than age 14. However, it is not possible to address all age groups and conditions in a single RRTC. In developing this priority, NIDRR considered the state of the science, major Federal reports and initiatives, and priorities of the Department of Education, which included an emphasis on transition to adulthood. The decision to fund research addressing the needs of the target population (*i.e.,* individuals between the ages of 14 and 30, inclusive) is a strategic one, based on a need for knowledge in this area.

*Changes:* None.

*Comment:* Four commenters requested that the priority include families as a critical component of research.

*Discussion:* NIDRR agrees that families are critical to the outcomes of children and young adults with serious mental health conditions. The priority requires research on family-guided care. In addition, paragraph (a) of the priority specifically requires family involvement in the processes of identifying, or developing, and evaluating interventions. We believe these provisions adequately address the concern raised by the commenters.

*Changes:* None.

*Comment:* One commenter suggested that the research conducted under this priority should focus on policy and financing issues related to mental health disparities in the access, availability, and quality of services, and associated outcomes for children, youth, and families of color.

*Discussion:* NIDRR agrees that research on policy and financing issues related to mental health disparities for children and youth of color would be an

important addition to the research literature. Applicants may propose such research under paragraph (c) of the priority, which requires research on the financial, policy, and other barriers to integration of youth and adult mental health systems. However, we have no basis for requiring all applicants to propose such research. In addition, the Department believes that limiting the research in this way would preclude applicants from proposing valuable research on the broader issues related to interventions and system coordination that would benefit all transition-aged youth with disabilities, including those from minority backgrounds. As described in the priority, research on this or other topics must focus on the experiences of youth and young adults between the ages of 14 and 30.

*Changes:* None.

*Comment:* One commenter noted that in May 2007, NIDRR convened a panel of experts on child and adolescent mental health that made a series of research recommendations, which are not addressed in the proposed priority. The commenter asked why panel recommendations in the areas of early intervention and screening, schools and education, family and community supports, systems of care, and diversity and cultural competence were not named as the focus of the priority.

*Discussion:* In determining priority topics, NIDRR uses a number of inputs, including but not limited to: NIDRR's analysis of the state of the science; input from experts in the field (*e.g.,* the 2007 expert panel on child and adolescent mental health); work produced by NIDRR's RRTCs; work sponsored by other agencies; major Federal reports and initiatives; and leadership initiatives at the Department of Education.

Although the priority does not focus exclusively on the topics recommended by the 2007 expert panel, it does incorporate several of the panel's recommendations. For example, the priority requires the RRTC to utilize recovery-based outcome measures, including education and community integration. In addition, the priority requires the development of new knowledge in a number of areas recommended by the panel, including knowledge about youth and young adults with serious mental health conditions who are from disadvantaged backgrounds, a focus on family and consumer-guided care, and systems coordination.

*Changes:* None.

*Comment:* One commenter recommended that the priority address the building of skills needed to achieve recovery-based outcomes.

*Discussion:* NIDRR agrees that these skills are important to recovery and positive outcomes. Nothing in the priority precludes an applicant from proposing interventions research that highlights the building of skills needed to achieve recovery-based outcomes under paragraphs (a) and (b). However, NIDRR does not have a sufficient basis for requiring all applicants to propose such interventions. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter recommended that research under this priority focus on the development of protocols for schools to bring together resources that help ensure safe and effective transition.

*Discussion:* NIDRR agrees that school-based protocols can be useful in promoting safe and effective transition for youth with serious mental health conditions. Such protocols could play a role in interventions research under paragraphs (a) and (b) of the priority or in systems integration research under paragraph (c). Nothing in the priority precludes an applicant from proposing research on school-based protocols. However, NIDRR does not have a sufficient basis for requiring all applicants to do so. The peer review process will determine the merits of each proposal under this priority.

*Changes:* None.

*Priority 3—Improving Measurement of Medical Rehabilitation Outcomes*

*Comment:* Two commenters suggested that by specifically requiring the RRTC to develop measures of cognition and ''environmental factors'' under paragraph (a) of the priority NIDRR is limiting the range of innovative applications that might be received under this priority. The commenters suggested that applicants be invited to address any of the seven research recommendations from the NIDRR-sponsored Post-Acute Rehabilitation Symposium in 2007.

*Discussion:* NIDRR has made the development of measures of cognitive function and measures to assess environmental factors a priority because adequate measures of these factors have not been developed for systemic application in the field of medical rehabilitation. Cognition is both a rehabilitation outcome and a factor related to broader functional and community outcomes for individuals with a wide variety of disabling conditions. Better measures of the environment are required to facilitate emerging research on the influence of environmental factors on medical rehabilitation outcomes.

Paragraph (a) of the priority also permits an RRTC to develop medical rehabilitation outcome measures in other areas where a demonstrated need has been identified in the literature. This flexibility allows applicants to propose development of outcomes measures in additional areas, including other areas identified in the proceedings of the Post Acute Care Symposium. The peer review process will determine the merits of each proposal under this priority.

*Changes:* None.

*Comment:* One commenter suggested that the priority require development of measures of physical function.

*Discussion:* NIDRR agrees that measures of physical function are important in the field of medical rehabilitation research. NIDRR has sponsored the development of key measures of physical function, which are now widely used in the field. Nothing in this priority prohibits applicants from proposing the development of additional measures of physical function. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter suggested that NIDRR revise the priority to encourage the application of newly developed measures to assess the effectiveness of rehabilitation or to compare the effectiveness of different rehabilitation approaches.

*Discussion:* The primary purpose of this priority is to develop outcome measures and data collection methods that improve the quality of disability and rehabilitation research related to medical rehabilitation. While we intend that the new outcome measures be used in the field, the application of new measures to assess the effectiveness of rehabilitation services is beyond the scope of this priority.

*Changes:* None.

*Comment:* One commenter suggested that NIDRR should specify that simple, valid, and reliable methods for characterizing cognitive function of rehabilitation patients is needed and that the new measure of cognition should be broader, better, and more reliable than the cognitive subscale of the Functional Independence Measure (FIM).

*Discussion:* In paragraph (a) of the priority, NIDRR emphasizes the specific need for valid and reliable measures of cognition, data collection efficiency, and the applicability of measures across a wide variety of rehabilitation settings

and disability groups. NIDRR agrees that the cognitive subscale of the FIM is an important benchmark in the field. However, we have no basis for requiring that all applicants use the FIM as a reference point as they develop new measures of cognition. Applicants may discuss the merits of their proposed measures, relative to the cognitive subscale of the FIM or any other relevant existing measure.

*Changes:* None.

*Comment:* One commenter asked NIDRR to specify whether we are prioritizing measures of the environment that focus on the characteristics of rehabilitation settings or on the characteristics of the social and physical environments to which rehabilitation patients are discharged.

*Discussion:* Paragraph (a) of the priority states that the RRTC must develop valid and reliable measures to assess environmental factors that affect outcomes among individuals with disabilities living in the community. NIDRR understands that characteristics of rehabilitation settings and characteristics of the home and community environment may affect outcomes. Applicants may propose and justify the development of measures in either, or both, settings.

*Changes:* None.

*Comment:* One commenter noted that computer adaptive testing (CAT) and item response theory may not be applicable to some key measurement areas, including measurement of the environment. This commenter suggested that we revise the priority to clarify that data collection strategies should be determined by the state of the science and that other data collection strategies may apply in some measurement domains.

*Discussion:* The priority does not endorse CAT as a universal approach for measurement. Rather, the priority calls for applicants to include item response theory and CAT techniques as strategies. Nothing in this priority prohibits applicants from proposing strategies in addition to these two. However, we acknowledge that our intent in this area may not be clear.

*Changes:* We have revised paragraph (a) of the priority to clarify that data collection strategies for newly developed measures must include, but are not limited to, item response theory and CAT techniques, as appropriate.

*Comment:* One commenter recommended that applicants be required to develop rehabilitation measures via research methods that are theory-based, with particular attention on reduction of measurement error and enhancement of precision. This commenter also recommended that measures developed under this priority should generate clinically useful information.

*Discussion:* NIDRR agrees that these are important considerations when developing rehabilitation outcome measures. However, we do not believe it is necessary for the priority to specify the role of theory-based methods of measure development. Applicants' attention to issues such as these will be considered during peer review. The peer review process will determine the merits of each proposal under this priority.

*Changes:* None.

*Comment:* One commenter recommended that the priority require research on methods for linking payment for post-acute rehabilitation to rehabilitation outcomes, across post-acute settings of care.

*Discussion:* NIDRR agrees that linking payment for post-acute rehabilitation to rehabilitation outcomes is an important issue. However, the purpose of this priority is to improve measurement of medical rehabilitation outcomes. Development of methods for establishing an outcomes-based rehabilitation payment system is beyond the scope of this priority.

*Changes:* None.

*Comment:* One commenter recommended that the priority ensure that individuals from a broad range of professions and interests be allowed to participate in the training to ensure comprehensive coverage of the full range of rehabilitation.

*Discussion:* NIDRR agrees that it would be beneficial to have individuals from a broad range of professions participate in the training.

*Changes:* We have revised the last sentence of paragraph (b) of the priority to require, where appropriate, the inclusion of multidisciplinary approaches from a broad range of professions and interests in the program of training.

*Priority 4—Developing Strategies To Foster Community Integration and Participation for Individuals With Traumatic Brain Injury*

*Comment:* Three commenters noted that development of improved tools for traumatic brain injury (TBI) research, required under paragraphs (a) and (b) of the proposed priority, would reduce grant resources that should be spent on testing interventions to promote community integration and participation.

*Discussion:* NIDRR agrees that there is a great need for community integration and participation (CIP) interventions in TBI. Our reading of the research literature suggests that better characterization of symptom variations within research samples might contribute substantially to improved accumulation of knowledge regarding the effectiveness of interventions. In response to the concerns of commenters that it would be difficult for one RRTC both to develop and test interventions and to develop a TBI classification system, we reordered the priority requirements to emphasize the testing of interventions and we eliminated some of the prescriptive requirements related to the development of a TBI classification system. Although we reduced the number of requirements for the development of a TBI classification system, we expect applicants to propose and justify the steps they will take to accomplish this task. The peer review process will determine the merits of each proposal.

*Changes:* We have revised the priority by reordering the priority requirements, eliminating the requirement for expert input into the classification system, and eliminating the requirement for the development of a manual for use of the classification system. Also, in response to this comment and related comments, discussed below in greater detail, we have revised the priority by decoupling the testing of interventions from the classification system, eliminating the numerous examples of symptoms, eliminating the requirement for a short version of the classification system, and eliminating the requirement for a literature review.

*Comment:* Three commenters stated that the sequential nature of the priority makes the timeline for required activities infeasible. Two of these commenters suggested that the research tools required under paragraphs (a) and (b) of the priority be developed concurrently with the interventions research conducted under paragraph (c) instead of having the testing of interventions be tied to the development of the research tools. One of these commenters asked about the logistical difficulty of reviewing and funding interventions research, which would not be developed and specified until after the completion of the research tools.

*Discussion:* NIDRR agrees that the sequential nature of the required activities as presented in the proposed priority may substantially reduce the time available to conduct research on the TBI interventions.

*Changes:* We have revised the priority by eliminating the requirement that the testing of interventions be tied to the classification system.

*Comment:* Three commenters stated that the development of a symptom-based classification of individuals with TBI is not feasible. These commenters noted that the large number of TBI symptoms and the uniqueness of every individual with TBI preclude meaningful classification.

*Discussion:* NIDRR understands that there are numerous TBI symptoms, and that every individual with TBI has unique circumstances and experiences. However, this does not preclude the development of tools to help broadly classify individuals with TBI according to the TBI symptoms that they experience. Through collection and analysis of data by researchers and clinicians, this RRTC can determine the prevalence of relevant clusters of TBI symptoms.

*Changes:* None.

*Comment:* One commenter stated that the general practice among TBI researchers of using inclusion and exclusion criteria to enroll appropriate individuals into research projects is adequate. The commenter also stated that the symptom classification required under paragraph (c) of the priority is not useful for this purpose.

*Discussion:* NIDRR agrees that clear and appropriate inclusion and exclusion criteria are essential in the field of disability research. However, individuals with similar severity of injury or cognitive function can have a wide range of symptoms that is not specified in the inclusion or exclusion criteria. This range can affect the impact of interventions, limit the ability to compare the findings of different studies, and make it unclear whether the findings can be generalized. A TBI symptom classification can serve as a tool for identifying important variations within samples, promote comparability of studies, and clarify the extent to which findings can be generalized to the larger population of individuals with TBI.

*Changes:* None.

*Comment:* Two commenters suggested that the symptom classification to be developed for this priority is potentially duplicative of an emerging effort to develop a classification of individuals with TBI based on the International Classification of Functioning, Disability, and Health (ICF). However, one of these commenters noted that the sample size planned by this group could limit its ability to generate adequate information about infrequent yet important TBI symptoms.

*Discussion:* We do not believe that the classification to be developed under this priority will be duplicative of the effort based on the ICF. NIDRR's focus on a symptom-based classification related to CIP should support the development of this broader classification activity. Applicants may propose methods that are in concert with this ICF effort or other methods of creating a symptom-based classification of individuals with TBI, as appropriate.

*Changes:* None.

*Comment:* Two commenters stated that the requirement in the priority that the grantee review the literature on barriers to CIP among individuals with TBI is unnecessary. These commenters stated that the review of literature on barriers to CIP is likely to be redundant with the effort to develop a list of symptoms because TBI symptoms are often CIP barriers for this population.

*Discussion:* NIDRR agrees that the literature on barriers to CIP may be significantly related to the list of TBI symptoms; in fact, NIDRR believes this relationship strengthens the importance of reviewing current and relevant literature. However, NIDRR feels that requiring a literature review under this priority is unnecessarily prescriptive. Applicants' plans for conducting and incorporating such a literature review into the RRTC's activities will be considered during peer review. The peer review process will determine the merits of each proposal under this priority.

*Changes:* We have revised the priority by removing the requirement for a literature review.

*Comment:* One commenter noted that the expertise necessary to create a TBI classification system under paragraphs (a) and (b) of the priority is different from the expertise required to carry out TBI interventions research under paragraph (c). The commenter stated that it may be difficult for an RRTC to have staff with this diverse expertise.

*Discussion:* NIDRR recognizes that an RRTC developing a TBI classification system and conducting high-quality intervention studies is likely to require staff with varying expertise. We would expect that an RRTC would have this diversity. In addition, as stated in its Long Range Plan, NIDRR expects RRTCs to be multidisciplinary, i.e., able to combine the strengths and perspectives of researchers from multiple disciplines and areas of expertise. (*See* 71 FR 8166, 8177.)

*Changes:* None.

*Comment:* One commenter suggested that NIDRR should publish a less prescriptive priority that would allow applicants more latitude to propose innovative research topics. This commenter and one other suggested a number of potentially innovative topics that could be proposed under such a priority. The suggested topics included testing cognitive rehabilitation interventions; assessing the use of computer-mediated networking technologies; developing new tools for measuring CIP; reviewing literature on CIP related interventions; and developing strategies to improve employment outcomes among individuals with TBI.

*Discussion:* NIDRR agrees that research on these topics may generate new knowledge about CIP among individuals with TBI. Many of these topics are appropriate for development under paragraph (a) of the priority that requires testing of interventions to improve CIP among individuals with TBI. Applicants may propose these topics. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter asked for clarification of NIDRR's intent related to the requirement to ''empirically validate'' the required list of TBI symptoms. This commenter noted that the time and resources required to validate the symptom list could vary greatly, depending on the applicants' approach to the task.

*Discussion:* Empirical validation is the use of data to demonstrate the intended utility of a tool. Applicants must propose and justify their approach to the validation of the TBI symptom list. The peer review will determine the merits of each proposal under this priority.

*Changes:* None.

*Comment:* One commenter asked what it means for applicants to ''provide or develop effective and practical methods'' for the identification of TBI symptoms. This commenter noted that there are no practical and effective methods for identifying many TBI symptoms.

*Discussion:* We recognize that it may not be feasible to provide an effective and practical method for identifying each TBI symptom. We expect that applicants will provide the most appropriate methods that are available for this purpose.

*Changes:* We have revised the priority by requiring that the methods for identification of TBI symptoms be appropriate, rather than effective and practical.

*Comment:* One commenter noted that the list of symptoms in paragraph (a) of the proposed priority included not just symptoms, but diseases, diagnoses, and a number of ''problems'' that people may experience after TBI.

*Discussion:* We agree that this list is unclear. We believe that applicants

should propose and justify their own list of TBI symptoms.

*Changes:* We have revised the priority by eliminating specific examples of the four major categories of symptoms named in the priority.

*Comment:* One commenter asked NIDRR to clarify its intent with regard to the ''short version'' of the classification system required under paragraph (b)(2) of the proposed priority. The commenter noted that valid and reliable short diagnostic tests do not exist for most TBI symptoms and that existing diagnostic tools are generally copyrighted. This commenter also noted that development of ''short versions'' of methodological tools is generally cost-prohibitive within a limited five-year budget.

*Discussion:* We agree that development of a short version of the TBI symptom classification system can be logistically complex and could absorb a disproportionate share of the Center's resources.

*Changes:* We have revised the priority by removing the requirement for a short version of the TBI classification system.

*Comment:* One commenter suggested that systematic reviews are a feasible and more traditional method for achieving the priority's aim of linking interventions to TBI symptoms.

*Discussion:* We decoupled the interventions-testing requirement from the requirement to develop a symptom-based TBI classification system. The linking of interventions to TBI symptoms is no longer an explicit requirement for RRTCs under this priority. However, one aim of a TBI classification system, generally, is to allow better targeting of interventions to specific symptoms. Applicants may propose a systematic review in support of the requirements of this priority. However, we have no basis for requiring all applicants to do so. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter stated that, in addition to its current focus on symptoms of TBI and barriers to CIP, the priority should focus on strengths of individuals with TBI and facilitators of CIP.

*Discussion:* NIDRR agrees that it is important to highlight the strengths of individuals with TBI and the facilitators of their CIP. The introductory paragraph of the priority refers to examining barriers to and facilitators of CIP for individuals with disabilities. The remainder of the priority refers to interventions that facilitate CIP for individuals with TBI. We believe that the revised priority strikes the appropriate balance between barriers to and facilitators of CIP.

*Changes:* None.

*Comment:* One commenter stated that the incidence of TBI is greater, yet access to rehabilitation services is lower, among minority populations. While recognizing that NIDRR requires all RRTCs to demonstrate how they will address the needs of individuals with disabilities from minority backgrounds, this commenter recommended that NIDRR add a specific requirement for this RRTC regarding the inclusion of minorities and individuals from diverse educational and socioeconomic backgrounds in research samples.

*Discussion:* NIDRR believes that requiring RRTCs to demonstrate how they will address the needs of individuals with disabilities from minority backgrounds is sufficient to promote appropriately diverse research samples under this priority. Applicants may propose and justify sample characteristics that are appropriate to their proposed research. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter recommended additional requirements for the symptom-based classification system, and specifically that the system include information about the environmental context in which symptoms are experienced. This commenter noted that information about the contexts in which symptoms are experienced will help inform the design of a symptom-based classification system and effective interventions.

*Discussion:* We agree that additional information of this nature may be useful in the development of a TBI classification system and TBI interventions. However, we have no basis for requiring all applicants to do so. The peer review process will determine the merits of each proposal.

*Changes:* None.

**RERCs**

*Priority 5—Telerehabilitation*

*Comment:* One commenter noted that mobile monitoring of gait and vision and home monitoring may be the future of fall and accident prevention for individuals with disabilities.

*Discussion:* NIDRR recognizes that mobile monitoring of gait and vision and home monitoring may be an important aspect of telerehabilitation. The priority allows applicants the discretion to propose research on mobile monitoring of gait and vision and home monitoring. However, NIDRR has no basis for requiring that all applicants do so.

*Changes:* None.

*Comment:* One commenter suggested that NIDRR expand the priority to include non-real time telerehabilitation applications.

*Discussion:* NIDRR recognizes that the use of non-real time methods can play a role in effective telerehabilitation services. We agree that applicants should be permitted to propose research on and development of technologies that support a variety of interventions, regardless of whether or not those interventions are to be delivered in real time. The peer review process will determine the merits of each proposal.

*Changes:* We have revised the priority by removing the requirement that telerehabilitation applications be in real time.

*Comment:* One commenter noted that there is no need for a one-size-fits-all solution for telerehabilitation infrastructure and architecture. The commenter noted that technology needs will vary considerably, based on unique needs of a diverse target population of individuals with disabilities.

*Discussion:* NIDRR does not intend to imply a one-size-fits-all solution for telerehabilitation infrastructure and architecture. The requirement that the RERC contribute to the continuing development of ''a'' telerehabilitation infrastructure and architecture may have led to this interpretation.

*Changes:* We have revised the priority by removing the first indefinite article (''a'') from the second sentence.

*Comment:* One commenter suggested that NIDRR more clearly define the meaning of ''barriers'' to telerehabilitation and ''limited access'' to rehabilitation. The commenter specifically suggested geography, physical immobility, clinician shortages, transportation, lack of reimbursement, licensure, and lack of appropriate technology as barriers that should be addressed by the RERC.

*Discussion:* NIDRR agrees that these can be important barriers to successful telerehabilitation and can affect access to rehabilitation services. However, NIDRR has no basis for requiring all applicants to address these specific barriers to rehabilitation services. NIDRR expects applicants to identify and justify the barriers upon which they will focus. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter stated that one of the greatest obstacles to the large-scale implementation of telerehabilitation service delivery is a lack of reimbursement. This commenter suggested that NIDRR require applicants to promote reimbursement of

telerehabilitation services. A second commenter also emphasized the importance of economic and reimbursement barriers to telerehabilitation.

*Discussion:* NIDRR agrees that lack of reimbursement can be an important barrier to use of telerehabilitation on a larger scale. Nothing in the priority precludes an applicant from focusing on this issue in its proposal. However, NIDRR has no basis for requiring all applicants to conduct research and development activities related to telerehabilitation reimbursement. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Comment:* One commenter asked if NIDRR intends the scope of this RERC to include clinical studies with large patient cohorts or policy and economic studies to determine factors such as cost effectiveness or reimbursement by health care systems.

*Discussion:* This comment referred to the content provided in the background statement for this priority. Although the background statement suggested the importance of these types of research, the priority does not require that the RERC perform large-scale clinical studies or policy and economic studies related to telerehabilitation.

*Changes:* None.

*Comment:* One commenter emphasized the importance of usability testing when developing telerehabilitation products.

*Discussion:* NIDRR agrees that usability testing is important. In development activities, RERCs must work directly with individuals with disabilities and their relevant representatives. Although this requirement does not specifically require usability testing, such testing regularly occurs in the development of technologies within the RERCs. However, we have no basis for requiring all applicants to do so. The peer review process will determine the merits of each proposal.

*Changes:* None.

*Priority 7—Cognitive Rehabilitation*

*Comment:* One commenter noted that the proposed priority did not mention a more holistic approach to improve cognitive function, which may include cognitive training therapies and exercise therapy.

*Discussion:* NIDRR agrees that holistic approaches and therapies may help improve cognitive function. However, the purpose of this priority is to contribute to the development and testing of assistive technology products that enhance cognitive functions needed to perform daily tasks at home, school, work, and in the community. Research on cognitive or exercise therapies are beyond the scope of this priority.

*Changes:* None.

**Final Priorities**

In this notice, we are announcing four priorities for RRTCs and three priorities for RERCs.

For RRTCs, the final priorities are:

- Priority 1—Improved Employment Outcomes for Individuals With Psychiatric Disabilities.
- Priority 2—Transition-Age Youth and Young Adults With Serious Mental Health Conditions.
- Priority 3—Improving Measurement of Medical Rehabilitation Outcomes.
- Priority 4—Developing Strategies to Foster Community Integration and Participation for Individuals With Traumatic Brain Injury.

For RERCs, the final priorities are:

- Priority 5—Telerehabilitation.
- Priority 6—Telecommunication.
- Priority 7—Cognitive Rehabilitation.

**RRTC Program**

The purpose of the RRTC program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, through advanced research, training, technical assistance, and dissemination activities in general problem areas, as specified by NIDRR. Such activities are designed to benefit rehabilitation service providers, individuals with disabilities, and the family members or other authorized representatives of individuals with disabilities. In addition, NIDRR intends to require all RRTC applicants to meet the requirements of the *General Rehabilitation Research and Training Centers (RRTC) Requirements* priority that it published in a NFP in the **Federal Register** on February 1, 2008 (72 FR 6132).

Additional information on the RRTC program can be found at: *http://www.ed.gov/rschstat/research/pubs/res-program.html#RRTC.*

**Statutory and Regulatory Requirements of RRTCs**

RRTCs must—

- Carry out coordinated advanced programs of rehabilitation research;
- Provide training, including graduate, pre-service, and in-service training, to help rehabilitation personnel more effectively provide rehabilitation services to individuals with disabilities;
- Provide technical assistance to individuals with disabilities, their representatives, providers, and other interested parties;
- Demonstrate in their applications how they will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds;
- Disseminate informational materials to individuals with disabilities, their representatives, providers, and other interested parties; and
- Serve as centers of national excellence in rehabilitation research for individuals with disabilities, their representatives, providers, and other interested parties.

**Final Priorities**

*Priority 1—Improved Employment Outcomes for Individuals With Psychiatric Disabilities*

The Assistant Secretary for Special Education and Rehabilitative Services announces a priority for a Rehabilitation Research and Training Center (RRTC) on Improved Employment Outcomes for Individuals with Psychiatric Disabilities. The RRTC must conduct rigorous research, training, technical assistance, and knowledge translation activities that contribute to improved employment outcomes for individuals with psychiatric disabilities. Under this priority, the RRTC must be designed to contribute to the following outcomes:

(a) Improved models, programs, and interventions to enable individuals with psychiatric disabilities to obtain, retain, and advance in competitive employment of their choice. The RRTC must contribute to this outcome by—

(1) Identifying or developing, and testing, innovative interventions and employment accommodations using scientifically based research (as this term is defined in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended). These interventions and employment accommodations must include an emphasis on consumer control, peer supports, and community living, and address the needs of individuals from traditionally underserved groups (*e.g.,* individuals from diverse racial, ethnic, and linguistic backgrounds, and different geographic areas, and individuals with multiple disabilities).

(2) Conducting research to identify barriers to, and facilitators of, effective partnerships between State vocational rehabilitation (VR) agencies, the Social Security Administration, State and local mental health programs, and consumer-directed programs, and collaborating with these entities to develop new models for effective partnerships.

(3) Developing, testing, and validating adaptations of evidence-based interventions to enhance the effectiveness of those interventions for

individuals from traditionally underserved groups (*e.g.,* individuals from diverse racial, ethnic, and linguistic backgrounds, and geographic areas, and individuals with multiple disabilities). Current evidence-based approaches include but are not limited to supported employment.

(b) Increased incorporation of research findings related to employment and psychiatric disability into practice or policy. The RRTC must contribute to this outcome by coordinating with appropriate NIDRR-funded knowledge translation grantees to advance their work in the following areas:

(1) Developing, evaluating, or implementing strategies to increase utilization of research findings related to employment and psychiatric disability.

(2) Conducting training, technical assistance, and dissemination activities to increase utilization of research findings related to employment and psychiatric disability.

In addition to contributing to these outcomes, the RRTC must:

• Collaborate with state VR agencies and other stakeholder groups (*e.g.,* consumers, families, advocates, clinicians, policymakers, training programs, employer groups, and researchers) in conducting the work of the RRTC. Research partners in this collaboration must include, but are not limited to, the NIDRR-funded RRTC for Vocational Rehabilitation Research, the Disability Rehabilitation Research Project on Innovative Knowledge Dissemination and Utilization for Disability and Professional Organizations and Stakeholders, and other relevant NIDRR grantees.

*Priority 2—Transition-Age Youth and Young Adults With Serious Mental Health Conditions*

The Assistant Secretary for Special Education and Rehabilitative Services announces a priority for a Rehabilitation Research and Training Center (RRTC) on Transition-Age Youth and Young Adults with Serious Mental Health Conditions (SMHC). This RRTC must conduct research that contributes to improved transition outcomes for youth and young adults with SMHC, including youth and young adults with SMHC from high-risk, disadvantaged backgrounds. The research conducted by this RRTC must focus on family and consumer-guided care. For purposes of this priority, the term ''youth and young adults with SMHC'' refers to individuals between the ages of 14 and 30, inclusive, who have been diagnosed with either serious emotional disturbance (for individuals under the age of 18 years) or serious mental illness (for those 18 years of age or older). Under this priority, the RRTC must contribute to the following outcomes:

(a) Improved and developmentally appropriate interventions for youth and young adults with SMHC. The RRTC must contribute to this outcome by identifying or developing, and evaluating, innovative interventions that meet the needs of youth and young adults with SMHC using scientifically based research (as this term is defined in section 9101(37) of the Elementary and Secondary Education Act of 1965, as amended). In carrying out this research, the RRTC must utilize recovery-based outcome measures, including improved employment, education, and community integration, among youth and young adults with SMHC. The RRTC must involve youth and young adults with SMHC, and their families or family surrogates, in the processes of identifying or developing, and evaluating, interventions.

(b) New knowledge about interventions for youth and young adults with SMHC who are from disadvantaged backgrounds (*e.g.*, backgrounds involving foster care, poverty, abuse, or substance abuse). The RRTC must contribute to this outcome by conducting scientifically based research to identify or develop, and evaluate effective interventions, for these at-risk youth and young adults with SMHC.

(c) Improved coordination between child and adult mental health services. The RRTC must contribute to this outcome by conducting research to identify and evaluate innovative approaches that address financial, policy, and other barriers to smooth system integration between the child and adult mental health service systems.

(d) Improved capacity building for service providers. The RRTC must provide training and technical assistance with a particular emphasis on graduate, pre-service, and in-service training and curriculum development designed to prepare direct service providers for work with youth and young adults with SMHC.

(e) Increased translation of findings into practice or policy. The RRTC must contribute to this outcome by coordinating with the RRTC on Vocational Rehabilitation and with appropriate NIDRR-funded knowledge translation grantees to—

(1) Collaborate with State VR agencies and other stakeholder groups (*e.g.*, State educational agencies, youth and young adults with SMHC, families, family surrogates, and clinicians) to develop, evaluate, or implement strategies to increase utilization of findings in programs targeted to youth and young adults with SMHC; and

(2) Conduct dissemination activities to increase utilization of the RRTC's findings.

*Priority 3—Improving Measurement of Medical Rehabilitation Outcomes*

The Assistant Secretary for Special Education and Rehabilitative Services announces a priority for a Rehabilitation Research and Training Center (RRTC) on Measurement of Medical Rehabilitation Outcomes. This RRTC must create and implement state-of-the-art measures for medical rehabilitation outcomes and identify the cognitive and environmental factors that shape those outcomes. Under this priority, the RRTC must be designed to contribute to the following outcomes:

(a) New tools and measures that facilitate research to promote improved clinical practice in the field of medical rehabilitation. The RRTC must contribute to this outcome by developing valid and reliable measures of cognitive function for individuals who receive post-acute medical rehabilitation, as well as measures to assess environmental factors that affect outcomes among individuals with disabilities living in the community. The RRTC may also develop medical rehabilitation outcome measures in other areas where a demonstrated need has been identified in the literature. In order to promote efficient collection of outcomes data, this RRTC must develop and apply data collection strategies for newly developed measures. These strategies must include, but are not limited to, item response theory and computer adaptive testing techniques, as appropriate. Measures developed by the RRTC must be designed to improve the capacity of researchers and practitioners to measure medical rehabilitation outcomes in a wide variety of settings and across disability groups.

(b) Improved capacity to conduct rigorous medical rehabilitation outcomes research. The RRTC must contribute to this capacity by providing a coordinated and advanced program of training in medical rehabilitation research that is aimed at increasing the number of qualified researchers working in the area of medical rehabilitation outcomes research. This program must focus on research methodology and outcomes measurement development, provide for experience in conducting applied research, and, where appropriate, include multidisciplinary approaches from a broad range of professions and interests.

(c) Collaboration with relevant projects, including NIDRR-sponsored projects, such as the Disability Rehabilitation Research Project on Classification and Measurement of Medical Rehabilitation Interventions, and other projects identified through consultation with the NIDRR project officer.

*Priority 4—Developing Strategies To Foster Community Integration and Participation for Individuals With Traumatic Brain Injury*

The Assistant Secretary for Special Education and Rehabilitative Services announces a priority for a Rehabilitation Research and Training Center (RRTC) for Developing Strategies to Foster Community Integration and Participation (CIP) for Individuals with Traumatic Brain Injury (TBI). This RRTC must conduct rigorous research to examine barriers to and facilitators of CIP for individuals with TBI; provide training and technical assistance to promote and maximize the benefits of this research; develop and validate a symptom-based, clinically and scientifically useful system for classifying individuals with TBI after discharge from inpatient medical or rehabilitative care; and develop, implement, and evaluate interventions to improve long-term outcomes—including return to work—for individuals with TBI. Under this priority, the RRTC must be designed to contribute to the following outcomes:

(a) New interventions to improve the level of CIP for individuals with TBI. The RRTC must contribute to this outcome by identifying or developing, and then evaluating, specific interventions to improve the CIP of individuals with TBI, using scientifically based research methods.

(b) New knowledge about the full range of symptoms of TBI that are experienced by individuals with TBI at any time after they exit inpatient care and re-enter the community. The RRTC must contribute to this outcome by developing and empirically validating a comprehensive list of the symptoms of TBI that can exist after inpatient care and that have the potential to affect CIP, and provide or develop appropriate methods for their identification. These symptoms include, but are not limited to, the following categories: neurological; medical; cognitive; and behavioral.

(c) An improved research infrastructure for developing interventions that facilitate CIP for individuals with TBI. The RRTC must contribute to this outcome by developing a classification system based on the symptoms identified in paragraph (b) of this priority for use with individuals with TBI.

(d) Improved levels of CIP for individuals with TBI. The RRTC must contribute to this outcome by—

(1) Developing a systematic plan for widespread dissemination of informational materials related to the Center's TBI interventions research and the symptom list and associated classification system to researchers, individuals with TBI and their family members, clinical practitioners, service providers, and members of the community. The RRTC must work with its NIDRR project officer to coordinate outreach and dissemination of research findings through appropriate venues such as NIDRR's Model Systems Knowledge Translation Center, State agencies and programs that administer a range of disability services and resources, the U.S. Department of Veterans Affairs Veterans Health Administration, the U.S. Department of Defense, and related veterans' service organizations; and

(2) Establishing and maintaining mechanisms for providing technical assistance to critical stakeholders, such as researchers, consumers and their family members, clinical practitioners, service providers, and members of the community to facilitate the use of knowledge generated by the RRTC.

**Rehabilitation Engineering Research Centers (RERCs)**

*General Requirements of RERCs*

RERCs carry out research or demonstration activities in support of the Rehabilitation Act of 1973, as amended, by—

- Developing and disseminating innovative methods of applying advanced technology, scientific achievement, and psychological and social knowledge to: (a) Solve rehabilitation problems and remove environmental barriers; and (b) study and evaluate new or emerging technologies, products, or environments and their effectiveness and benefits; or
- Demonstrating and disseminating: (a) Innovative models for the delivery of cost-effective rehabilitation technology services to rural and urban areas; and (b) other scientific research to assist in meeting the employment and independent living needs of individuals with severe disabilities; and
- Facilitating service delivery systems change through: (a) The development, evaluation, and dissemination of innovative consumer-responsive and individual- and family-centered models for the delivery to both rural and urban areas of innovative, cost-effective rehabilitation technology services; and (b) other scientific research to assist in meeting the employment and independence needs of individuals with severe disabilities.

Each RERC must be operated by, or in collaboration with, one or more institutions of higher education or one or more nonprofit organizations.

Each RERC must provide training opportunities, in conjunction with institutions of higher education or nonprofit organizations, to assist individuals, including individuals with disabilities, to become rehabilitation technology researchers and practitioners.

Each RERC must emphasize the principles of universal design in its product research and development. Universal design is ''the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design'' (North Carolina State University, 1997. *http://www.design.ncsu.edu/cud/about_ud/udprinciplestext.htm)*.

Additional information on the RERCs can be found at: *http://www.ed.gov/rschstat/research/pubs/index.html*.

*Priorities 5, 6, and 7—Rehabilitation Engineering Research Centers (RERCs) on Telerehabilitation (Priority 5), Telecommunication (Priority 6), and Cognitive Rehabilitation (Priority 7)*

The Assistant Secretary for Special Education and Rehabilitative Services announces the following three priorities for the establishment of (a) An RERC on Telerehabilitation; (b) an RERC on Telecommunication; and (c) an RERC on Cognitive Rehabilitation. Within its designated priority research area, each RERC will focus on innovative technological solutions, new knowledge, and concepts that will improve the lives of individuals with disabilities.

(a) RERC on Telerehabilitation (Priority 5). Under this priority, the RERC must conduct research on and develop methods, systems, and technologies that support consultative, preventative, diagnostic and therapeutic interventions and address the barriers to successful telerehabilitation for individuals who have limited local access to comprehensive medical and rehabilitation outpatient services. The RERC must contribute to the continuing development of telerehabilitation infrastructure and architecture, conduct research and development projects on technologies that can be used to deliver telerehabilitation services, address the barriers to successful telerehabilitation

to individuals who have limited access to rehabilitation services, participate in the development of telerehabilitation standards, and contribute, by means of research and development, to the use of telerehabilitation on a larger scale.

(b) *RERC on Telecommunication (Priority 6).* Under this priority, the RERC must research and develop technological solutions to promote universal access to telecommunications systems and products, including strategies for integrating current accessibility features into newer generations of telecommunications systems and products. The RERC must contribute to the continuing development of interoperable telecommunications systems, items, and assistive technologies; conduct research and development projects that enable access to emerging telecommunications technologies; address the barriers to successful telecommunication, including emergency communications access; and participate in the development of telecommunications standards.

(c) *RERC on Cognitive Rehabilitation (Priority 7).* Under this priority, the RERC must research and develop methods, systems, and technologies that will improve: Existing assistive technology for cognition; the integration of assistive technology for cognition into assistive technology design; and the application of this technology in vocational rehabilitation settings, career development programs, postsecondary education facilities, and places of work. The RERC must contribute to the development and testing of assistive technology products that enhance cognitive functions needed to perform daily tasks and activities at home, school, work, and in the community; and to the development, testing, and implementation of cognitive assistive technology training programs and materials for professional use as well as for consumer use.

**RERC Requirements**

Under each priority, the RERC must be designed to contribute to the following outcomes:

(1) Increased technical and scientific knowledge base relevant to its designated priority research area. The RERC must contribute to this outcome by conducting high-quality, rigorous research and development projects.

(2) Innovative technologies, products, environments, performance guidelines, and monitoring and assessment tools applicable to its designated priority research area. The RERC must contribute to this outcome through the development and testing of these innovations.

(3) Improved research capacity in its designated priority research area. The RERC must contribute to this outcome by collaborating with the relevant industry, professional associations, and institutions of higher education.

(4) Improved focus on cutting edge developments in technologies within its designated priority research area. The RERC must contribute to this outcome by identifying and communicating with NIDRR and the field regarding trends and evolving product concepts related to its designated priority research area.

(5) Increased impact of research in the designated priority research area. The RERC must contribute to this outcome by providing technical assistance to public and private organizations, individuals with disabilities, and employers on policies, guidelines, and standards related to its designated priority research area.

(6) Increased transfer of RERC-developed technologies to the marketplace. The RERC must contribute to this outcome by developing and implementing a plan for ensuring that all technologies developed by the RERC are made available to the public. The technology transfer plan must be developed in the first year of the project period in consultation with the NIDRR-funded Disability Rehabilitation Research Project, Center on Knowledge Translation for Technology Transfer.

In addition, under each priority, the RERC must—

- Have the capability to design, build, and test prototype devices and assist in the transfer of successful solutions to relevant production and service delivery settings;
- Evaluate the efficacy and safety of its new products, instrumentation, or assistive devices;
- Provide as part of its proposal, and then implement, a plan that describes how it will include, as appropriate, individuals with disabilities or their representatives in all phases of its activities, including research, development, training, dissemination, and evaluation;
- Provide as part of its proposal, and then implement, in consultation with the NIDRR-funded National Center for the Dissemination of Disability Research (NCDDR), a plan to disseminate its research results to individuals with disabilities, their representatives, disability organizations, service providers, professional journals, manufacturers, and other interested parties;
- Conduct a state-of-the-science conference on its designated priority research area in the fourth year of the project period, and publish a comprehensive report on the final outcomes of the conference in the fifth year of the project period; and
- Coordinate research projects with other relevant projects, including NIDRR-funded projects, as identified through consultation with the NIDRR project officer.

**Types of Priorities**

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

*Absolute priority:* Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

*Competitive preference priority:* Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

*Invitational priority:* Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

**Note:** This notice does *not* solicit applications. In any year in which we choose to use these priorities, we invite applications through a notice in the **Federal Register**.

*Executive Order 12866:* This notice has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this final regulatory action.

The potential costs associated with this final regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this final regulatory action, we have determined that the benefits of the final priorities justify the costs.

We have determined, also, that this final regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

**Summary of Potential Costs and Benefits**

The benefits of the RRTC and RERC programs have been well established over the years in that other RRTC and RERC projects have been completed successfully. The priorities announced in this notice will generate new knowledge through research, dissemination, utilization, and technical assistance.

Another benefit of these final priorities is that establishing new RRTCs and RERCs will improve the lives of individuals with disabilities. These new RRTCs and RERCs will generate, disseminate, and promote the use of new information that will improve the options for individuals with disabilities to achieve improved education, employment, and independent living outcomes.

*Accessible Format:* Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, Potomac Center Plaza, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

*Delegation of Authority:* The Secretary of Education has delegated authority to Andrew J. Pepin, Executive Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: July 23, 2009.

**Andrew J. Pepin,**

*Executive Administrator for Special Education and Rehabilitative Services.*

[FR Doc. E9–17924 Filed 7–27–09; 8:45 am]

BILLING CODE 4000–01–P

## DEPARTMENT OF EDUCATION

### Office of Special Education and Rehabilitative Services; Overview Information; National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

*Catalog of Federal Domestic Assistance (CFDA) Numbers:* 84.133B–1, 84.133B–3, 84.133B–4, and 84.133B–5.

**DATES:**

*Applications Available:* See chart.

*Date of Pre-Application Meeting:* See chart.

*Deadline for Transmittal of Applications:* See chart.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The purpose of the RRTC program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, through advanced research, training, technical assistance, and dissemination activities in general problem areas, as specified by NIDRR. Such activities are designed to benefit rehabilitation service providers, individuals with disabilities, and the family members or other authorized representatives of individuals with disabilities.

Additional information on the RRTC program can be found at: *http://www.ed.gov/rschstat/research/pubs/res-program.html#RRTC.*

*Priorities:* NIDRR has established five separate priorities for the four competitions announced in this notice. The *General RRTC Requirements* priority, which applies to all RRTC competitions, is from the notice of final priorities (NFP) for the Disability and Rehabilitation Research Projects and Centers program, published in the **Federal Register** on February 1, 2008 (73 FR 6132). The remaining four priorities are from the NFP for the Disability and Rehabilitation Research Projects and Centers program, published elsewhere in this issue of the **Federal Register.**

*Absolute Priorities:* For FY 2009, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), for each competition (designated by CFDA number in the following chart), we consider only applications that meet both the *General RRTC Requirements* priority and the absolute priority designated for that competition.

These priorities are:

| Absolute priority | Corresponding competition CFDA No. |
|---|---|
| General RRTC Requirements | 84.133B–1, 84.133B–3, 84.133B–4, 84.133B–5 |
| Improved Employment Outcomes for Individuals With Psychiatric Disabilities | 84.133B–1 |
| Transition-Age Youth and Young Adults With Serious Mental Health Conditions | 84.133B–3 |
| Improving Measurement of Medical Rehabilitation Outcomes | 84.133B–4 |
| Developing Strategies to Foster Community Integration and Participation for Individuals With Traumatic Brain Injury | 84.133B–5 |

**Note:** The full text of each of these priorities is included in its NFP in the **Federal Register** and in the applicable application package.

*Program Authority:* 29 U.S.C. 762(g) and 764(b)(2).

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The NFP for this program published in the **Federal Register** on February 1, 2008 (73 FR 6132). (d) The NFP for the Disability and Rehabilitation Research Projects and Centers program, published elsewhere in this issue of the **Federal Register**.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $4,150,800.

*Estimated Average Size of Awards:* See chart.

*Maximum Award:* See chart.

*Estimated Number of Awards:* See chart.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* See chart.

REHABILITATION RESEARCH AND TRAINING CENTERS APPLICATION NOTICE FOR FISCAL YEAR 2009

| CFDA number and name | Applications available | Deadline for transmittal of applications | Date of pre-application meeting | Estimated average size of awards | Maximum award* | Estimated number of awards | Project period |
|---|---|---|---|---|---|---|---|
| *84.133B–1 Improved Employment Outcomes for Individuals With Psychiatric Disabilities.* | July 28, 2009 ..... | August 27, 2009 | 08/11/09 | $850,000 | * 850,000 | 1 | Up to 60 mos. |
| *84.133B–3 Transition-Age Youth and Young Adults With Serious Mental Conditions.* | ..... | ..... | 08/11/09 | 800,400 | * 800,400 | 2 | Up to 60 mos. |
| *84.133B–4 Improving Measurement of Medical Rehabilitation Outcomes.* | ..... | ..... | 08/11/09 | 850,000 | * 850,000 | 1 | Up to 60 mos. |
| *84.133B–5 Developing Strategies to Foster Community Integration and Participation for Individuals With Traumatic Brain Injury.* | ..... | ..... | 08/11/09 | 850,000 | * 850,000 | 1 | Up to 60 mos. |

* We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

**Note:** The maximum amount includes direct and indirect costs. A grantee may not collect more than 15 percent of the total grant award as indirect cost charges (34 CFR 350.23).

## III. Eligibility Information

1. *Eligible Applicants:* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; IHEs; and Indian tribes and tribal organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify these competitions as follows: CFDA numbers 84.133B–1, 84.133B–3, 84.133B–4, or 84.133B–5.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

*Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 125 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative. Single spacing may be used for titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative section (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative justification; other required forms; an abstract, Human Subjects narrative, Part III narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*

*Applications Available:* See chart.

*Date of Pre-Application Meeting:* See chart.

Interested parties are invited to participate in a pre-application meeting and to receive information and technical assistance through individual consultation with NIDRR staff. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1 p.m. and 3 p.m., Washington, DC time. NIDRR staff also will be available from 3:30 p.m. to 4:30 p.m., Washington, DC time, on the same day, by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to

participate in the meeting via conference call or for an individual consultation, contact Donna Nangle, U.S. Department of Education, room 6029, Potomac Center Plaza (PCP), 550 12th Street, SW., Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov.*

*Deadline for Transmittal of Applications:* See chart.

Applications for grants under these competitions must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:*

Applications for grants under these competitions must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under these RRTCs competitions—CFDA Numbers 84.133B–1, 84.133B–3, 84.133B–4, and 84.133B–5—must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until 8 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8 p.m. on Sundays and 6 a.m. on Mondays, and between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of e-Application Unavailability:* If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions

referred to in this section apply only to the unavailability of e-Application.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to e-Application;

*and*

- No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, PCP, Washington, DC 20202–2700. FAX: (202) 245–7323.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Numbers 84.133B–1, 84.133B–3, 84.133B–4, or 84.133B–5), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Numbers 84.133B–1, 84.133B–3, 84.133B–4, or 84.133B–5), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 350.54 and are listed in the application package.

2. *Review and Selection Process:* Additional factors we consider in determining the merits of an application are as follows—

The Secretary is interested in outcomes-oriented research or development projects that use rigorous scientific methodologies. To address this interest, applicants are encouraged to articulate goals, objectives, and expected outcomes for the proposed research or development activities. Proposals should describe how results and planned outputs are expected to contribute to advances in knowledge, improvements in policy and practice, and public benefits for individuals with disabilities. Applicants should propose projects that are designed to be consistent with these goals. We encourage applicants to include in their application a description of how results will measure progress towards achievement of anticipated outcomes (including a discussion of the proposed measures of effectiveness), the mechanisms that will be used to evaluate outcomes associated with specific problems or issues, and how the proposed activities will support new intervention approaches and strategies. Submission of the information identified in this section V. 2. *Review and Selection Process* is voluntary, except where required by the selection criteria listed in the application package.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific

requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

**Note:** NIDRR will provide information by letter to grantees on how and when to submit the final performance report.

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through a review of grantee performance and products. Each year, NIDRR examines a portion of its grantees to determine:

- The percentage of NIDRR-supported fellows, post-doctoral trainees, and doctoral students who publish results of NIDRR-sponsored research in refereed journals.
- The number of accomplishments (*e.g.,* new or improved tools, methods, discoveries, standards, interventions, programs, or devices) developed or tested with NIDRR funding that have been judged by expert panels to be of high quality and to advance the field.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new NIDRR grants that assess the effectiveness of interventions, programs, and devices using rigorous methods.
- The number of new or improved NIDRR-funded assistive and universally designed technologies, products, and devices transferred to industry for potential commercialization.

Each grantee must annually report its performance through NIDRR's Annual Performance Report (APR) form. NIDRR uses APR information submitted by grantees to assess progress on these measures.

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, PCP, Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov.*

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

## VIII. Other Information

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

*Delegation of Authority:* The Secretary of Education has delegated authority to Andrew J. Pepin, Executive Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: July 23, 2009.

**Andrew J. Pepin,**

*Executive Administrator for Special Education and Rehabilitative Services.*

[FR Doc. E9–17921 Filed 7–27–09; 8:45 am]

**BILLING CODE 4000–01–P**

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## DEPARTMENT OF EDUCATION

### National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs)—Enhancing the Health and Wellness of Individuals With Arthritis (CFDA 84.133B–9); Correction

**AGENCY:** Department of Education.

**ACTION:** Notice inviting applications for new awards for fiscal year (FY) 2009; correction.

**SUMMARY:** On July 21, 2009, we published in the **Federal Register** (74 FR 35851) a notice inviting applications for new awards for FY 2009 under Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs)—Enhancing the Health and Wellness of Individuals With Arthritis (CFDA 84.133B–9).

This document corrects errors in the July 21, 2009 notice.

On page 35851, in the second column, correct the date in the ''Date of Pre-Application Meeting'' caption to read ''August 6, 2009''.

On page 35852, in the second column, correct the date in the ''Date of Pre-Application Meeting'' caption to read ''August 6, 2009''.

On page 35851, in the second column, correct the date in the ''Deadline for Transmittal of Applications'' caption to read ''August 20, 2009''.

On page 35852, in the second column, correct the date in the ''Deadline for Transmittal of Applications'' caption to read ''August 20, 2009''.

On page 35851, in the third column, correct the amount in the ''Estimated Available Funds'' caption to read ''$800,000''.

On page 35851, in the third column, correct the amount in the ''Maximum Award'' caption to read ''$800,000''.

**FOR FURTHER INFORMATION CONTACT:** Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, PCP, Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll-free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

*Delegation of Authority:* The Secretary of Education has delegated authority to Andrew J. Pepin, Executive

Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: July 23, 2009.

**Andrew J. Pepin,**

*Executive Administrator for Special Education and Rehabilitative Services.*

[FR Doc. E9–17962 Filed 7–27–09; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs)—Enhancing the Health and Wellness of Individuals With Neuromuscular Diseases (CFDA 84.133B–10); Correction

**AGENCY:** Department of Education.

**ACTION:** Notice inviting applications for new awards for fiscal year (FY) 2009; correction.

**SUMMARY:** On July 21, 2009, we published in the **Federal Register** (74 FR 35855) a notice inviting applications for new awards for FY 2009 under Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Research and Training Centers (RRTCs)—Enhancing the Health and Wellness of Individuals With Neuromuscular Diseases (CFDA 84.133B–10).

This document corrects errors in the July 21, 2009 notice.

On page 35855, in the first column, correct the date in the ''Date of Pre-Application Meeting'' caption to read ''August 6, 2009''.

On page 35856, in the first column, correct the date in the ''Date of Pre-Application Meeting'' caption to read ''August 6, 2009''.

On page 35855, in the first column, correct the date in the ''Deadline for Transmittal of Applications'' caption to read ''August 20, 2009''.

On page 35856, in the first column, correct the date in the ''Deadline for Transmittal of Applications'' caption to read ''August 20, 2009''.

On page 35855, in the second column, correct the amount in the ''Estimated Available Funds'' caption to read ''$800,000''.

On page 35855, in the second column, correct the amount in the ''Maximum Award'' caption to read ''$800,000''.

**FOR FURTHER INFORMATION CONTACT:** Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, PCP, Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov.*

If you use a telecommunication device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll-free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

*Delegation of Authority:* The Secretary of Education has delegated authority to Andrew J. Pepin, Executive Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: July 23, 2009.

**Andrew J. Pepin,**

*Executive Administrator for Special Education and Rehabilitative Services.*

[FR Doc. E9–17964 Filed 7–27–09; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Office of Special Education and Rehabilitative Services; Overview Information; National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Engineering Research Centers (RERCs); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2009

*Catalog of Federal Domestic Assistance (CFDA) Numbers:* 84.133E–1, 84.133E–3, and 84.133E–4.

**DATES:** *Applications Available:* See chart.

*Date of Pre-Application Meeting:* See chart.

*Deadline for Transmittal of Applications:* See chart.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The purpose of the RERC program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by conducting advanced engineering research and development on innovative technologies that are designed to solve particular rehabilitation problems, or remove environmental barriers. RERCs also demonstrate and evaluate such technologies, facilitate service delivery system changes, stimulate the production and distribution of new technologies and equipment in the private sector, and provide training opportunities.

Additional information on the RERC program can be found at: *http://www.ed.gov/rschstat/research/pubs/res-program.html#RERC.*

*Priorities:* NIDRR has established three separate priorities for the three competitions announced in this notice. The three priorities are from the notice of final priorities (NFP) for the Disability and Rehabilitation Research Projects and Centers program, published elsewhere in this issue of the **Federal Register**.

*Absolute Priorities:* For FY 2009, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3), for each competition (designated by CFDA number in the following chart), we consider only applications that meet the absolute priority designated for that competition.

These priorities are:

| Absolute priority | Corresponding competition CFDA No. |
|---|---|
| Telerehabilitation ..... | 84.133E–1 |

| Absolute priority | Corresponding competition CFDA No. |
|---|---|
| Telecommunication ..... | 84.133E–3 |
| Cognitive Rehabilitation ..... | 84.133E–4 |

**Note:** The full text of each of these priorities is included in its NFP in the **Federal Register** and in the applicable application package.

*Program Authority:* 29 U.S.C. 762(g) and 764(b)(3).

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The NFP for the Disability and Rehabilitation Research Projects and Centers program, published elsewhere in this issue of the **Federal Register**.

**Note:** The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

## II. Award Information

*Type of Award:* Discretionary grants.

*Estimated Available Funds:* $2,850,000.

*Estimated Average Size of Awards:* See chart.

*Maximum Award:* See chart.

*Estimated Number of Awards:* See chart.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* See chart.

REHABILITATION ENGINEERING RESEARCH CENTERS APPLICATION NOTICE FOR FISCAL YEAR 2009

| CFDA Number and name | Applications available | Deadline for transmittal of applications | Date of pre-application meeting | Estimated average size of awards | Maximum award * | Estimated number of awards | Project period |
|---|---|---|---|---|---|---|---|
| *84.133E–1* Telerehabilitation | July 28, 2009 ..... | August 27, 2009 .. | 08/10/09 | $950,000 | * $950,000 | 1 | Up to 60 mos. |
| *84.133E–3* Telecommunication. | ..... | ..... | 08/10/09 | 950,000 | * 950,000 | 1 | Up to 60 mos. |
| *84.133E–4* Cognitive Rehabilitation. | ..... | ..... | 08/10/09 | 950,000 | * 950,000 | 1 | Up to 60 mos. |

* We will reject any application that proposes a budget exceeding the maximum award for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

**Note:** The maximum amount includes direct and indirect costs.

## III. Eligibility Information

1. *Eligible Applicants:* States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; IHEs; and Indian tribes and tribal organizations.

2. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

## IV. Application and Submission Information

1. *Address To Request Application Package:* Education Publications Center (ED Pubs), P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: *http://www.ed.gov/pubs/edpubs.html* or at its e-mail address: *edpubs@inet.ed.gov.*

If you request an application package from ED Pubs, be sure to identify these competitions as follows: CFDA numbers 84.133E–1, 84.133E–3, or 84.133E–4.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Accessible Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

*Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 125 pages, using the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1'' margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative. Single spacing may be used for titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative section (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative justification; other required forms; an abstract, Human Subjects narrative, Part III narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*

*Applications Available:* See chart.

*Date of Pre-Application Meeting:* See chart.

Interested parties are invited to participate in a pre-application meeting and to receive information and technical assistance through individual consultation with NIDRR staff. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1 p.m. and 3 p.m., Washington, DC time. NIDRR staff also will be available from 3:30 p.m. to 4:30 p.m., Washington, DC time, on the same day, by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to participate in the meeting via conference call or for an individual consultation, contact Donna Nangle,

U.S. Department of Education, Room 6029, Potomac Center Plaza (PCP), 550 12th Street, SW., Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov.*

*Deadline for Transmittal of Applications:* See chart.

Applications for grants under these competitions must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:*

Applications for grants under these competitions must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under these RERCs competitions—CFDA Numbers 84.133E–1, 84.133E–3, and 84.133E–4—must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6 a.m. Monday until 7 p.m. Wednesday; and 6 a.m. Thursday until 8 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8 p.m. on Sundays and 6 a.m. on Mondays, and between 7 p.m. on Wednesdays and 6 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

*Application Deadline Date Extension in Case of e-Application Unavailability:* If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2) (a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

*Exception to Electronic Submission Requirement:* You qualify for an exception to the electronic submission requirement, and may submit your

application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., Room 6029, PCP, Washington, DC 20202–2700. FAX: (202) 245–7323.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Numbers 84.133E–1, 84.133E–3, or 84.133E–4), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Numbers 84.133E–1, 84.133E–3, or 84.133E–4), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 350.54 and are listed in the application package.

2. *Review and Selection Process:* Additional factors we consider in determining the merits of an application are as follows—

The Secretary is interested in outcomes-oriented research or development projects that use rigorous scientific methodologies. To address this interest, applicants are encouraged to articulate goals, objectives, and expected outcomes for the proposed research or development activities. Proposals should describe how results and planned outputs are expected to contribute to advances in knowledge, improvements in policy and practice, and public benefits for individuals with disabilities. Applicants should propose projects that are designed to be consistent with these goals. We encourage applicants to include in their application a description of how results will measure progress towards achievement of anticipated outcomes (including a discussion of the proposed measures of effectiveness), the mechanisms that will be used to evaluate outcomes associated with specific problems or issues, and how the proposed activities will support new intervention approaches and strategies. Submission of the information identified in this section V. 2. *Review and Selection Process* is voluntary, except where required by the selection criteria listed in the application package.

## VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html*.

**Note:** NIDRR will provide information by letter to grantees on how and when to submit the final performance report.

4. *Performance Measures:* To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through a review of grantee performance and products. Each year, NIDRR examines a portion of its grantees to determine:

- The percentage of NIDRR-supported fellows, post-doctoral trainees, and doctoral students who publish results of NIDRR-sponsored research in refereed journals.
- The number of accomplishments (*e.g.*, new or improved tools, methods, discoveries, standards, interventions, programs, or devices) developed or tested with NIDRR funding that have been judged by expert panels to be of high quality and to advance the field.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new NIDRR grants that assess the effectiveness of interventions, programs, and devices using rigorous methods.
- The number of new or improved NIDRR-funded assistive and universally designed technologies, products, and devices transferred to industry for potential commercialization.

Each grantee must annually report its performance through NIDRR's Annual Performance Report (APR) form. NIDRR uses APR information submitted by grantees to assess progress on these measures.

## VII. Agency Contact

**FOR FURTHER INFORMATION CONTACT:** Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, PCP, Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: *Donna.Nangle@ed.gov*.

If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

## VIII. Other Information

*Accessible Format:* Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.*, braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202–2550. Telephone: (202) 245–7363. If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

*Electronic Access to This Document:* You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

*Delegation of Authority:* The Secretary of Education has delegated authority to Andrew J. Pepin, Executive Administrator for the Office of Special Education and Rehabilitative Services, to perform the functions of the Assistant Secretary for Special Education and Rehabilitative Services.

Dated: July 23, 2009.

**Andrew J. Pepin,**

*Executive Administrator for Special Education and Rehabilitative Services.*

[FR Doc. E9–17925 Filed 7–27–09; 8:45 am]

BILLING CODE 4000–01–P

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–R09–OAR–2009–0374; FRL–8936–5]**

## Adequacy Status of Motor Vehicle Emissions Budgets in Submitted Attainment and Reasonable Further Progress Plan for Sacramento 8-hour Ozone for Transportation Conformity Purposes; California

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

**ACTION:** Notice of adequacy and inadequacy.

**SUMMARY:** In this notice, EPA is notifying the public that the Agency has found that the motor vehicle emissions budgets for the years 2011, 2014 and 2017 from the Sacramento Regional 8-Hour Ozone Attainment and Reasonable Further Progress Plan (''2009 Sacramento Ozone Plan''), are adequate for transportation conformity purposes. In this notice, EPA is also notifying the public that the Agency has found that the motor vehicle emissions budgets for the year 2018 from the 2009 Sacramento Ozone Plan are inadequate for transportation conformity purposes. The 2009 Sacramento Ozone Plan was submitted to EPA on April 17, 2009 by the California Air Resources Board (CARB) as a revision to the California State Implementation Plan (SIP). As a result of our adequacy findings, the Sacramento Area Council of Governments (SACOG) and the U.S. Department of Transportation must use the adequate budgets and cannot use the inadequate budget in future transportation conformity analyses once the finding becomes effective.

**DATES:** This finding is effective August 12, 2009.

**FOR FURTHER INFORMATION CONTACT:** John Kelly, U.S. EPA, Region IX, Air Division AIR–2, 75 Hawthorne Street, San Francisco, CA 94105–3901; (415) 947–4151 or *kelly.johnj@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Today's notice is simply an announcement of a finding that we have already made. EPA Region IX sent a letter to CARB on July 16, 2009 stating that the motor vehicle emissions budgets in the submitted 2009 Sacramento Ozone Plan for the reasonable further progress (RFP) milestone years of 2011, 2014 and 2017 are adequate. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.* The adequate motor vehicle emissions budgets are provided in the following table:

ADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS

[summer planning]

| Budget year | Reactive organic gases [1] (tons per day) | Nitrogen oxides (tons per day) |
|---|---|---|
| 2011 | 38 | 78 |
| 2014 | 32 | 61 |

ADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS—Continued

[summer planning]

| Budget year | Reactive organic gases [1] (tons per day) | Nitrogen oxides (tons per day) |
|---|---|---|
| 2017 | 29 | 48 |

[1] Reactive organic gases (ROG) is the term used in the plan and is comparable to the Federal term, volatile organic compounds (VOC).

Our letter dated July 16, 2009 also states that budgets for 2018 are inadequate for transportation conformity purposes. The 2018 budgets include estimated emission reductions associated with a number of commitments for future rule adoption that lack specificity. As such, the SACOG would not be able to accurately quantify future emission reductions associated with the commitments. Without additional specificity, it is also unclear how the 2018 budgets are precisely quantified or related to the overall emissions inventory and other measures. Therefore, the 2018 budgets do not meet the adequacy criteria found in 40 CFR 93.118(e)(4)(iii), (iv), and (v). The inadequate motor vehicle emissions budgets are provided in the following table:

INADEQUATE MOTOR VEHICLE EMISSIONS BUDGETS

[summer planning]

| Budget year | Reactive organic gases [1] (tons per day) | Nitrogen oxides (tons per day) |
|---|---|---|
| 2018 | 24 | 34 |

[1] Reactive organic gases (ROG) is the term used in the plan is comparable to the Federal term, volatile organic compounds (VOC).

Acting in response to a request by CARB for parallel processing of the final, but not yet adopted, 2009 Sacramento Ozone Plan and related budgets, we announced availability of the plan and related budgets on EPA's transportation conformity Web site on March 18, 2009. We received no comments in response to the adequacy review posting. The finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/stateresources/transconf/adequacy.htm.*

Transportation conformity is required by Clean Air Act section 176(c). EPA's conformity rule requires that transportation plans, transportation improvement programs, and projects conform to state air quality implementation plans (SIPs) and establishes the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4) which was promulgated in our August 15, 1997 final rule (62 FR 43780, 43781–43783). We have further described our process for determining the adequacy of submitted SIP budgets in our July 1, 2004 final rule (69 FR 40004, at 40038), and we used the information in these resources in making our adequacy determination. Please note that an adequacy review is separate from EPA's completeness review, and should not be used to prejudge EPA's ultimate approval action for the SIP. Even if we find a budget adequate, the SIP could later be disapproved.

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

Dated: July 16, 2009.

**Laura Yoshii,**

*Acting Regional Administrator, Region IX.*

[FR Doc. E9–17926 Filed 7–27–09; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OW–2006–0408; FRL–8936–3]**

## Agency Information Collection Activities; Proposed Collection; Comment Request; EPA's WaterSense Program (Renewal); EPA ICR No. 2233.04, OMB Control No. 2040–0272

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR is scheduled to expire on January 31, 2010. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

**DATES:** Comments must be submitted on or before September 28, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OW–2006–0408 by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- E-mail: *OW-Docket@epa.gov.*
- *Mail:* Water Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand Delivery: Public Reading Room, Room 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OW–2006–0408. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets*.

**FOR FURTHER INFORMATION CONTACT:** Tara O'Hare, OW, WaterSense Program (7324U), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–564–8836; fax number: 202–501–2396; e-mail address: *ohare.tara@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## How Can I Access the Docket and/or Submit Comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OW–2006–0408, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Water Docket is 202–566–2426.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

## What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

## What Should I Consider When I Prepare My Comments for EPA?

*You may find the following suggestions helpful for preparing your comments:*

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under **DATES**.
7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

## What Information Collection Activity or ICR Does This Apply to?

*Affected entities:* Entities potentially affected by this action are manufacturers, professional certifying organizations, businesses, institutions, retailers, distributors, utilities, state and local government, developers, landscape irrigation professionals and non-governmental organizations (NGOs). Randomly sampled citizens will also be affected.

*Title:* EPA's WaterSense Program (Renewal).

*ICR numbers:* EPA ICR No. 2233.04, OMB Control No. 2040–0272.

*ICR status:* This ICR is currently scheduled to expire on January 31, 2010. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

*Abstract:* WaterSense is a voluntary program designed to create self-sustaining markets for water-efficient products and services via a common label. The program provides incentives for manufacturers to design, produce, and market water-efficient products. In addition, the program provides incentives for certified professionals (*e.g.* certified irrigation auditors, designers, or installation and maintenance professionals) to deliver water-efficient services. The program also encourages consumers and commercial and institutional purchasers of water-using products and systems to choose water-efficient products and engage in water-efficient practices.

As part of strategic planning efforts, EPA encourages programs to develop meaningful performance measures, set ambitious targets, and link budget expenditures to results. Data collected under this ICR will assist WaterSense demonstrating results under and carrying out evaluation efforts to ensure continual program improvement. In addition, data will help EPA monitor market penetration and inform future product categories and specifications.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 19 hours per response for organizational partners, who are not manufacturers and who are not applying for an award. The average burden is 35 hours for manufacturing partners who must also complete New

Certified Product Notification Forms. Award applicants are estimated to spend an additional 20 hours on average to complete the awards application. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:*

*Estimated Number of Respondents:* 357 state and local government; 1,319 private sector organizations, and 668 individuals per year.

*Frequency of Response:* Varies.

*Estimated Total Annual Hour Burden:* 57,248 hours.

*Estimated Total Annual Cost:* $4,665,618, including $1,793,181 in operation & maintenance costs.

### Are There Changes in the Estimates From the Last Approval?

The overall burden estimate for this collection is 7,167 hours higher than the burden estimated under the current ICR because the WaterSense program has been launched and expanded since the current ICR was approved. The change in burden reflects the substantial increase in the number of products certified, new partners joining and reporting, and the addition of the New Homes portion of the program. EPA also has a better understanding of how long it takes partners to complete program forms, now that the program is underway.

### What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: July 20, 2009.

**James Hanlon,**

*Director, Office of Wastewater Management.*

[FR Doc. E9–17927 Filed 7–27–09; 8:45 am]

**BILLING CODE 6560–50–P**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–SFUND–2009–0265; FRL–8931–7]**

**RIN 2050–AG56**

## Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements

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

**ACTION:** Priority notice of action.

**SUMMARY:** Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, establishes certain regulatory authorities concerning financial responsibility requirements. Specifically, the statutory language addresses the promulgation of regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. CERCLA Section 108(b) also requires EPA to publish a notice of the classes for which financial responsibility requirements will be first developed. To fulfill this requirement, EPA is by this notice identifying classes of facilities within the hardrock mining industry for which the Agency will first develop financial responsibility requirements under CERCLA Section 108(b). For purposes of this notice, hardrock mining facilities include those which extract, beneficiate or process metals (*e.g.,* copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g.,* asbestos, gypsum, phosphate rock, and sulfur).

**FOR FURTHER INFORMATION CONTACT:** For more information on this notice, contact Ben Lesser, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, Mail Code 5302P, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone (703) 308–0314; or (e-mail) *Lesser.Ben@epa.gov;* or Elaine Eby, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, Mail Code 5304P,1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone (703) 603–844; or (e-mail) *Eby.Elaine@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

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

This **Federal Register** notice and supporting documentation are available in a docket EPA has established for this action under Docket ID No. EPA–HQ–SFUND–2009–0265. 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, because for example, it may be Confidential Business Information (CBI) or other information, the disclosure of which is restricted by statute. Certain 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 RCRA Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The Docket Facility 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 Superfund Docket is (202) 566–0270. A reasonable fee may be charged for copying docket materials.

### B. Table of Contents

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### I. Introduction

Section 108(b), 42 U.S.C. 9608 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, requires in specified circumstances that owners and operators of facilities establish evidence of financial responsibility. Specifically, it requires

the promulgation of regulations that require classes of facilities to establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. The section also instructs that the President: [1]

> * * * identify those classes for which requirements will be first developed and publish notice of such identification in the **Federal Register**.[2]

EPA is publishing this notice to fulfill its obligations under CERCLA Section 108(b) to identify those classes of facilities, owners, and operators (herein referred to as classes of facilities) for which financial responsibility requirements will first be developed.

For the reasons that follow, the Agency has identified classes of facilities within the hard-rock mining industry as its priority for the development of financial responsibility requirements under CERCLA Section 108(b). For purposes of this notice only, hardrock mining is defined as the extraction, beneficiation or processing of metals (*e.g.,* copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g.,* asbestos, gypsum, phosphate rock, and sulfur).[3] (*See* Section VI of this notice for a discussion of EPA's consideration of additional classes of facilities for developing financial responsibility requirements under Section 108(b) of CERCLA.)

## II. EPA's Approach for Identifying Those Classes of Facilities for Which Requirements Will Be First Developed

In accordance with CERCLA Section 108(b) EPA worked to determine which classes of facilities it should identify as its priority. CERCLA Section 108(b) directs the President to ''identify those classes for which requirements will be first developed and publish notice of such identification [.]'' However, this simple sentence does not spell out a particular methodology by which the identification is to be made. While EPA views this statutory ambiguity as allowing substantial discretion in making the identification, EPA looked to the rest of CERCLA Section 108(b) to inform its exercise of this discretion.

Examination of CERCLA Section 108(b) as a whole reveals repeated references to the concept of ''risk.'' The first sentence of paragraph (b)(1) refers to ''requirements * * * that classes of facilities establish and maintain evidence of financial responsibility consistent with the *degree and duration of risk''* and the last sentence states that ''[p]riority in the development of such requirements shall be accorded to those classes of facilities * * * which the President determines present the *highest level of risk of injury.''* Paragraph (b)(2) also states that ''[t]he level of financial responsibility shall be initially established, and, when necessary, adjusted to *protect against the level of risk* which the President in his discretion believes is appropriate * * * .'' Accordingly, EPA chose to look for indicators of risk and its related effects to inform its selection of classes for which it would first develop requirements under CERCLA Section 108(b). As a practical method of doing so, EPA reviewed information contained in a number of studies, reports, and analyses. This review pointed to numerous factors EPA should consider. For example, typical elements in evaluating risk to human health and the environment include: the probability of release, exposure, and toxicity.[4] While some of the considerations reflect these basic elements of risk evaluation, others relate more closely to the severity of consequences that result when those risks are realized, such as the releases' duration if not prevented or quickly controlled as a result of economic factors and the exposures that can result. Therefore, EPA has chosen to evaluate the following factors: (1) Annual amounts of hazardous substances released to the environment; (2) the number of facilities in active operation and production; (3) the physical size of the operation; (4) the extent of environmental contamination; (5) the number of sites on the CERCLA site inventory (including both National Priority List (NPL) sites and non-NPL sites); (6) government expenditures; (7) projected clean-up expenditures; and (8) corporate structure and bankruptcy potential.

Toxicity is reflected in the designation of substances as CERCLA hazardous substances. Current releases of hazardous substances, number of operating facilities, the physical size of an operation, the extent of environmental contamination, and the number of sites on the CERCLA site inventory (non-NPL sites and NPL sites) are factors that can relate to the probability of a release of a hazardous substance, as well as the potential for exposure. These are discussed in detail, in Section IV of this notice. Government expenditures, projected clean-up costs, and corporate structure and bankruptcy potential can relate to the severity of the consequences as a result of releases and exposure of hazardous substances. These are discussed in Section V of this notice.

EPA's review of all these factors, as reflected in the information presented in this notice and included in the docket, makes it readily apparent that hardrock mining facilities present the type of risk that, in light of EPA's current assessment, justifies designating such facilities as those for which EPA will first develop financial responsibility requirements pursuant to CERCLA Section 108(b).[5]

## III. Identification of Classes of Facilities in Hardrock Mining

For purposes of this notice, EPA has included the following classes of facilities under the general title of hardrock mining: facilities which extract, beneficiate or process metals (*e.g.* copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g.* asbestos, gypsum, phosphate rock, and sulfur).[6] As explained below, hardrock mining facilities share common characteristics, and are thus being identified as a group. At the same time, those facilities included in the definition above differ such that ''hardrock mining facilities'' are properly considered to encompass multiple ''classes'' of facilities. The various classes in this notice's definition of hardrock mining are involved in two general activities: (1) The extraction of an ore or mineral from the earth; and (2) using various beneficiation activities and processing operations to produce a targeted material product, such as a metal ingot. The operations that comprise hardrock mining (*i.e.,* extraction, beneficiation, and then processing) are all part of a sequential process of converting

[1] Executive Order 12580 delegates this responsibility to the Administrator of the U.S. Environmental Protection Agency (''EPA'' or ''the Agency'') for non-transportation related facilities. 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

[2] 42 U.S.C. 9608 (b)(1).

[3] *See* memorandum to Jim Berlow, USEPA from Stephen Hoffman, USEPA and Shahid Mahmud, USEPA. *Re:* Mining Classes Not Included in Identified Classes of Hardrock Mining. June 2009.

[4] ''Risk Assessment in the Federal Government: Managing the Process.'' National Research Council. National Academy Press, Washington, DC. 1983.

[5] Today's identification of hardrock mining is not itself a rule, and does not create any binding duties or obligations on any party. Additional research, outreach to stakeholders, proposed regulations, review of public comments, and finalization of those regulations are needed before hardrock mining facilities are subject to any financial assurance requirements.

[6] EPA notes that this notice does not affect the current Bevill status of extraction, beneficiation and processing wastes as codified in 40 CFR 261.4(b)(7).

material removed from the earth into marketable products, even though the intermediate and end products differ. Extraction, beneficiation or processing of ores and minerals can involve similar processes across types of mining, as discussed below.

However, hardrock mining is also properly considered to encompass multiple ''classes'' that represent a range of activities and marketable products. Extraction differs from beneficiation and both differ from processing, and depending upon the product sought, different types of processes are used. Extraction, also called mining, is the removal of rock and other materials that contain the target ore and/or mineral. The physical processes used to accomplish this vary, but are nonetheless often shared across different types of mining. These physical processes include surface, underground, and in-situ solution mining. Overburden and waste rock are removed during surface and underground extraction processes in order to gain access to the ore. Overburden and waste rock are disposed of in dumps near the mine. The dumps may or may not be lined or covered. In-situ mining involves the recovery of the metal from the ore by circulating solutions through the ore in its undisturbed geologic state and recovering those solutions for processing. The principal environmental protection concern with in-situ mining is the control and containment of the leach solutions.

Typically the next step after extraction, beneficiation involves separating and concentrating the target mineral from the ore. There are, however, many different ways in which beneficiation can occur. Beneficiation activities generally do not change the mineral values themselves other than by reducing (*e.g.* crushing or grinding) or enlarging (pelletizing or briquetting) particle size to facilitate processing, but can involve the introduction of water, other substances, and chemicals (including hazardous substances). A common beneficiation technique is flotation. Froth flotation involves adding forced air and chemicals to an ore slurry causing the target mineral surfaces to become hydrophobic and attach to air bubbles that carry the target minerals to the top of a floatation vessel. The surface froth containing the concentrated mineral is removed, and thus separated from the other waste minerals. The remaining waste minerals are called tailings. Leaching, another beneficiation technique, involves the addition of chemicals to ores or flotation concentrates in order to dissolute the target metal. For example, solvents, such as sulfuric acid are used to leach copper and sodium cyanide is used to leach gold. Following leaching, the leftover waste product is called spent ore (in heap leaching) or tailings (in other types of leaching). There are various other beneficiation techniques and intermediate processes that are used and not described here. However, flotation and leaching are the most common techniques used in the mining industry. Tailings from beneficiation are disposed in a variety of ways, most commonly in tailing ponds. Design of tailings ponds differ and may or may not include liners, seepage control, surface water diversions, and final covers. Regardless, many tailings ponds require long-term management of waste and the impoundment dam.

Processing is the refining of ores or mineral concentrates after beneficiation to extract the target material. As with beneficiation, there are many different ways of processing the ores or mineral concentrates. For example, mineral processing operations can use pyrometallurgical techniques (the use of higher temperatures as in smelting), to produce a metal or high grade metallic mixture. Smelting generates a waste product called slag. Slag is initially placed directly on the ground to cool, and is often subsequently managed into a wide range of construction materials (*e.g.,* road bed or foundation bedding).

Both because of the ways that the facilities covered by this notice fit together, and because of the range of activities that they cover, EPA believes hardrock mining is properly identified as a group and considered to include multiple classes of facilities.

## IV. Hardrock Mining—Releases and Exposure to Hazardous Substances

As discussed above, evaluations of risk typically include considerations of the probability of a release, including its potential scale and scope, the exposure potential and toxicity. EPA research indicates that the hardrock mining industry typically operates on a large scale, with releases to the environment and, in some situations, subsequent exposure of humans, organisms, and ecosystems to hazardous substances on a similarly large scale. Indeed, EPA estimates that the hardrock mining industry is responsible for polluting 3,400 miles of streams and 440,000 acres of land.[7] The U.S. Forest Service (USFS) estimates that approximately 10,000 miles of rivers and streams may have been contaminated by acid mine drainage from the metal mining industry.[8]

The Agency examined its 2007 Toxic Release Inventory (TRI), and this data revealed that the metal mining industry[9] (*e.g.,* gold ore mining, lead ore and zinc ore mining, and copper ore and nickel ore mining) releases enormous quantities of toxic chemicals, at nearly 1.15 billion pounds or approximately 28 percent of the total releases by U.S. industry that is required to report under the TRI program.[10] [11] This overall percentage has remained relatively stable since 2003, ranging from 25 percent (1.07 billion pounds) of total releases in 2004 to 29 percent (1.26 billion pounds) of total releases in 2006. In 2007, the majority of releases of hazardous substances from the metal mining industry were to the land, with additional releases to both the air and surface waters. Additional releases of hazardous substances were reported to TRI from metal processing facilities (*e.g.,* primary smelting of copper) with significant releases to the air and land.

The potential for releases of and exposure to hazardous substances is also reflected in the number of active facilities operating in the U.S. While estimates of the number of active mining facilities vary, in 2004, EPA estimated that there were 1,000 metal and non-metal mineral mines and processing facilities in the U.S. Furthermore, many mining facilities have been in operation for decades and can exceed thousands of acres in size.[12] Since large mines may be operated for decades, this can extend the time frame for potential releases and exposure of hazardous substances. At individual facilities, hardrock mining operations

[7] U.S. EPA. 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[8] U.S. EPA 2004. ''Nationwide Identification of Hardrock Mining Sites.'' Office of Inspector General. Report No. 2004–P–00005. Accessed at: *http://epa.gov/oig/reports/2004/20040331-2004-p-00005.pdf.*

[9] Metal mining industry is defined as NAICS Code 2122 (Metal Mining).

[10] U.S. EPA 2009. Toxic Release Inventory, 2007 Updated Data Releases, as of March 19, 2009.

[11] TRI estimates include all on-site and off-site releases to the land, air and surface water, including those disposed of in RCRA Subtitle C hazardous waste land disposal units and Safe Drinking Water Act (SDWA) permitted underground injection (UIC) wells. However, less than one percent of hazardous substances are managed in this manner. Thus, the data demonstrates the enormous volume of hazardous chemical releases reported to TRI by the metal mining industry and is an indication of the high volume of hazardous substances it manages, and the industry's potential for posing health and environmental risk.

[12] National Research Council. 2005. *Superfund and Mining Megasites: Lessons from the Coeur d'Alene River Basin.* The National Academies Press, Washington, DC. Accessed at: *http://www.nap.edu/catalog.php?record_id=11359.*

may disturb thousands of acres of land and impact watersheds including, to varying degrees, effects on groundwater, surface water, aquatic biota, aquatic and terrestrial vegetation, wetlands, wildlife, soils, air, cultural resources, and humans that use these resources recreationally or for subsistence.[13]

Hardrock mining facilities also generate an enormous volume of waste, which may increase the risk of releases of hazardous substances. Annually, hardrock mining facilities generate between one to two billion tons of mine waste.[14] This waste can take a variety of forms, including mine water, waste rock, overburden, tailings, slag, and flue dust and can contain significant quantities of hazardous substances. The 2007 TRI data demonstrate that hardrock mining facilities reported large releases of many hazardous substances, including ammonia, benzene, chlorine, hydrogen cyanide, hydrogen fluoride, toluene, and xylene, as well as heavy metals and their compounds (*e.g.,* antimony, arsenic, cadmium, chromium, cobalt, copper, lead, manganese, mercury, nickel, selenium, vanadium and zinc).[15] Similarly, the National Research Council (NRC) has indicated that hazardous substances of particular concern include heavy metals, ammonia, nitrates, and nitrites.[16]

These releases, in some cases, have lead to ground and surface water contamination from acid mine drainage and metal leachate, and air quality issues resulting from heavy metal-contaminated dust or emissions of gaseous metals from thermal processes.[17] Acid mine drainage is the formation and movement of acidic water which dissolves and transports metals into the environment. This acidic water forms through the chemical reaction of surface water (rainwater, snowmelt, pond water) and shallow subsurface water with rocks (*e.g.,* waste rock, tailings, mine walls) that contain sulfur-bearing minerals, resulting in the production of sulfuric acid. Metals can be leached from rocks that come in contact with the acid, a process that may be substantially enhanced by bacterial action.[18] The resulting acidic and metal-contaminated fluids may be acutely or chronically toxic and, when mixed with groundwater, surface water and soil, may have harmful effects on humans, fish, animals, and plants.[19] When acid mine drainage occurs, it is extremely difficult and often expensive to control and often requires long-term management measures.[20] Air, land and water contamination may also result when waste rock dumps, tailings disposal facilities and open pits are not maintained properly and there are releases of hazardous substances to the environment.[21] Additional risks can occur with the use of cyanide in gold mining operations, including the possible release of cyanide into soil, groundwater, and/or surface waters or catastrophic cyanide spills.[22] Contaminants of concern at uranium mines include radionuclides. Due to the volume of the hazardous substances generated and released and the potential for long-term management of acid mine drainage, the cause for concern is only heightened.

Other studies and EPA's analysis of NPL data also underscores the risk of hardrock mining facilities. The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants or contaminants throughout the U.S. The Hazard Ranking System (HRS), the scoring system EPA uses to assess the relative threat associated with a release from a site, is the primary method used to determine whether a site should be placed on the NPL.[23] The HRS takes into account the three elements of environmental and human health risk: (1) Probability of release; (2) exposure; and (3) toxicity. EPA generally will list sites with scores of 28.50 or above. The HRS is a proven tool for evaluating and prioritizing the releases that may pose threats to human health and the environment throughout the nation. In 2005, the NRC noted that at the largest mining sites, or mega sites (*i.e.,* those with projected cleanup costs exceeding $50 million), ''wastes* * * are dispersed over a large area and deposited in complex hydrogeochemical and ecologic systems that often include human communities and public natural resources.'' [24] For example, a molybdenum mine located near Questa, New Mexico, began operations in 1919 and some underground mining operations are still in operation today. The mine's operational capacity is reportedly 20,000 tons of ore processed at the facility per day, although it does not typically operate at capacity. The site stretches over approximately three square miles of land. Across this large area, operations include an underground mine, a milling facility, a nine-mile long tailings pipeline and a tailing disposal facility. There is also an open pit and waste rock dumps at the mine site, which were created during open-pit mining operations. Other problems at the site include subsidence areas with a surface depression from active underground operations.[25]

In 2004, EPA's Office of Inspector General (OIG) examined 156 hardrock mining sites that are part of the CERCLA site inventory and concluded that ecological and environmental risks are often substantial. For the 82 Non-NPL sites that were evaluated, 64 percent had a current high or medium ecological/environmental risk, while the percentage of sites that were found to have low risk was only 13%. Another 23% had an unknown level of risk.[26]

In support of this notice, EPA examined not only sites listed on the

[13] National Research Council. 1999. *Hardrock Mining on Federal Lands.* National Academies Press. Washington, DC.

[14] U.S. EPA 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[15] *See* Memorandum to the Record: Toxic Release Inventory (TRI) Releases from Hardrock Mining Operations. June 2009.

[16] National Research Council. 1999. Hardrock Mining on Federal Lands. National Academies Press. Washington, DC. Also, EPA conducted a preliminary review of the Records of Decisions (RODs) for a selected group mining NPL sites. These substances were found to be common contaminants at these sites. Accessed at *http://books.nap.edu/catalog.php?record_id=9682.*

[17] U.S EPA. 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[18] U.S. EPA. 1997. ''EPA's National Hardrock Mining Framework.'' Accessed at: *http://www.epa.gov/owm/frame.pdf.*

[19] U.S. EPA 2009. Accessed at: *http://www.epa.gov/nps/acid_mine.html.*

[20] The conventional approach to treating contaminated ground or surface water produced through acid drainage involves an expensive, multi-step process that pumps polluted water to a treatment facility, neutralizes the contaminants in the water, and turns these neutralized wastes into sludge for disposal. U.S. EPA. Profile of the Metal Mining Industry. September 1995. *See also:* Lind, Greg. 2007. Testimony to the Subcommittee on Energy and Mineral Resources of the Committee on Natural Resources, U.S. House of Representatives, One Hundred Tenth Congress. Serial No. 110–46.

[21] U.S. EPA. 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[22] U.S. EPA. 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[23] U.S. EPA. 2007. ''Introduction to the Hazard Ranking System (HRS).'' Accessed at: *http://www.epa.gov/superfund/programs/npl_hrs/hrsint.htm.*

[24] National Research Council. 2005. *Superfund and Mining Megasites: Lessons from the Coeur d'Alene River Basin.* The National Academies Press, Washington, DC. Accessed at: *http://www.nap.edu/catalog.php?record_id=11359.*

[25] USEPA Administrative Order on Consent for Molycorp RI/FS (2001). Molycorp is proposed for listing on the NPL. More information is at *http://www.epa.gov/region6/6sf/pdffiles/0600806.pdf.*

[26] U.S. EPA 2004. ''Nationwide Identification of Hardrock Mining Sites.'' Office of Inspector General. Report No. 2004–P–00005, Figure 4.2. Accessed at: *http://epa.gov/oig/reports/2004/20040331-2004-p-00005.pdf.*

NPL, but also sites proposed (including sites with Superfund alternative approach agreements in place) and deleted from the NPL.[27] As of April, 2009, approximately 90 hardrock mining sites have been listed on the NPL, and another 20 facilities have been proposed for inclusion on the list.[28]

## V. Hardrock Mining—Severity of Consequences Resulting From Releases and Exposure to Hazardous Substances

The severity of the consequences impacting human health and the environment as a result of releases and exposure of hazardous substances is evident by analyzing a number of factors. Specifically, the past and estimated future costs associated with protecting public health and the environment through what is often extensive and long-term reclamation and remediation efforts, as well as corporate structure and bankruptcy potential. This information also plays a significant role in leading EPA to conclude that classes of facilities involved in hardrock mining should be the first for which financial assurance requirements are developed under CERCLA Section 108(b).

The severity of consequences posed by hardrock mining facilities is evident in the enormous costs associated with past and projected future actions necessary to protect public health and the environment, after releases from hardrock mining facilities occur. In other words, the documented expenditures reflect efforts to correct the realized risks from hardrock mining facilities. As noted earlier, these facilities release large quantities of hazardous substances, often over hundreds of square miles and, in some instances, have resulted in groundwater and surface water contamination that requires long-term management and treatment. Remediation of these hardrock mining facilities has therefore been historically costly. EPA's past experience with these sites leads it to conclude that hardrock mining facilities are likely to continue to present a substantial financial burden that could be met by financial responsibility requirements. These enormous expenditures have been documented in a United States Government Accountability Office (GAO) study, and EPA's own data confirm the large amounts of money spent by the Federal government alone. The GAO, in its report ''Current Government Expenditures to Cleanup Hard Rock Mining Sites,'' reported that in total, the Federal government spent at least $2.6 billion to remediate hardrock mine sites from 1998 to 2007. EPA spent the largest amount at $2.2 billion, with the USFS, the Office of Surface Mining, and the Bureau of Land Management spending $208 million, $198 million, and $50 million, respectively.[29] EPA's expenditure data show that between 1988 and 2007, for mining sites with response actions taken under EPA removal and remedial authorities (including sites proposed, listed, and deleted from the NPL and sites with Superfund alternative approach agreements in place), approximately $2.7 billion was spent.[30] [31] Of this total, $2.4 billion was spent at the 84 sites listed as final on the NPL list at that time.[32]

Estimated costs of remediation for all hardrock mining facilities from several sources have generally been in the range of billions of dollars. EPA has estimated that the cost of remediating all hardrock mining facilities is between $20 and $54 billion. EPA's analysis showed that if the total Federal, State, and potentially responsible party outlays for remediation were to continue at existing levels ($100 to $150 million annually), no more than eight to 20 percent of all cleanup work could be completed within 30 years.[33] In another analysis based on a survey of 154 large sites, EPA's OIG projected that the potential total hardrock mining remediation costs totaled $7 to $24 billion. OIG calculated that this amount is over 12 times EPA's total annual Superfund budget of about $1.2 billion from 1999 to 2004.[34] The annual Superfund budget from 2004 through 2008 remained consistent with OIG's assessment, at approximately $1.25 billion.[35] [36]

Common corporate structures and interrelated corporate failures within the hardrock mining industry increase the likelihood of uncontrolled releases of hazardous substances being left unmanaged, increasing risks. To begin with, mine ownership is typically complex, with individual mines often separately incorporated.[37] The existence of a parent-subsidiary relationship can present several risks. First, corporate structures may allow parent

[27] A significant number of response actions have been taken by several Federal agencies at hardrock mining facilities under CERCLA removal and emergency response authorities. Those actions were not evaluated for purposes of this Notice because of the lack of immediately available data. EPA alone took non-NPL removal actions at 99 mining sites between 1988 and October 2007. Provided to GAO for GAO 2008, ''Hardrock Mining: Information on Abandoned Mines and Value and Coverage of Financial Assurance on BLM Land.'' GAO–08–574T. Other Federal agencies also use non-NPL removal authorities to address releases from mining sites. Accessed at: *http://www.gao.gov/highlights/d08574thigh.pdf.*

[28] Provided to GAO for GAO 2008, ''Hardrock Mining: Information on Abandoned Mines and Value and Coverage of Financial Assurance on BLM Land.'' GAO–08–574T. Accessed at: *http://www.gao.gov/new.items/d08574t.pdf.* and updated to reflect sites finalized on the NPL in 2008 and 2009. The 2008 and 2009 NPL updates can be found at: *http://www.epa.gov/superfund/sites/npl/status.htm.*

[29] U.S. Government Accountability Office. 2008. ''Information on Abandoned Mines and Value and Coverage of Financial Assurance on BLM Land. GAO–08–574T. Accessed at: *http://www.gao.gov/highlights/d08574thigh.pdf.*

[30] Moreover, EPA's cost data likely underestimates true cleanup costs, because they do not include costs borne by the States and potentially responsible parties. These costs only reflect expenditures to date. To reach construction completion, many sites will require additional, substantial remediation efforts. In addition, sites with acid mine drainage may require water quality treatment in perpetuity. Lind, Greg. 2007. Testimony to the Subcommittee on Energy and Mineral Resources of the Committee on Natural Resources, U.S. House of Representatives, One Hundred Tenth Congress. Serial No. 110–46.

[31] U.S. EPA. 2007. Superfund eFacts Database. Accessed: October 24, 2007; U.S. Environmental Protection Agency. 2007 Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). Provided to GAO for their report, GAO 2008, ''Hardrock Mining: Information on Abandoned Mines and Value and Coverage of Financial Assurance on BLM Land.'' GAO–08–574T. Accessed at: *http://www.gao.gov/highlights/d08574thigh.pdf.*

[32] U.S. EPA. 2007. Superfund eFacts Database. Accessed: October 24, 2007; U.S. Environmental Protection Agency. 2007 Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS). Provided to GAO for their report, GAO 2008, ''Hardrock Mining: Information on Abandoned Mines and Value and Coverage of Financial Assurance on BLM Land.'' GAO–08–574T, *http://www.gao.gov/new.items/d08574t.pdf.*

[33] U.S. EPA. 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[34] U.S. EPA 2004. ''Nationwide Identification of Hardrock Mining Sites.'' Office of Inspector General. Report No. 2004–P–00005. Accessed at: *http://epa.gov/oig/reports/2004/20040331-2004-p-00005.pdf.*

[35] Appropriation amounts reflect an average of the discretionary appropriation amounts in the President's Budget or Operating Plan between 2004 and 2008.

[36] No single source provides information on estimated future reclamation and remediation costs for hardrock mining facilities. In addition, for those estimates that do exist, remediation costs are often folded in with other reclamation activities, such as correcting safety hazards and landscaping, which leaves the amount attributable to remediation unknown. *See* U.S. EPA. 2004. ''Cleaning Up the Nation's Waste Sites: Markets and Technology Trends.'' EPA 542–R–04–015. Accessed at: *http://www.epa.gov/tio/pubisd.htm.*

[37] For example, one mining company's 2008 SEC 10–K filing noted that its segments included ''The Greens Creek unit, a 100%-owned joint venture arrangement, through our subsidiaries Hecla Alaska LLC, Hecla Greens Creek Mining Company and Hecla Juneau Mining Company. We acquired 70.3% of our ownership of Greens Creek in April 2008 from indirect subsidiaries of Rio Tinto, PLC.'' From this description, it appears that ownership of the mine has involved multiple subsidiaries, under both its current owner and under the previous ownership.

corporations to shield themselves from liabilities of their subsidiaries.[38] In a 2005 study, the GAO cited mining facilities as an example of businesses at risk of incurring substantial liability and transferring the most valuable assets to the parent that could not be reached for cleanup.[39]

Second, many mining interests are located outside of the U.S. According to one report, six of the top ten mining claim owners in the U.S. are multi-national corporations with headquarters outside the U.S.[40] Such multi-national corporations can be difficult to hold responsible for contamination in the U.S. because of the difficulties of locating and then obtaining jurisdiction over the ultimate parent company.

This is of particular concern since the hardrock mining industry has experienced a pattern of failed operations, which often require significant environmental responses that cannot be financed by industry.[41] The pattern of failed operations has been well documented. GAO investigated 48 hardrock mining operations on U.S. Department of Interior (DOI), Bureau of Land Management (BLM) Federal lands that had ceased operations and not been reclaimed by operators since BLM began requiring financial assurance under its regulations. Of the 48 operations, 30 cited bankruptcy as the reason for completing reclamation activities.[42] Numerous other examples exist of bankruptcies in the hardrock mining industry that resulted in or will likely require significant Federal responses, such as:

- When the owner/operator filed for bankruptcy in 1992, it left the Summitville mine in Colorado with serious cyanide contamination and acid mine drainage. In 1994, the site was listed on the NPL. In 2000, EPA estimated that the remediation cost at the mine would be $170 million.[43] As of October 2007, EPA had spent approximately $192 million in cleanup costs.[44]
- In 1999, another mining company filed for bankruptcy, leaving more than 100 million gallons of contaminated water and millions of cubic yards of waste rock at the Gilt Edge Mine in South Dakota.[45] EPA listed the site on the NPL in 2000 and estimated at that time the present value remediation costs to be $50.3 million.[46] Even this estimate, however, does not include water collection and treatment costs that will be handled under additional remediation plans. As of October 2007, EPA expenditures at this site exceeded $56.1 million.[47]
- In 1998, operators of the Zortman Landusky mine in Montana filed for bankruptcy. Numerous cyanide releases occurred during operations which have affected the community drinking water supply on a nearby Tribal reservation. Acid mine drainage has also permeated the ground and surface waters. The projected cleanup costs at the site are estimated to be approximately $85.2 million, of which only $57.8 million will be paid for by the responsible party. State and Federal authorities are projected to pay the remaining $27.4 million for cleanup.[48]
- A large mining company filed for bankruptcy in 2005. The company has estimated the total environmental claims filed against it to have been in excess of $5 billion. Recently approved settlements with the U.S. and certain State governments involving environmental clean-up claims, when combined with settlements already approved by the bankruptcy court for environmental clean-up claims, provide for allowed claims and payments in the bankruptcy in an amount in excess of $1.5 billion and involve in excess of 50 sites. EPA and DOI estimate their combined claims in the bankruptcy at the largest of these sites, an NPL site located in Idaho and Eastern Washington, to be in excess of $2 billion.[49]

Taking all this information into account, EPA concludes that classes of facilities within the hardrock mining industry are those for which EPA should first develop financial responsibility requirements under CERCLA Section 108(b), based upon those facilities' sheer size; the enormous quantities of waste and other materials exposed to the environment; the wide range of hazardous substances released to the environment; the number of active hardrock mining facilities; the extent of environmental contamination; the number of sites in the CERCLA site inventory, government expenditures, projected clean-up costs and corporate structure and bankruptcy potential.

## VI. EPA's Consideration of Additional Classes of Facilities for Developing Financial Responsibility Requirements

The Agency believes classes of facilities outside of the hardrock mining industry also may warrant the development of financial responsibility requirements under CERCLA Section 108(b). Therefore, the Agency will continue to gather and analyze data on additional classes of facilities, beyond the hardrock mining industry, and will consider them for possible development of financial responsibility requirements. In determining whether to propose requirements under CERCLA Section 108(b) for such additional classes of facilities, EPA will consider the risks posed and, to do so, may take into account factors such as: (1) The amounts of hazardous substances released to the environment; (2) the toxicity of these substances; (3) the existence and proximity of potential receptors; (4) contamination historically found from facilities; (5) whether the causes of this contamination still exist; (6) experiences from Federal cleanup programs; (7) projected costs of Federal cleanup programs; and (8) corporate structures and bankruptcy potential. EPA also intends to consider whether financial responsibility requirements under CERCLA Section 108(b) will effectively reduce these risks. While the Agency recognizes that data for some of these factors may be unavailable or limited in

[38] *See U.S.* v. *Bestfoods,* 524 U.S. 51, 61 (1998) (''[i]t is a general principle of corporate law * * * that a parent corporation * * * is not liable for the acts of its subsidiaries.'')

[39] U.S. Government Accountability Office. 2005. ''Environmental Liabilities: EPA Should Do More to Ensure That Liable Parties Meet Their Cleanup Obligations.'' Report to Congressional Requesters. GAO–05–658, pp. 21–24. Accessed at: *http://www.gao.gov/highlights/d05658high.pdf.*

[40] Environmental Working Group. 2006. ''Who Owns the West?'' Accessed at: *http://www.ewg.org/mining/claims/index.php.*

[41] EPA notes that there are several potential explanations for these failures, such as a boom and bust cycle in the price of commodities, the finite life of a particular ore body or the possibility that closure or reclamation obligations exceed the remaining value of the operation, in addition to factors that can cause bankruptcies in other sectors. However, regardless of the cause, the fact remains a large number of bankruptcies and abandonments have occurred.

[42] U.S. Government Accountability Office. 2005. Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs. GAO–05–377. Accessed at: *http://gao.gov/products/GAO-05-377.*

[43] U.S. Environmental Protection Agency. 2000. *Liquid Assets 2000: America's Water Resources at a Turning Point.* EPA–840–B–00–001. Accessed at: *http://www.epa.gov/water/liquidassest.pdf.*

[44] U.S. Environmental Protection Agency. 2007. Superfund eFacts Database. Accessed: October 24, 2007.

[45] CDM. 2008. Final Feasibility Study Report for the Gilt Edge Superfund Site, Operable Unit 1 (OU1). Prepared for EPA, Region VIII. May 2008.

[46] U.S. EPA 2008. Record of Decision for the Gilt Edge Superfund Site Operable Unit 1 (OU1). Accessed at: *http://www.epa.gov/region8/superfund/sd/giltedge/RODGiltEdgeVolumeOne_Text.pdf.*

[47] U.S. EPA. 2007. Superfund eFacts Database. Accessed: October 24, 2007.

[48] U.S. Government Accountability Office. 2005. Hardrock Mining: BLM Needs to Better Manage Financial Assurances to Guarantee Coverage of Reclamation Costs. GAO–05–377. Accessed at: *http://gao.gov/products/GAO-05-377.*

[49] Asarco, LLC, *et al.* U.S. Bankruptcy Court Southern District of Texas. May 15, 2009, Case No. 05–21207, Docket No. 11343.

availability, it plans to consider whatever data are available.

As part of the Agency's evaluation, it plans to examine, at a minimum, the following classes of facilities: hazardous waste generators, hazardous waste recyclers, metal finishers, wood treatment facilities, and chemical manufacturers. This list may be revised as the Agency's evaluation proceeds. EPA is currently scheduled to complete and publish in the **Federal Register** a notice addressing additional classes of facilities the Agency plans to evaluate regarding financial responsibility requirements under CERCLA Section 108(b) by December 2009, and, at that time, will solicit public comment.

## VII. Conclusion

Based upon the Agency's analysis and review, it concludes that hardrock mining facilities, as defined in this notice, are those classes of facilities for which EPA should identify and first develop requirements pursuant to CERCLA Section 108(b). EPA will carefully examine specific activities, processes, and/or metals and minerals in order to determine what proposed financial responsibility requirements may be appropriate. As part of this process, EPA will conduct a close examination and review of existing Federal and State authorities, policies, and practices that currently focus on hardrock mining activities.[50]

Dated: July 10, 2009.

**Lisa P. Jackson,**

*Administrator.*

[FR Doc. E9–16819 Filed 7–27–09; 8:45 am]

**BILLING CODE 6560–50–P**

[50] As part of developing proposed and final rules the Agency will consider whether hardrock mining facilities which have a RCRA Part B permit or are subject to interim status under RCRA Subtitle C and already are subject to RCRA financial assurance and facility-wide corrective action requirements need to also be subject to the financial responsibility requirements under Section 108(b) of CERCLA. In addition, EPA is aware and will consider in its development of proposed and final rules, that mining on Federal land triggers either the Bureau of Land Management's (BLM) Part 3809 regulations (43 CFR Part 3809) and the Forest Service's Part 228 regulations (36 CFR Part 228), both have financial responsibility requirements that cover reclamation costs. Many States also have reclamation laws.

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## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8932–9]**

## Modification of the 1985 Clean Water Act Section 404(c) Final Determination for Bayou aux Carpes in Jefferson Parish, LA

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

**ACTION:** Notice.

**SUMMARY:** This is a notice of EPA's Modification of the 1985 Clean Water Act Section 404(c) Final Determination for Bayou aux Carpes to allow for the discharge of dredged or fill material for the purpose of the construction of the West Closure Complex as part of the larger flood protection project for the greater New Orleans area. EPA believes that this Final Determination for modification achieves a balance between the national interest in reducing overwhelming flood risks to the people and critical infrastructure of south Louisiana while minimizing any damage to the Bayou aux Carpes CWA Section 404(c) site to the maximum degree possible in order to avoid unacceptable adverse effects.

**DATES:** *Effective Date:* The effective date of the Final Determination for Modification was May 28, 2009.

**ADDRESSES:** U.S. Environmental Protection Agency, Office of Water, Wetlands Division, Mail code 4502T, 1200 Pennsylvania Ave, NW., Washington, DC 20460. The following documents used in the Bayou aux Carpes modification are listed on the EPA Wetlands Division Web site at *http://www.epa.gov/owow/wetlands/regs/404c.html:* New Orleans District of the Corps letter dated November 4, 2008, requesting that EPA modify the Bayou aux Carpes CWA Section 404(c) designation; Public Notice of Proposed Determination to modify the Bayou aux Carpes CWA Section 404(c) designation published in the **Federal Register** on January 14, 2009; April 2, 2009, Recommended Determination (RD) for modification of the Bayou aux Carpes 404(c) action; and the May 28, 2009, Modification of the 1985 Clean Water Act Section 404(c) Final Determination for Bayou aux Carpes. Additional documents that are related to the Bayou aux Carpes modification can be located on the U.S. Army Corps of Engineers New Orleans District Web site at *http://www.nolaenvironmental.gov/projects/usace_levee/IER.aspx?IERID=12.*

Publicly available document materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426.

**FOR FURTHER INFORMATION CONTACT:** Mr. Clay Miller at (202) 566–1365 or by e-mail at *miller.clay@epa.gov.* Additional information and copies of EPA's Final Determination for Modification are available at *http://www.epa.gov/owow/wetlands/regs/404c.html* or *http://www.nolaenvironmental.gov/projects/usace_levee/IER.aspx?IERID=12.*

**SUPPLEMENTARY INFORMATION:** Section 404(c) of the Clean Water Act (CWA) (33 U.S.C. 1251 *et seq*) authorizes EPA to prohibit, restrict, or deny the specification of any defined area in waters of the United States (including wetlands) as a disposal site for the discharge of dredged or fill material whenever it determines, after notice and opportunity for public hearing, that such discharge into waters of the United States will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Congress directed the U.S. Army Corps of Engineers (Corps) to enhance the existing Lake Pontchartrain and Vicinity Hurricane Protection project and the West Bank and Vicinity Hurricane Protection project to the 100-year level of protection. One section of this much larger project is within the Bayou aux Carpes area that is subject to a 1985 EPA CWA Section 404(c) action that prohibited the discharge of dredged or fill material in the Bayou aux Carpes site south of the New Orleans metro area. On November 4, 2008, the New Orleans District of the Corps requested a modification of the Bayou aux Carpes CWA Section 404(c) designation to accommodate discharges to the Bayou aux Carpes wetlands associated with the proposed enhanced levee system in Jefferson Parish, Louisiana.

In evaluating the Corps of Engineers proposal for modification of the 1985 Bayou aux Carpes CWA Section 404(c) Final Determination, the key elements of a Section 404(c) process were followed. These include a hearing and opportunity for the public to provide written comments, preparation and submittal of a Recommended Determination proposed by EPA Region 6 to EPA Headquarters, and a Final Determination for Modification issued by EPA Headquarters.

## Background

On October 16, 1985, EPA issued a Final Determination pursuant to Section 404(c) of the Clean Water Act restricting the discharge of dredged or fill material in the Bayou aux Carpes site, Jefferson Parish, Louisiana, based on findings that the discharges of dredged or fill material into that site would have unacceptable

adverse effects on shellfish beds and fishery areas (including spawning and breeding areas), wildlife, and recreational areas. EPA published a CWA Section 404(c) Final Determination prohibiting, with three exceptions, future discharges of dredged or fill material to wetlands into the Bayou aux Carpes site at 50 FR 47267 (November 15, 1985). The first exception was for discharges associated with the completion of the Corps modified design for the Harvey Canal—Bayou Barataria Levee Project. The second exception was for discharges associated with routine operation and maintenance of the Southern Natural Gas Pipeline. The third exception covered discharges associated with EPA approved habitat enhancement activities. The CWA Section 404(c) action was based upon a thorough record of investigations, including field surveys, remote sensing, and other technical analyses conducted by three EPA facilities, the U.S. Fish and Wildlife Service (USFWS), the National Park Service (NPS), and the Louisiana State University (LSU) Center for Wetland Resources.

After completion of the Final Determination, several requests for modifications were reviewed by EPA. The one request that was granted was for an emergency exception to bury an existing pipeline deeper via horizontal drilling techniques as a response to unstable soil conditions and a leaking pipeline. Shell Pipe Line Corporation (Shell) petitioned EPA for reconsideration of exceptions identified in EPA's 1985 Final Determination concerning the Bayou aux Carpes site on December 18, 1991. Shell requested a modification to the Final Determination in order to (1) temporarily discharge dredged or fill material associated with performing emergency work to relocate an existing below ground pipeline located in the restricted Section 404(c) area; and (2) exclude from the Bayou aux Carpes Section 404(c) restriction future discharges associated with routine operation and maintenance of this pipeline. On February 28, 1992, Shell's request for modification was approved by the EPA Assistant Administrator for Water on the basis that relocating the pipeline to non-wetlands was infeasible from the perspectives of engineering alternatives and public safety, the work would have only minimal and temporary impacts on the wetlands, and the work was essentially the same as that envisioned under the second exception granted in the 1985 Final Determination (57 FR 3757).

As a result of the residential, commercial, and industrial damage caused by Hurricanes Katrina and Rita in 2005, Congress directed the Corps to enhance the existing Lake Pontchartrain and Vicinity Hurricane Protection project and the West Bank and Vicinity Hurricane Protection project to the 100-year level of protection, as determined by the Federal Emergency Management Agency (FEMA). The overall Corps project to provide protection to southern Louisiana involves two large levee systems, the West Bank and Vicinity Hurricane Protection Project and the Lake Pontchartrain and Vicinity Hurricane Protection Project, and approximately 350 miles of earthen levees and floodwalls throughout five parishes in the New Orleans metropolitan area. One section of this much larger project is within the Bayou aux Carpes area. The Corps' proposal for providing increased hurricane and storm damage risk reduction for this area does not fall within one of the previously established exceptions to the Section 404(c) Final Determination. Since the construction of the Corps' project would result in discharges of dredged or fill material within the Bayou aux Carpes site, a request for modification of 1985 EPA's Final Determination was submitted for consideration and final decision.

On November 4, 2008, the New Orleans District of the Corps requested a modification to the 1985 EPA action, which prohibited the discharge of dredged or fill material in the Bayou aux Carpes site south of the New Orleans metro area. The Corps requested that EPA modify the Bayou aux Carpes CWA Section 404(c) designation to accommodate discharges to the Bayou aux Carpes wetlands associated with the proposed enhanced levee system in Jefferson Parish, Louisiana. The project known as the West Closure Complex proposes the construction of a ''T-wall'' style floodwall in lieu of an earthen levee in order to minimize the footprint. A berm to protect the floodwall from barge collisions would be constructed on the water side of the floodwall and would serve as a maintenance access road. The floodwall would be built from the water side to reduce construction impacts.

The placement of the wall within a 100 foot by 4,200 foot corridor on a previously impacted area of the Bayou aux Carpes site, along with the commitment by the Corps to augment the design as necessary to enhance the hydrology of the Bayou aux Carpes 404(c) area to offset any potential impacts due to construction, provides the most practical approach from an environmental perspective while ensuring the 100-year level of risk reduction is accomplished. Construction of the proposed action would impact less than 10 acres within the Bayou aux Carpes 404(c) boundary.

EPA carefully reviewed the proposal and the information submitted by the New Orleans District of the Corps, comments received pursuant to the notice published in the **Federal Register** and public hearing held in New Orleans, and the existing Bayou aux Carpes administrative record. On January 14, 2009, EPA posted a notice in the **Federal Register** announcing a public comment period on the request by the New Orleans District of the Corps to amend the 1985 Bayou aux Carpes CWA Section 4040(c) Final Determination. There were 25 written comments received from individuals and organizations that included opinions about whether the modification should be granted or denied, consideration of a project alternative that would avoid all impacts to the Bayou aux Carpes site, the need for a detailed mitigation plan to be included, the need to thoroughly research and plan mitigation and augmentation features, and the need for a long-term monitoring plan. A public hearing was held on February 11, 2009. Thirteen people spoke at the hearing, and raised issues about the larger plans for providing upgraded hurricane and storm damage risk reduction for a portion of the West Bank and Vicinity Hurricane Protection Levee system as well as whether EPA should grant the modification.

**Conclusion**

The West Closure Complex project sited on the Bayou aux Carpes area is a part of a much larger project with the intent to reduce flood risks to the 250,000 people living on the west bank of the Mississippi River and to infrastructure supporting the greater New Orleans area by building a more resilient and reliable storm damage and risk reduction system, as directed by Congress. In an effort to reconcile the potentially conflicting goals of increased flood protection and ecological protection, the Corps and EPA worked closely together and with other Federal partners, State and local agencies, and many stakeholders in an effort to understand fully the possibilities for accommodating these dual objectives. Having worked closely with the Corps and other resource agencies on the evaluation of the environmental aspects of this segment of the overall West Bank and Vicinity project upgrade, EPA agreed with the Corps' conclusion that

there is no reasonable and less environmentally damaging practicable alternative for achieving the Congressional directive than to locate a sector gate adjacent to the Bayou aux Carpes CWA 404(c) site.

In consideration of the above information, EPA believes that compelling circumstances justify a modification of the 1985 Bayou aux Carpes CWA Section 404(c) designation, that there are no less environmentally damaging practicable alternatives that would adequately address those circumstances, and that all feasible means of minimizing adverse wetland effects to the Bayou aux Carpes site will be implemented. Therefore, EPA is modifying the 1985 Bayou aux Carpes CWA 404(c) Final Determination with conditions to allow for discharges associated with construction of the West Closure Complex on the Bayou aux Carpes site as described in the Corps' November 4, 2008, request for modification. EPA believes that this Final Determination for modification achieves a balance between the national interest in reducing overwhelming flood risks to the people and critical infrastructure of south Louisiana while minimizing any damage to the Bayou aux Carpes CWA Section 404(c) area to the maximum degree possible in order to avoid unacceptable adverse effects.

Dated: July 21, 2009.

**Michael H. Shapiro,**

*Acting Assistant Administrator for Water.*

[FR Doc. E9–17928 Filed 7–27–09; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8935–8]**

## Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Sharon Elementary School Water System, Sharon, VT

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

**ACTION:** Notice.

**SUMMARY:** The EPA is hereby granting a project waiver of the Buy American requirements of ARRA section 1605 under the authority of section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the Sharon Elementary School Water System in Sharon, Vermont for the purchase of NSF–55 Class A certified Ultra Violet (UV) disinfection equipment. This is project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on project specific circumstances. The UV disinfection equipment under consideration is manufactured outside of the United States by two companies based in Canada and meets the water system's technical and design specifications. The Acting Regional Administrator is making this determination based on the review and recommendations of the Municipal Assistance Unit. The Sharon Elementary School Water System has provided sufficient documentation to support its request. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to section 1605 of the ARRA. This action permits the purchase of specific UV disinfection equipment for the proposed project being implemented by the Sharon Elementary School Water System.

**DATES:** *Effective Date:* July 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Katie Connors, Environmental Engineer, (617) 918–1658, or David Chin, Environmental Engineer, (617) 918–1764, Municipal Assistance Unit (CMU), Office of Ecosystem Protection (OEP), U.S. EPA, One Congress Street, CMU, Boston, MA 02114.

**SUPPLEMENTARY INFORMATION:**

In accordance with ARRA section 1605(c) and pursuant to section 1605(b)(2) of Public Law 111–5, Buy American requirements, EPA hereby provides notice that it is granting a project waiver to the Sharon Elementary School Water System (the ''System'') in Sharon, Vermont for the acquisition of NSF–55 Class A certified Ultra Violet (UV) disinfection equipment manufactured outside of the United States.

Section 1605 of the ARRA requires that none of the appropriated funds may be used 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, or unless a waiver is provided to the recipient by the head of the appropriate agency, here EPA. A waiver may be provided if EPA determines that (1) Applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The State of Vermont requires that water supply installations must comply with the Vermont Standards for Water System Design, Construction and Protection (Vermont Water Supply Rule—Chapter 21). In order to meet these standards the State of Vermont requires public water systems using UV disinfection to use National Sanitation Foundation (NSF) Standard 55 (Ultraviolet Microbial Water Treatment Systems) Class A certified UV equipment. The State of Vermont, Agency of Natural Resources, Water Supply Division (VTANR) has identified three lines of UV disinfection systems with NSF–55 Class A certification, all manufactured in Canada. Two of the three include the UV Pure Hallett 15xs ultraviolet water system, as well as the Trojan Technologies Sterilight SPV 200 series units. The design engineer and the VTANR have conducted research and determined that there are no domestic manufacturers that have NSF–55 Class A certification at the time of this waiver request.

The design engineer for the System indicated that he chose to use four Hallett 15xs (15 gpm) UV units for the school buildings and one Sterilight SPV 200 (2 gpm) UV unit for a remote location which receives its water supply from the school well. The designs also took into account the limited space available for retrofitting the water supply and distribution systems, as well as the attributes of the specific equipment. The estimated cost for all of the UV equipment for the proposed project was under $10,000.

The System's submission clearly articulates functional reasons for its technical specifications and requirements, and has provided sufficient documentation that the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantity and of a satisfactory quality to meet its technical specifications.

The April 28, 2009 EPA HQ Memorandum, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' '', defines *reasonably available quantity* as ''the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project

plans and design''. After extensive research by the design engineer and the VTANR, the system has provided information to the EPA representing that there is currently no other UV disinfection equipment from a domestic manufacturer available to meet the System's exact design specifications.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are ''shovel ready'' by requiring utilities, such as the Sharon Elementary School Water System, to revise their standards and specifications and to start the bidding process again. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the ''shovel ready'' status for this project. To further delay construction is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs. The construction must be completed by late August when the students return for the new school year.

EPA's national contractor prepared a technical assessment report dated June 19, 2009 based on the waiver request submitted and supporting documentation. The report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. The report confirmed the waiver applicant's claim that NSF Standard 55 Class A UV disinfection equipment of the size specified are not available from a domestic manufacturer.

The Municipal Assistance Unit (CMU) has reviewed this waiver request and has determined that the supporting documentation provided by the Sharon Elementary School Water District is sufficient to meet the criteria listed under section 1605(b) of the ARRA and in the April 28, 2009, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' Memorandum'': Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in section 1605(b)(2) of the ARRA. Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the System's technical specifications and requirements, a waiver from the Buy American requirement is justified.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to section 1605 of the ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, the Sharon, Vermont Elementary School Water System is hereby granted a waiver from the Buy American requirements of section 1605(a) of Public Law 111–5 for the purchase of the specified UV disinfection equipment using ARRA funds as specified in the System's request of June 15, 2009. This supplementary information constitutes the detailed written justification required by section 1605(c) for waivers ''based on a finding under subsection (b).''

**Authority:** Public Law 111–5, Section 1605.

Dated: July 17, 2009.

**Ira W. Leighton,**

*Acting Regional Administrator, Region I, New England.*

[FR Doc. E9–17931 Filed 7–27–09; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8935–7]**

## Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Lewiston, ME Department of Public Services

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

**ACTION:** Notice.

**SUMMARY:** The EPA is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the Lewiston, Maine Department of Public Services (LMDPS) for the purchase of a Hydroslide model DR–400 VN-Vario constant flow regulator. This is a project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on project specific circumstances. This flow regulator is manufactured outside of the United States by Gabriel Novac & Associates, Inc., a company based in Canada, and meets the LMDPS's technical specifications and requirements. The Acting Regional Administrator is making this determination based on the review and recommendations of the Municipal Assistance Unit. The LMDPS has provided sufficient documentation to support its request. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of a specific constant flow regulator for the proposed project being implemented by the LMDPS that may otherwise be prohibited under Section 1605(a) of the ARRA.

**DATES:** *Effective Date:* July 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Katie Connors, Environmental Engineer, (617) 918–1658, or David Chin, Environmental Engineer, (617) 918–1764, Municipal Assistance Unit (CMU), Office of Ecosystem Protection (OEP), U.S. EPA, One Congress Street, CMU, Boston, MA 02114.

**SUPPLEMENTARY INFORMATION:**

In accordance with ARRA Section 1605(c) and pursuant to Section 1605(b)(2) of Public Law 111–5, Buy American requirements, EPA hereby provides notice that it is granting a project waiver to the Lewiston, Maine Department of Public Services (LMDPS) for the acquisition of a Hydroslide model DR–400 VN-Vario constant flow regulator manufactured outside of the United States by Gabriel Novac & Associates, Inc., a company based in Canada.

Section 1605 of the ARRA requires that none of the appropriated funds may be used 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, or unless a waiver is provided to the recipient by the head of the appropriate agency, here EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with the public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

This manufactured good will be installed as part of the ''Goff Brook Combined Sewer Overflow (CSO) Storage Project'' to help reduce combined sewer overflows. Parts for this specific constant flow regulator device are manufactured in Germany, will arrive in several pieces, and require assembly at the job site prior to installation at a total cost of $14,700. The Hydroslide DR–400 VN-Vario model is a hydraulically-operated flow control regulator that allows for continued discharge to the downstream sewers under normal, dry flow conditions. Under specified wet weather conditions, the mechanical flow control regulator would be activated to divert flows to a separate discharge pipe and storage chamber to help eliminate CSOs. CSOs currently discharge directly to a small brook nearby, and this project is being implemented to minimize those occurrences. The proposed project was designed to accommodate a one year, six-hour rain event (approximately 2.04 inches over a 6-hour period), which is based on historical rain data from the area.

As represented by the LMDPS, the project site is located in a remote rural area with limited space and no available electrical power. As a result, constant flow regulators with modulating sluice gates requiring electrical service cannot be installed for this project. The Hydroslide model DR–400 VN-Vario constant flow regulator, which does not require any electricity, maintains a pre-set flow rate at varying water levels ranging from 0 to 10 feet on the upstream side, with an adjustable flow ± 30% from the above ground. It is operated by use of a float to control a sliding plate to reduce the outflow area as the water level rises. This allows full use of the storage chamber while maintaining a constant flow to the 18 inch outlet pipe.

According to the LMDPS, there are only two other non-electric manufacturers of regulators for CSO flow control, one foreign and one domestic. The only domestic alternative is not feasible for several reasons: (1) The flow rate is not adjustable; (2) the opening is 2½ inches smaller, making it more likely to be plugged; and (3) it does not reach its peak flow until the water level in the tank is at its peak and therefore would require a larger storage volume in order to capture the same size design storm of a one year, six hour rain event. As a result, the domestic alternative would not be able to meet the proposed design specifications.

If the footprint of the project needs to be expanded to increase the storage volume to accommodate the domestic alternative, additional wetlands would be required to be filled. If the storage volume was not expanded, the tank would overflow more frequently and discharge a larger volume of combined sewer effluent. This would result in a large reduction in the environmental benefit for which the tank is being constructed and would not meet the level of abatement control in the CSO Long Term Control Plan approved by the State of Maine.

The April 28, 2009 EPA HQ Memorandum, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' '', defines *reasonably available quantity* as ''the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design.'' Based on the information provided to EPA and to the best of our knowledge at this time, there do not appear to be other constant flow regulators manufactured in the United States available to meet the LMDPS's exact technical specifications and requirements. The Hydroslide flow regulator is self-operating, requires low maintenance, and does not use electricity. There do not appear to be any American manufacturers that make a comparable product.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are ''shovel ready'' by requiring utilities such as the LMDPS to revise their standards and specifications and to start the bidding process again. The imposition of ARRA Buy American requirements on such projects otherwise eligible for ARRA State Revolving Fund assistance would result in unreasonable delay and thus displace the ''shovel ready'' status for this project. To further delay construction is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

EPA's national contractor prepared a technical assessment report dated June 19, 2009 based on the waiver request submitted. The report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. The report confirmed the waiver applicant's claim that there are no comparable non-electric domestic products that can handle the design storm event without overflow, and can be installed at the proposed site without requiring expanding the necessary storage volume.

The Municipal Assistance Unit has reviewed this waiver request and has determined that the supporting documentation provided by the LMDPS is sufficient to meet the criteria listed under Section 1605(b) of the ARRA and in the April 28, 2009, ''Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' Memorandum'': Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in Section 1605(b)(2) of the ARRA. Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the System's technical specifications and requirements, a waiver from the Buy American requirement is justified.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of the ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, the Lewiston, Maine Department of Public Services is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5 for the purchase of a constant flow regulator using ARRA funds as specified in the System's request of June 5, 2009. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers ''based on a finding under subsection (b).''

**Authority:** Public Law 111–5, Section 1605.

Dated: July 17, 2009.

**Ira W. Leighton,**

*Acting Regional Administrator, Region I, New England.*

[FR Doc. E9–17937 Filed 7–27–09; 8:45 am]

BILLING CODE 6560–50–P

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPPT–2008–0848; FRL–8392–4]**

## TSCA Chemical Substance Inventory Update; Changing Certain Chemical Substances Identities from Confidential to Non-Confidential

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

**ACTION:** Notice.

**SUMMARY:** EPA is updating the Toxics Substances Control Act (TSCA) Chemical Substance Inventory (TSCA Inventory) Master File to list 530 chemical substances as non-confidential on the TSCA Inventory that were previously listed as confidential. This action is necessary because these chemical substances no longer qualify for listing as confidential on the TSCA Inventory.

**DATES:** This update is effective July 22, 2009.

These chemical substances will be listed on public versions of the TSCA Inventory on or after August 3, 2009.

**FOR FURTHER INFORMATION CONTACT:** *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

*For technical information contact*: Scott Sherlock, Environmental Assistance Division (7408M), Office Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8257; e-mail address: *sherlock.scott @epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you manufacture (defined by statute at 15 U.S.C. 2602(7) to include import) chemical substances, including inorganic chemical substances, subject to reporting under TSCA. Potentially affected entities identified by their North American Industrial Classification System (NAICS) codes may include, but are not limited to:

• Chemical manufacturers and importers, including chemical manufacturers and importers of inorganic chemical substances (NAICS codes 325 and 32411). You may also be potentially affected by this action if you are a user of information generated under TSCA.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected or interested in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

*B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2008–0848. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. Information about the TSCA Inventory is available at *http://www.epa.gov/opptintr/newchems/pubs/invntory.htm*.

### II. Background

The TSCA Inventory is a listing of all chemical substances manufactured, imported, or processed for a commercial purpose, which EPA was directed to establish and maintain pursuant to TSCA section 8. Since the initial TSCA Inventory was published, persons intending to manufacture or import a non-exempt chemical substance that is not on the TSCA Inventory have been required to submit premanufacture notices (PMNs) to the Agency under TSCA section 5; see 40 CFR part 720. For more information about the TSCA Inventory and related requirements, go to the TSCA Inventory webpage identified in Unit I.B.2.

The TSCA Inventory implementing regulations in 40 CFR part 710 provide that the manufacturer or importer may claim that the identity of a chemical substance in commerce is CBI. Confidential chemical identities are not listed on public versions of the TSCA Inventory. Chemical identities that are not confidential (i.e., where it is public knowledge that the chemical substance is in commerce) are listed on public versions of the TSCA Inventory.

### III. Updating of the Public and Confidential TSCA Inventory Data

When reporting under the TSCA Inventory Update Rule (IUR at 40 CFR part 710), some manufacturers of these 530 chemical substances did not include any claim of confidentiality for the chemical identity of the chemical substance with the IUR submission. These chemical identities were previously listed as confidential on the TSCA Inventory. IUR regulations at 40 CFR 710.38(d) provide that where no claim of confidentiality accompanies IUR information at the time it is submitted to EPA, the Agency may make the information available to the public without further notice to the submitter. By submitting non-CBI IUR reports for previously confidential chemical identities, manufacturers make those chemical identities eligible for inclusion on public versions of the TSCA Inventory.

With this action, EPA is updating the TSCA Inventory Master File to reflect the public status of the identities of these chemical substances. The complete list of these chemical substances is provided in the docket at *http://www.regulations.gov*. The updated public version of the TSCA Inventory will be available on or after August 3, 2009. For information on how to access the public (also referred to as the non-confidential) version of the TSCA Inventory, go to *http://www.epa.gov/opptintr/newchems/pubs/invntory.htm*.

**List of Subjects**

Environmental protection, Chemicals, Hazardous materials, Reporting and recordkeeping requirements, TSCA Inventory.

Dated: July 22, 2009.

**Stephen A. Owens,**

*Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.*

[FR Doc. E9–17944 Filed 7–27–09; 8:45 am]

**BILLING CODE 6560–50–S**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

July 21, 2009.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Persons wishing to comment on this information collection should submit comments September 28, 2009. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov*, Federal Communications Commission (FCC). To submit your comments by e-mail send them to: *PRA@fcc.gov*.

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review'', (3) click the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**FOR FURTHER INFORMATION CONTACT:** For additional information, send an e-mail to Judith B. Herman at 202–418–0214.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0723.

*Title:* 47 U.S.C. Section 276, Public Disclosure of Network Information by Bell Operating Companies (BOCs).

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents: 3* respondents; 3 responses.

*Estimated Time per Response:* 120 hours.

*Frequency of Response:* On occasion reporting requirement and third party disclosure requirement.

*Obligation to Respond:* Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. 276 of the Telecommunications Act of 1996.

*Total Annual Burden:* 360 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* If the Commission requests respondents to submit information to the Commission or to USAC that the respondents believe is confidential, the respondents may request confidential treatment of such information pursuant to 47 CFR section 0.459 of the Commission's rules.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting and/or third party disclosure requirements) of this information collection. The Commission is reporting no change in their burden estimates.

Under 47 U.S.C. section 276(b)(1)(C), the Bell Operating Companies (BOCs) are required to publicly disclose changes in their networks or new network services.

The Computer III network information disclosure requirements specifically state that the disclosure would occur at two different points in time. First, disclosure would occur at eh make/buy point: when a BOC decides to make for itself, or procure from an unaffiliated entity, any product whose design affects or relies on the network interface. Second, a BOC would publicly disclose technical information about a new service 12 months before it is introduced. If the BOC could introduce the service within 12 months of the make/buy point, it would make a public disclosure at the make/buy point. In no event, however, would the public disclosure occur less than six months before the introduction of the service.

Without provision of this information, the industry would be unable to ascertain whether the BOCs designing new network services or changing network technical specifications are to the advantage of their own payphones, or might disadvantage BOC payphone competitors. The of the requirements are used to ensue that BOCs comply with their obligations under the Telecommunications Act of 1996.

*OMB Control Number:* 3060–0711.

*Title:* Sections 1.5000 through 1.5007, Implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935, as amended by the Telecommunications Act of 1996.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 1 respondent; 1 response.

*Estimated Time per Response:* 10 hours.

*Frequency of Response:* On occasion reporting requirement and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is required by section 34(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA 1935), as amended by section 103 of the Telecommunications Act of 1996, Public Law No. 104–104, 110 Stat. 56 (1996) and authorized by sections 4(i), 4(j) and 303(r) of the

Communications Act of 1934, as amended.

*Total Annual Burden:* 10 hours.

*Total Annual Cost:* $3,200.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* The Commission is not requesting that respondents submit confidential information.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting and/or third party disclosure requirements) of this information collection. The Commission is reporting a change in the burden estimates. The Commission has reduced the number of respondents/responses by 14; reduced the total burden hours by 140 hours; and the annual costs decreased by $44,800. This adjusted change in the estimated burden is due to fewer applicants requesting entry into the telecommunications industry.

Sections 1.5000 through 1.5007 implement Section 34(a) of the Public Utility Holding Company Act of 1935 (PUHCA 1935). The rules provide filing requirements and procedures to expedite public utility holding company entry into the telecommunications industry. To achieve this goal, the regulations require persons seeking a determination of ETC status to file in good faith for a determination by the Commission. Applicants are required to file with the Commission a brief description of their planned activities, and a sworn statement attesting to any facts presented otherwise offered to demonstrate eligibility for ETC status. Applicants are required to submit a sworn statement certifying that they comply with Part 1, Subpart P, of the Commission's regulations, 47 CFR 1.2001 *et seq.*, regarding implementation of the Anti-Drug Abuse Act of 1988, 21 U.S.C. 862. Finally, applicants would also be required to serve copies of their application with the Securities and Exchange Commission (SEC) and affected state commissions. The applicant must notify the Commission of material change in facts within 30 days of the change in fact. *See 47 CFR 1.5006*. Persons wishing to be heard concerning an application for ETC status may file with the Commission within 15 days from the release date of a public notice regarding the application. Any person who files comments with the Commission must also serve copies of all comments on the applicant. *See 47 CFR 1.5007*.

On August 8, 2005, President Bush signed the Energy Policy Act of 2005 (EPAct 2005) into law, repealing the PUHCA 1935 and enacting the Public Utility Holding Company Act of 2005 (PUHCA 2005) in its place. See Energy Policy Act of 2005, Public Law No. 109–58, 119 Stat. 594 (2005). Congress further directed the Federal Energy Regulatory Commission (FERC) to issue final regulations and submit further recommendations to Congress four months after the date of enactment. The EPAct 2005 makes no mention of exempt telecommunications companies, nor any relevant mention of telecommunications as they relate to exempt telecommunications company status, and the PUHCA 2005, which replaces PUHCA 1935, does not address exempt telecommunications companies at all. Consequently, the Wireline Competition Bureau Staff Report prepared pursuant to the FCC's biennial regulatory review process, staff recommended that sections 1.5001 through 1.5007 of the Commission's rules be eliminated. This recommendation has not yet been effectuated, so the rules are still currently in place. Until the Commission does eliminate these rules, the Commission is requesting continued OMB approval of the information collection requirements contained in 47 CFR 1.5000 through 1.5007.

The information would be used by the Commission to determine whether persons satisfy the criteria for ''exempt telecommunications company'' status. Without such information, the Commission could not determine whether persons satisfy the criteria under section 34(a)(1) of the PUHCA, as amended.

*OMB Control Number:* 3060–0745.

*Title:* Implementation of the Local Exchange Carrier Tariff Streamlining Provisions of the Telecommunications Act of 1996, CC Docket No. 96–187.

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit.

*Number of Respondents:* 50 respondents; 1,536 responses.

*Estimated Time per Response:* .25–5 hours.

*Frequency of Response:* On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. Sections 151, 154(i) and 204(a)(3) of the Communications Act of 1934, as amended.

*Total Annual Burden:* 4,054 hours.

*Total Annual Cost:* $786,250.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* The Commission is not requesting respondents to submit confidential information with tariffs eligible for streamlined regulation. If the Commission requests respondents to submit information that the respondents believe is confidential, the respondents may request confidential treatment of such information pursuant to 47 CFR section 0.459 of the Commission's rules. In the case where such requests are made in the course of a tariff filing that is eligible for streamlined treatment, the Commission will routinely impose a standard protective order. A standard protective order to be used in the streamlined tariff proceedings is attached to the *Report and Order*.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting, recordkeeping and/or third party disclosure requirements) of this information collection. The Commission is now reporting a 26 hour increase in the total annual burden; an $11,250 increase in annual costs; and a 2,492 reduction in the number of responses.

In CC Docket No. 96–187, the Commission adopted measures to streamline tariff filing requirements for local exchange carriers (LECs) pursuant to the Telecommunications Act of 1996. In order to achieve a streamlined and deregulatory environment for LEC tariff filings, local exchange carriers are required to file tariffs electronically.

There are eight information collection requirements that contain reporting, third party disclosure and recordkeeping requirements. They are described in the Supporting Statement that will accompany the submission to OMB. They are: (1) Electronic filing requirement; (2) requirement that carriers desiring tariffs proposing rate decreases to be effective seven days file separate transmittals; (3) requirement that carriers identify transmittals filed pursuant to the streamlined provisions of the 1996 Act; (4) The requirements are described in the Supporting Statement that will accompany the submission to OMB. They are: (1) Electronic filing requirement for LECs to file tariffs seven and fifteen days notice; (2) requirement that carriers desiring tariffs proposing rate decreases to be

effective seven days file separate transmittals; (3) requirement that carriers identify transmittals filed pursuant to the streamlined provisions of the 1996 Act; (4) requirement that price cap LECs file their Tariff Review Plans prior to filing their annual access tariffs; (5) filing petitions and replies electronically (reporting requirement); (6) filing petitions and replies electronically (third party disclosure requirement); (7) recordkeeping requirement (standard protective order); and (8) reporting requirement (standard protective order).

The information collected via electronic filing will facilitate access to tariff and associated documents by the public, especially by interested persons or parties who do not have ready access to the Commission's public reference center, and state and federal regulators. Electronic access to carrier tariffs should also facilitate the compilation of aggregate data for industry analysis purposes without imposing new reporting requirements on carriers. Carriers desiring tariffs proposing rate decreases to be effective in seven days must file a separate transmittal. This requirement will ensure that a tariff filing proposing a rate decrease is given the shortest notice period possible under the 1996 Act. The Commission also adopted the requirement that carriers identify transmittals filed pursuant to the streamlining provisions of the 1996 Act. All of the requirements help to ensure that local exchange carriers comply with their obligations under the Communications Act and that the Commission is able to ensure compliance within the streamlined timeframes established in the 1996 Act.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E9–17919 Filed 7–27–09; 8:45 am]

BILLING CODE 6712–01–P

## FEDERAL ELECTION COMMISSION

### Sunshine Act Notices

**AGENCY:** Federal Election Commission.

**DATE AND TIME:** Tuesday, July 28, 2009, 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This Meeting Will be Open to the Public.

**ITEMS TO BE DISCUSSED:**

**CORRECTION AND APPROVAL OF MINUTES.**

**DRAFT ADVISORY OPINION 2009–13:** The Black Rock Group, by William J. McGinley, Esq.

**DRAFT ADVISORY OPINION 2009–14:** Mercedes-Benz USA LLC and Sterling Truck Corporation, by Jan Baran, Esq., and Caleb Burns, Esq.

**DRAFT ADVISORY OPINION 2009–15:** Bill White for Texas, by Barry Hunsaker, Treasurer.

**DRAFT ADVISORY OPINION 2009–16:** Libertarian Party of Ohio, by Michael Johnston, Treasurer.

**DRAFT ADVISORY OPINION 2009–17:** Romney for President, Inc., by Benjamin L. Ginsberg, Esq., and Glenn Willard, Esq.

**DRAFT ADVISORY OPINION 2009–18:** Penske Truck Leasing Co., L.P., Penske Truck Leasing Corporation, and Penske Truck Leasing Co., L.P. Political Action Committee, by Carol A. Laham, Esq. and D. Mark Renaud, Esq.

**PROPOSED RULE OF AGENCY PROCEDURES:** Notice to Named Respondents of Additional Material Facts or Additional Potential Violations.

**PROPOSED RULE OF AGENCY PROCEDURES:** Notice to Potential Respondents in Enforcement Matters.

**PROPOSED RULE OF AGENCY PROCEDURES:** Modification of Procedural Rules for Probable Cause Hearings.

**MANAGEMENT AND ADMINISTRATIVE MATTERS:**

**DATE AND TIME:** Tuesday, July 28, 2009, at the conclusion of the open meeting.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This Meeting will be Closed to the Public.

**ITEMS TO BE DISCUSSED:** Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

**DATE AND TIME:** Wednesday, July 29, 2009, at 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This Hearing Will be Open to the Public.

**MATTER BEFORE THE COMMISSION:** Web site and Internet communications improvement initiative.

Federal Election Commission, Sunshine Act Notices for Meetings of July 28 and 29, 2009.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mary Dove, Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

**PERSON TO CONTACT FOR INFORMATION:** Judith Ingram, Press Officer, Telephone: (202) 694–1220.

**Darlene Harris,**

*Deputy Secretary of the Commission.*

[FR Doc. E9–17864 Filed 7–27–09; 8:45 am]

BILLING CODE 6715–01–M

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 12, 2009.

**A. Federal Reserve Bank of Philadelphia** (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

*1. George G. Levin*, Fort Lauderdale, Florida; to acquire voting shares of Nova Financial Holdings, Inc., and thereby indirectly acquire voting shares of Nova Bank, both of Berwyn, Pennsylvania.

Board of Governors of the Federal Reserve System, July 23, 2009.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E9–17933 Filed 7–27–09; 8:45 am]

BILLING CODE 6210–01–S

## FEDERAL RESERVE SYSTEM

### Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

**SUMMARY:** *Background.* Notice is hereby given of the final approval of a proposed information collection by the Board of Governors of the Federal Reserve

System (Board) under OMB delegated authority, as per 5 CFR 1320.16 (OMB Regulations on Controlling Paperwork Burdens on the Public). Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instrument(s) are placed into OMB's public docket files. The Federal Reserve 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.

**FOR FURTHER INFORMATION CONTACT:** Acting Federal Reserve Board Clearance Officer—Cynthia Ayouch—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202–452–3829).

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

**Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Report**

*Report title:* Reporting and Disclosure Requirements Associated with Regulation P.

*Agency form number:* Reg P.

*OMB control number:* 7100–0294.

*Frequency:* Reporting, on occasion; and disclosure, annually.

*Reporters:* State member banks, subsidiaries of state member banks, bank holding companies and their subsidiaries or affiliates, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, corporations operating under section 25 or 25A of the Federal Reserve Act, and customers of these financial institutions.

*Estimated annual number of institution respondents:* Initial notice, 185; annual notice and revised notice, 6,735; opt-out notice, 1,235.

*Estimated average time per response per institution:* Initial notice, 80 hours; annual notice and revised notice, 8 hours; opt-out notice, 8 hours.

*Estimated subtotal annual burden hours for institutions:* 78,560 hours.

*Estimated annual number of consumer respondents:* 442,225.

*Estimated average time per consumer response:* 30 minutes.

*Estimated subtotal annual burden hours for consumers:* 221,113 hours.

*Estimated total annual burden hours:* 299,673 hours.

*General description of report:* This information collection is mandatory pursuant to section 504 of Gramm-Leach-Bliley Act (GLBA) (15 U.S.C. 6804). Since the Federal Reserve does not collect any information, no issue of confidentiality normally arises.

*Abstract:* The information collection pursuant to Regulation P is triggered by the establishment of a relationship between a customer and a financial institution. The regulation ensures that financial institutions provide customers notice of the privacy policies and practices of financial institutions and a means to prevent the disclosure of nonpublic personal information, in certain circumstances. Where applicable, financial institutions are required to provide an initial notice and an annual notice of their privacy policies and practices, opt-out notices, and revised notices containing changes in policies and procedures.

*Current Actions:* On May 20, 2009, the Federal Reserve published a notice in the **Federal Register** (74 FR 23717) requesting public comment for 60 days on the extension, without revision, of this information collection. The comment period for this notice expired on July 20, 2009. No comments were received.

Board of Governors of the Federal Reserve System, July 22, 2009.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E9–17878 Filed 7–27–09; 8:45 am]

**BILLING CODE 6210–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Announcement of Meeting of the Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020

**AGENCY:** Department of Health and Human Services, Office of the Secretary, Office of Public Health and Science, Office of Disease Prevention and Health Promotion.

**ACTION:** Notice of meeting.

**SUMMARY:** The U.S. Department of Health and Human Services (HHS) announces the next federal advisory committee meeting regarding the national health promotion and disease prevention objectives for 2020. This meeting will be open to the public and will be held online via WebEx software. The Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020 will address efforts to develop the nation's health promotion and disease prevention objectives and strategies to improve the health status and reduce health risks for Americans by the year 2020. The Committee will provide to the Secretary of Health and Human Services advice and consultation for developing and implementing the next iteration of national health promotion and disease prevention goals and objectives and provide recommendations for initiatives to occur during the initial implementation phase of the goals and objectives. HHS will use the recommendations to inform the development of the national health promotion and disease prevention objectives for 2020 and the process for implementing the objectives. The intent is to develop and launch objectives designed to improve the health status and reduce health risks for Americans by the year 2020.

**DATES:** The Committee will meet on August 14, 2009 from 1 p.m. to 3 p.m. Eastern Daylight Time (EDT).

**ADDRESSES:** The meeting will be held online, via WebEx software. For detailed instructions about how to make sure that your windows computer and browser is set up for WebEx, please visit the ''Secretary's Advisory Committee'' Web page of the Healthy People Web site at: *http://www.healthypeople.gov/hp2020/advisory/default.asp*.

**FOR FURTHER INFORMATION CONTACT:** Emmeline Ochiai, Designated Federal Officer, Secretary's Advisory Committee on National Health Promotion and Disease Prevention Objectives for 2020, U.S. Department of Health and Human Services, Office of Public Health and Science, Office of Disease Prevention and Health Promotion, 1101 Wootton Parkway, Room LL–100, Rockville, MD 20852, (240) 453–8259 (telephone), (240) 453–8281 (fax). Additional information is available on the Internet at *http://www.healthypeople.gov*.

**SUPPLEMENTARY INFORMATION:**

*Purpose of Meeting:* Every 10 years, through the Healthy People initiative, HHS leverages scientific insights and lessons from the past decade, along with the new knowledge of current data, trends, and innovations to develop the

*Authority:* 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended. The Committee is governed by the provision of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

next iteration of national health promotion and disease prevention objectives. Healthy People provides science-based, 10-year national objectives for promoting health and preventing disease. Since 1979, Healthy People has set and monitored national health objectives to meet a broad range of health needs, encourage collaborations across sectors, guide individuals toward making informed health decisions, and measure the impact of our prevention and health promotion activities. Healthy People 2020 will reflect assessments of major risks to health and wellness, changing public health priorities, and emerging issues related to our nation's health preparedness and prevention.

*Public Participation at Meeting:* Members of the public are invited to listen to the online Committee meeting. There will be no opportunity for oral public comments during the online Committee meeting. Written comments, however, are welcome throughout the development process of the national health promotion and disease prevention objectives for 2020. They can be submitted through the Healthy People Web site at: *http://www.healthypeople.gov/hp2020/comments/* or they can be e-mailed to *HP2020@hhs.gov*. Please note that the public comment Web site will be updated throughout the Healthy People development process, so people should return to the site frequently and provide their input.

To listen to the Committee meeting, individuals must pre-register to attend at the Healthy People Web site located at *http://www.healthypeople.gov*. Participation in the meeting is limited. Registrations will be accepted until maximum WebEx capacity is reached and must be completed by 9 a.m. EDT on August 14, 2009. A waiting list will be maintained should registrations exceed WebEx capacity. Individuals on the waiting list will be contacted as additional space for the meeting becomes available.

Registration questions may be directed to Hilary Scherer at *HP2020@norc.org* (e-mail), (301) 634–9374 (phone) or (301) 634–9301 (fax).

Dated: July 22, 2009.

**Penelope Slade-Sawyer,**

*RADM, USPHS, Deputy Assistant Secretary for Health (Disease Prevention and Health Promotion).*

[FR Doc. E9–17895 Filed 7–27–09; 8:45 am]

BILLING CODE 4150–32–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Comment Request

*Title:* FPLS Child Support Services Portal Registration (FCSSP).

*OMB No.:* New Collection.

*Description:* The Federal Office of Child Support Enforcement (OCSE) is implementing the Federal Parent Locator Service (FPLS) Child Support Services Portal (FCSSP) for users of the FPLS to access online Web applications. The portal Registration Process will provide OCSE, States, employers and multistate financial institutions the ability to create a secure account to view data for their respective applications. In order for users to access the portal, registration is required.

*Respondents:* OCSE, Employers, Multistate Financial Institutions and State Child Support Agencies.

**Annual Burden Estimates**

| Instrument | Number of respondents | Number of responses per respondent | Average burden hours per response | Total burden hours |
|---|---|---|---|---|
| Registration Screens: Employers, Financial Institutions and State Child Support Agencies | 520 | 1 | 0.10 | 52 |

*Estimated Total Annual Burden Hours:* 52.

*Additional Information:* Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *infocollection@acf.hhs.gov.*

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7245. Attn: Desk Officer for the Administration for Children and Families.

Dated: July 23, 2009.

**Janean Chambers,**

*Reports Clearance Officer.*

[FR Doc. E9–17886 Filed 7–27–09; 8:45 am]

BILLING CODE 4184–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–09–08BN]**

### 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**

Voluntary Product Satisfaction and Usability Assessment—New—National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Executive Order 12862 directs Federal agencies that provide services directly to the public to survey customers to determine the kind and quality of services they need and their level of satisfaction with existing services.

CDC releases a number of new products each year to its customers, a diverse group that includes health care providers, researchers, public health practitioners, policy makers, and the general public. The term product is broadly defined to include publications, Web pages, podcasts, e-cards, CD–ROMs, and videos. At present, there is no mechanism for evaluating whether these products are meeting customer needs.

CDC is requesting a 3-year generic clearance in order to better evaluate its products. Obtaining feedback from customers on a regular, on-going basis will help ensure that customers find CDC products to be useful. This type of evaluation will allow CDC to maximize the impact of its products which will ultimately benefit the public's health.

The target audience will be limited to customers who request and receive CDC products. Customer participation in the evaluation is completely voluntary. Names of customers will not be collected. The only personal information collected will relate to professional discipline, job duties, and experience working with public health topics. No sensitive data (*e.g.,* age, race, or gender) will be collected. The evaluation data will be collected using a combination of methodologies including:

1. *Response cards via mail:* Each product that is sent out will include a one-page response card along with a self-addressed and stamped envelope. Customers can then voluntarily choose whether to return the response card.

2. *E-mail announcements:* Products are released to customers via an e-mail announcement that includes a link to the electronic version of the product plus a link to a Web-based evaluation. Customers can then voluntarily choose whether to complete the evaluation.

3. *Web-based assessments:* Products are available on-line in an electronic format. Each product Web page will include a link to a Web-based evaluation. Customers can then voluntarily choose whether to complete the evaluation.

The information being collected will not impose a cost burden on the respondents beyond that associated with their time to provide the required data.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Evaluation method | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|---|
| Customers | Response cards | 50,000 | 1 | 10/60 | 8,333 |
| | E-mail Assessments | 60,000 | 1 | 10/60 | 10,000 |
| | Web-Based Assessments | 432,000 | 1 | 10/60 | 72,000 |
| Total | | | | | 90,333 |

Dated: July 22, 2009.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E9–17898 Filed 7–27–09; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Office of Community Services; Notice To Award a Single Source Program Expansion Supplement Under the American Recovery and Reinvestment Act (ARRA) to Technical Assistance by Community Action Program Legal Services, Inc.

**AGENCY:** Office of Community Services, ACF, HHS.

**ACTION:** Notice to award a Single Source Program Expansion Supplement under the American Recovery and Reinvestment Act (ARRA) to Technical Assistance by Community Action Program Legal Services, Inc.

*CFDA#:* 93.710.

**Legislative Authority:** The legislative authority for this award is provided in the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5). Additional legislative authority and requirements are provided in Section 674(b)(2)(B) of the CSBG Act, as amended, by the Community Opportunity Accountability, and Training and Educational Services (Coats Human Services Reauthorization Act of 1998) (Pub. L. 105–285).

*Amount of Supplemental Award:* $96,952.

*Project Period:* September 30, 2006 through September 30, 2009.

**SUMMARY:** The Office of Community Services (OCS) announces the awarding of a $96,952 single source program expansion supplement to the Community Action Legal Services, Inc. (CAPLAW), located in Boston, MA, to support training and technical assistance on legal issues faced by Community Action Agencies (CAAs) related to the American Recovery and Reinvestment Act of 2009 (ARRA). The project activities are designed to support and strengthen the ability of the CAA network to comply with, and carry out, Community Services Block Grant (CSBG) activities funded by ARRA. The training projects and resources developed under the award will include analysis and explanation of the practical impact of ARRA for States and CSBG-eligible entities so that they can work more effectively to reach the ARRA goals and document how they have in fact reached those goals and used the ARRA funds. The project's overall approach is based on the following five key elements: (1) Technical assistance and issue-specific consultation; (2) Publications, including online postings on the CAPLAW Web site, e-Bulletins, and a print newsletter, which is also available on CAPLAW's Web site; (3) Online toolkit; (4) Presentations at CAA conferences, including CAPLAW's 2009 national training conference, and CAPLAW audio conferences.

The training and technical assistance CAPLAW will provide is particularly critical at this time due to the large temporary increase in funding of CSBG awards to eligible entities and the need for both rapid implementation of these programs and adherence to high

standards of accountability and tracking of awards and results.

*Contact for Further Information:* Danielle Williams, U.S. Department of Health and Human Services, Office of Community Services, Administration for Children and Families, 370 L'Enfant Promenade, SW., Washington, DC 20047.

*Telephone:* (202) 205–4717. *E-mail: Danielle.Williams@acf.hhs.gov.*

Dated: July 15, 2009.

**Yolanda J. Butler,**

*Acting Director, Office of Community Services.*

[FR Doc. E9–17890 Filed 7–27–09; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–D–0379]**

### Guidance for Industry: Nucleic Acid Testing To Reduce the Possible Risk of Human Parvovirus B19 Transmission by Plasma-Derived Products; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a document entitled ''Guidance for Industry: Nucleic Acid Testing (NAT) to Reduce the Possible Risk of Human Parvovirus B19 Transmission by Plasma-Derived Products,'' dated July 2009. The guidance document provides to manufacturers of plasma-derived products recommendations for performing parvovirus B19 NAT as an in-process test for Source Plasma and recovered plasma to identify and help to prevent the use of plasma units containing high levels of parvovirus B19. The guidance also recommends how to report to FDA implementation of parvovirus B19 NAT. The guidance announced in this notice finalizes the draft guidance of the same title, dated July 2008.

**DATES:** Submit written or electronic comments on agency guidances at any time.

**ADDRESSES:** Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

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*.

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

**SUPPLEMENTARY INFORMATION:**

### I. Background

FDA is announcing the availability of a document entitled ''Guidance for Industry: Nucleic Acid Testing (NAT) to Reduce the Possible Risk of Human Parvovirus B19 Transmission by Plasma-Derived Products,'' dated July 2009. Parvovirus B19 is a small, non-enveloped single stranded DNA virus. Virus clearance studies, using non-human parvoviruses as models for parvovirus B19, have indicated that this virus is highly resistant to all commonly used inactivation methods, including heat and solvent/detergent (S/D) treatment, and is also difficult to remove by filtration because of its small size. More recent studies have demonstrated that human parvovirus B19 may be more readily cleared than certain model animal parvoviruses. The parvovirus B19 can be transmitted by blood components and certain plasma derivatives and may cause morbidity to susceptible recipients such as pregnant women, persons with underlying hemolytic disorders, and immune compromised individuals. The disease transmission from transfusion of blood components is rare. However, extremely high levels of parvovirus B19 in plasma of acutely infected but asymptomatic donors may present a greater risk in plasma derivatives due to pooling of large numbers of units of these products in the manufacturing process.

The guidance provides recommendations for performing parvovirus B19 NAT as an in-process test for Source Plasma and recovered plasma used in the further manufacturing of plasma-derived products to identify and help to prevent the use of plasma units containing high levels of parvovirus B19. The guidance also recommends how to report to FDA implementation of parvovirus B19 NAT.

In the **Federal Register** of July 30, 2008 (73 FR 44272), FDA announced the availability of the draft guidance of the same title, dated July 2008. FDA received a few comments on the draft guidance and those comments were considered as the guidance was finalized. In addition to minor editorial changes made to improve clarity, changes to the draft guidance include the addition of 4 references to reflect recent studies that show B19 may be less resistant to inactivation than animal-derived parvoviruses that have been used as models; and removal of the recommendation on the acceptable limit for B19 DNA titer in individual plasma units. The guidance announced in this notice finalizes the draft guidance dated July 2008.

The guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents FDA'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 requirement of the applicable statutes and regulations.

### II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 601.12(a)(2) and 601.12(c)(5), have been approved under OMB No. 0910–0338.

### III. Comments

Interested persons may, at any time, submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding the guidance. 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. A copy of the guidance and received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

### IV. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://*

*www.fda.gov/cber/guidelines.htm* or *http://www.regulations.gov*.

Dated: July 20, 2009.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E9–17965 Filed 7–27–09; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2009–N–0664]**

### Science Board to the Food and Drug Administration; 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*: Science Board to the Food and Drug Administration (Science Board).

*General Function of the Committee*: The Science Board provides advice primarily to the Commissioner of Food and Drugs and other appropriate officials on specific complex and technical issues, as well as emerging issues within the scientific community in industry and academia. Additionally, the Science Board provides advice to the agency on keeping pace with technical and scientific evolutions in the fields of regulatory science, on formulating an appropriate research agenda, and on upgrading its scientific and research facilities to keep pace with these changes. It will also provide the means for critical review of agency sponsored intramural and extramural scientific research programs.

*Date and Time*: The meeting will be held on Monday, August 17, 2009, from 8 a.m. to 4 p.m.

*Addresses*: Hilton Washington DC/ Rockville Hilton, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person*: Carlos Peña, Office of the Commissioner, Food and Drug Administration (HF–33), 5600 Fishers Lane, Rockville, MD 20857, 301–827–6687, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512603. 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 Science Board will hear about and discuss reports from its subcommittees on the following: (1) The review of research at the Center for Veterinary Medicine, and (2) the review of FDA's scientific information technology infrastructure modernization initiatives. The Science Board will hear about plans to establish an additional subcommittee for the review of research at the Center for Food Safety and Applied Nutrition. The Science board will also hear about and discuss updates from the agency regarding the continued assessment of Bisphenol-A (BPA) in FDA-regulated 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/AdvisoryCommittees/Calendar/default.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 August 10, 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 August 3, 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 August 4, 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 Carlos Peña 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/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.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: July 22, 2009.

**Randall W. Lutter,**

*Deputy Commissioner for Policy.*

[FR Doc. E9–17961 Filed 7–27–09; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, July 27, 2009, 11 a.m. to July 27, 2009, 7 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 which was published in the **Federal Register** on July 16, 2009, 74 FR 34583–34585.

The meeting will be held July 31, 2009. The meeting time and location remain the same. The meeting is closed to the public.

Dated: July 22, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E9–17974 Filed 7–27–09; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Translational Research.

*Date:* September 17, 2009.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

*Contact Person:* Michele L. Barnard, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 753, 6707 Democracy Boulevard, Bethesda, MD 20892–2542. (301) 594–8898. *barnardm@extra.niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: July 22, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E9–17959 Filed 7–27–09; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Institutional National Research Service Award (T32's).

*Date:* July 31, 2009.

*Time:* 5 p.m. to 7 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

*Contact Person:* Charles Joyce, Ph.D, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: July 22, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E9–17976 Filed 7–27–09; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Cancer Institute Special Emphasis Panel, ARRA GO Applications (RC2).

*Date:* August 10, 2009.

*Time:* 12 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute, 6116 Executive Boulevard, Room 8105, Bethesda, MD 20892.

*Contact Person:* Lynn M. Amende, Ph.D, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8105, Bethesda, MD 20892–8328, 301–451–4759, *amendel@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to scheduling conflicts.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control; 93.701, ARRA Related Biomedical Research and Research Support Awards., National Institutes of Health, HHS)

Dated: July 22, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E9–17973 Filed 7–27–09; 8:45 am]

BILLING CODE 4140–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health, Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice concerning the final effect of the HHS decision to designate a class of employees at the Standard Oil Development Company in Linden, New Jersey, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On June 18, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All AWE employees of the Standard Oil Development Company in Linden, New

Jersey, during the period from August 13, 1942 through December 31, 1945, while working for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

This designation became effective on July 18, 2009, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on July 18, 2009, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

**FOR FURTHER INFORMATION CONTACT:** Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

**Christine M. Branche,**

*Acting Director, National Institute for Occupational Safety and Health.*

[FR Doc. E9–17899 Filed 7–27–09; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institute for Occupational Safety and Health; Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

**AGENCY:** National Institute for Occupational Safety and Health, Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HHS gives notice concerning the final effect of the HHS decision to designate a class of employees at the Standard Oil Development Company in Linden, New Jersey, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On June 18, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All AWE employees of the Standard Oil Development Company in Linden, New Jersey, during the period from August 13, 1942 through December 31, 1945, while working for a number of work days aggregating at least 250 work days, either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

This designation became effective on July 18, 2009, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on July 18, 2009, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

**FOR FURTHER INFORMATION CONTACT:** Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

**Christine M. Branche,**

*Acting Director, National Institute for Occupational Safety and Health.*

[FR Doc. E9–17900 Filed 7–27–09; 8:45 am]

**BILLING CODE 4163–19–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

### Agency Information Collection Activities: InfoPass System; New Information Collection; Comment Request

**ACTION:** 60-Day Notice of Information Collection Under Review: InfoPass System; OMB Control No. 1615–NEW.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until September 28, 2009.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, Clearance Office, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail, please add the USCIS File Number (OMB–48) in the subject box.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Overview of this information collection:*

(1) *Type of Information Collection:* New Information collection.

(2) *Title of the Form/Collection:* InfoPass System.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; File No. OMB–48. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. The InfoPass system allows an applicant or petitioner to schedule an interview appointment with USCIS through USCIS' Internet Web site.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,043,319 responses at 6 minutes (.10) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 104,332 annual burden hours.

If you need a copy of the information collection instrument, please visit the Internet Web site at: *http://www.regulations.gov/search/index.jsp*.

We may also be contacted at: USCIS, Regulatory Products Division, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529–2210, Telephone number 202–272–8377.

Dated: July 23, 2009.

**Stephen Tarragon,**

*Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services.*

[FR Doc. E9–17894 Filed 7–27–09; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5282–N–03]**

## Notice of Submission of Proposed Information Collection to OMB; Comment Request; HOME Investment Partnerships Program

**AGENCY:** Office of the Chief Information Officer.

**ACTION:** Notice of proposed information collection.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* September 28, 2009.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB approval number and should be sent to: Ms. Kimberly P. Nelson, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail: *Kimberly_P._Nelson@omb.eop.gov;* fax: (202) 395–6974.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail: *Lillian.L.Deitzer@hud.gov*; telephone (202) 402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

**SUPPLEMENTARY INFORMATION:** The Notice will inform the public that the U.S. Department of Housing and Urban Development (HUD) will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35 as Amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* HOME Investment Partnerships Program (HOME).

*Description of Information Collection:* The information collected through HUD's Integrated Disbursement and Information System (IDIS) (§ 92.502) is used by HUD Field Offices, HUD Headquarters and HOME Program Participating Jurisdictions (PJs). The information on program funds committed and disbursed is used by HUD to track PJ performance and to determine compliance with the statutory 24-month commitment deadline and the regulatory 5-year expenditure deadline (§ 92.500(d)). The project-specific property, tenant, owner and financial data is used to compile annual reports to Congress required at Section 284(b) of the Act, as well as to make program management decisions about how well program participants are achieving the statutory objectives of the HOME Program. Program management reports are generated by IDIS to provide data on the status of program participants' commitment and disbursement of HOME funds. These reports are provided to HUD staff as well as to HOME PJs.

Management reports required in conjunction with the Annual Performance Report (§ 92.509) are used by HUD Field Offices to assess the effectiveness of locally designed programs in meeting specific statutory requirements and by Headquarters in preparing the Annual Report to Congress. Specifically, these reports permit HUD to determine compliance with the requirement that PJs provide a 25% match for HOME funds expended during the Federal fiscal year (Section 220 of the Act) and that program income be used for HOME eligible activities (Section 219 of the Act), as well as the Women and Minority Business Enterprise requirements (§ 92.351(b)).

Financial, project, tenant and owner documentation is used to determine compliance with HOME Program cost limits (Section 212(e) of the Act), eligible activities (§ 92.205), and eligible costs (§ 92.206), as well as to determine whether program participants are achieving the income targeting and affordability requirements of the Act (Sections 214 and 215). Other information collected under Subpart H (Other Federal Requirements) is primarily intended for local program management and is only viewed by HUD during routine monitoring visits. The written agreement with the owner for long-term obligation (§ 92.504) and tenant protections (§ 92.253) are required to ensure that the property owner complies with these important elements of the HOME Program and are also reviewed by HUD during monitoring visits. HUD reviews all other data collection requirements during monitoring to assure compliance with the requirements of Title II and other related laws and authorities.

HUD tracks PJ performance and compliance with the requirements of 24 CFR Parts 91 and 92. PJs use the required information in the execution of their program, and to gauge their own performance in relation to stated goals.

*OMB Control Number:* 2506–0171.

*Agency Form Numbers:* HUD 40093, SF 1199A, HUD 20755, HUD 40107, HUD 401107A.

*Members of Affected Public:* State and local government participating jurisdictions.

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:*

| Reg. section | Paperwork requirement | Recordkeeping hours | Reporting hours | Number of jurisdictions | Total hours |
|---|---|---|---|---|---|
| § 92.61 | Program Description and Housing Strategy for Insular Areas. | | 10 | 4 | 40 |
| § 92.66 | Reallocation—Insular Areas | | 3 | 4 | 12 |
| § 92.101 | Consortia Designation | | 5 | 36 | 180 |
| § 92.200 | Private-Public Partnership | 2 | | 594 | 1,188 |

| Reg. section | Paperwork requirement | Recordkeeping hours | Reporting hours | Number of jurisdictions | Total hours |
|---|---|---|---|---|---|
| § 92.201 | Distribution of Assistance | 2 | | 594 | 1,188 |
| § 92.201 | State Designation of Local Recipients. | | 1.5 | 51 | 76.5 |
| § 92.202 | Site and Neighborhood Standards | 2 | | 594 | 1,188 |
| § 92.203 | Income Determination | 2 | | 6,667 | 13,334 |
| § 92.206, § 92.216, § 92.217, § 92.218, § 92.250, § 92.252, § 92.254. | Documentation required by HUD to be included in project file to determine project eligibility, i.e., eligible uses and costs, cost limits, mixed-projects and value. | 5 | | 6,667 | 33,335 |
| § 92.206 | Eligible Costs—Refinancing | | 4 | 100 | 400 |
| § 92.251 | Written Property Standards | 1 | | 6,667 | 6,667 |
| § 92.253 | Tenant Protections (including lease requirement). | 5 | | 6,667 | 33,335 |
| § 92.254 | Homeownership—Median Purchase Price. | 5 | | 80 | 400 |
| § 92.254 | Homeownership—Alternative to Resale/recapture. | | 5 | 100 | 500 |
| § 92.300 | CHDO Identification | 2 | | 594 | 1,188 |
| § 92.300 | Designation of CHDOs | | 1.5 | 480 | 720 |
| § 92.300 | CHDO Project Assistance | 2 | | 594 | 1,188 |
| § 92.303 | Tenant Participation Plan | 10 | | 4,171 | 41,710 |
| § 92.350 | Equal Opportunity (including non-discrimination, and minority and women business enterprise and minority outreach efforts). | 5 | | 6,667 | 33,335 |
| § 92.351 | Affirmative Marketing | 10 | | 6,667 | 66,670 |
| § 92.353 | Displacement, relocation and acquisition (including tenant assistance policy). | 5 | | 6,667 | 33,335 |
| § 92.354 | Labor | 2.5 | | 6,667 | 16,667.50 |
| § 92.355 | Lead-based paint | 1 | | 6,667 | 6,667 |
| § 92.357 | Debarment and Suspension | 1 | | 6,667 | 6,667 |
| § 92.501 | Investment Partnership Agreement | 0.5 | 0.5 | 598 | 598 |
| § 92.502 | Homeownership and Rental Set-Up and Completion (IDIS). | | 16 | 594 | 9,504 |
| § 92.502 | Tenant-Based Rental Assistance Set-Up (IDIS). | | 5.5 | 225 | 1,237.50 |
| § 92.502 | IDIS Performance Measurement Set-Up and Completion Screens. | | 21 | 6,671 | 140,091 |
| § 92.504 | Participating Jurisdiction's Written Agreements. | 10 | | 6,667 | 66,670 |
| § 92.509 | Management Reports—Annual Performance Reports. | | 2.5 | 598 | 1,495 |
| § 92.509 | Management Reports—FY Match Report. | | 0.75 | 594 | 445.5 |
| § 91.220 | Describe the use of ADDI funds | | 1 | 427 | 427 |
| § 91.220 | Describe the plan for outreach | | 1 | 427 | 427 |
| § 91.220 | Describe plan to ensure suitability of families. | | 1 | 427 | 427 |
| § 91.604 | Describe prior commitment | | 1 | 37 | 37 |
| § 91.616 | Confirm first-time homebuyer status | 0.1 | | 427 | 43 |
| § 92.502 | Input first-time homebuyer status (IDIS). | | 0.2 | 427 | 85 |
| § 92.502 | IDIS Access Request form (HUD 27055). | | 0.5 | 50 | 25 |
| | Direct Deposit Sign Up Form (SF 1199A). | | 0.16 | 10 | 1.6 |
| Total Annual Respondents and Burden Hours. | | | | 6,667 | 522,103 |

Estimate of Respondent Cost: 522,103 hours × $31/hour = $16,185,193.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: July 21, 2009.

**Mercedes Márquez,**

*Assistant Secretary, Office of Community Planning & Development.*

[FR Doc. E9–17856 Filed 7–27–09; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5281–N–58]**

### Multifamily Project Applications and Construction Prior to Initial Endorsement

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Information provided is the application for HUD/FHA multifamily mortgage insurance. The information form sponsors and general contractors, and submitted by a HUD-approved mortgagee, is needed to determine project feasibility, mortgagor/contractor acceptability, and construction cost. Documentation from operators/managers of health care facilities is also required as part of the application for firm commitment for mortgage insurance. Project owners/sponsors may apply for permission to commence construction prior to initial endorsement.

**DATES:** *Comments Due Date:* August 27, 2009.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0029) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

**FOR FURTHER INFORMATION CONTACT:** Lillian Deitzer, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Lillian Deitzer at *Lillian_L._Deitzer@HUD.gov* or telephone 202–402–8048. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Deitzer.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This notice also lists the following information:

*Title of Proposal:* Multifamily Project Applications and Construction Prior to Initial Endorsement.

*OMB Approval Number:* 2502–0029.

*Form Numbers:* HUD–92013, HUD–92013–SUPP, HUD–92013–E, HUD–92264–A, HUD–92264–T, HUD–92273, HUD–92274, HUD–92326, HUD–92329, HUD–92331, HUD–92415, HUD–92447, HUD–92452, HUD–92485, HUD–91708, HUD–92010, FM–1006, HUD–2880, HUD–92466 (Rider Forms–92466–R1, 92466–R2, 92466–R3, 92466–R4).

*Description of the Need for the Information and its Proposed Use:* Information provided is the application for HUD/FHA multifamily mortgage insurance. The information form sponsors and general contractors, and submitted by a HUD-approved mortgagee, is needed to determine project feasibility, mortgagor/contractor acceptability, and construction cost. Documentation from operators/managers of health care facilities is also required as part of the application for firm commitment for mortgage insurance. Project owners/sponsors may apply for permission to commence construction prior to initial endorsement.

*Frequency of Submission:* On occasion. Other required with each project application.

| | Number of respondents | Annual responses | × | Hours per response | = | Burden hours |
|---|---|---|---|---|---|---|
| Reporting Burden | 18,901 | 1.50 | | 1.82 | | 51,860 |

*Total Estimated Burden Hours:* 51,860.

*Status:* Revision of a currently approved collection.

**Authority:** Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 22, 2009.

**Lillian Deitzer,**

*Departmental Reports Management Officer, Office of the Chief Information Officer.*

[FR Doc. E9–17855 Filed 7–27–09; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5329–N–01]**

### Notice of Certification and Funding of State and Local Fair Housing Enforcement Agencies Under the Fair Housing Assistance Program; Request for Comments

**AGENCY:** Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

**ACTION:** Notice.

**SUMMARY:** Through the Fair Housing Assistance Program (FHAP), HUD provides funding to State and local fair housing agencies that enforce laws that HUD has deemed substantially equivalent to the Fair Housing Act. The Department's FHAP regulations provide that the Assistant Secretary for Fair Housing and Equal Opportunity may publish, on an annual basis, a notice that identifies all agencies that received interim certification during the prior calendar year, and to solicit public comment on the State or local fair housing laws of the interim agencies, including the performance of agencies in enforcing such laws. Today's **Federal Register** publication is being issued in

accordance with this regulatory provision.

**DATES:** *Comment Due Date:* August 27, 2009.

**ADDRESSES:** Interested persons are invited to submit comments to the FHAP Division, Office of Enforcement, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW., Room 5206, Washington, DC 20410–0500. Communications must refer to the above docket number and title. Facsimile (FAX) comments will not be accepted.

**FOR FURTHER INFORMATION CONTACT:** Kenneth J. Carroll, Director, FHAP Division, Office of Enforcement, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 7th Street, SW., Room 5206, Washington, DC 20410–0500; telephone number 202–402–7044 (this is not a toll-free number). Persons with speech or hearing impairments may contact the FHAP Division by calling 1–800–290–1671 (this is a toll-free number), or 1–800–877–8339 (the Federal Information Relay Service TTY) (this is a toll-free number).

**SUPPLEMENTARY INFORMATION:**

## I. Background

Through the Fair Housing Assistance Program (FHAP), HUD provides funding to State and local fair housing agencies that enforce laws HUD has deemed substantially equivalent to the Fair Housing Act (42 U.S.C. 3601 *et seq.*). HUD's regulations for the FHAP are codified at 24 CFR part 115 (entitled ''Certification and Funding of State and Local Fair Housing Enforcement Agencies'').

In order to participate in FHAP, HUD's Assistant Secretary for Fair Housing and Equal Opportunity (FHEO) must first determine whether a State or local law, on its face, provides rights, procedures, remedies, and judicial review provisions that are substantially equivalent to the Federal Fair Housing Act. An affirmative conclusion that the State or local law is substantially equivalent on its face will result in HUD offering interim certification to the agency. During the period of interim certification, HUD's Assistant Secretary for FHEO will determine whether the State or local law, in operation, affords rights, procedures, remedies, and the availability of judicial review in a manner substantially equivalent to the Fair Housing Act. An affirmative conclusion during interim certification that the State or local law is substantially equivalent both on its face and in operation will result in HUD offering certification to the agency.

Certification is for a term of 5 years, during which the agency's ability to maintain certification is evaluated. After the five years of certification, if the Assistant Secretary for FHEO determines that the agency continues to qualify, HUD will renew the agency's certification for another 5 years.

## II. This Notice

The FHAP regulations at 24 CFR 115.102(b) provide that the Assistant Secretary for FHEO may, on an annual basis, publish a notice in the **Federal Register** that identifies all agencies that received interim certification during the preceding year. The notice must invite the public to comment on the State or local laws of the new interim agencies, including on the performance of the agencies in enforcing their laws.

In accordance with § 115.102(b) of the FHAP regulations, HUD seeks public comment on the following agencies that were granted interim certification during the prior calendar year:

- Westchester County Human Rights Commission (New York).
- Oregon Bureau of Labor and Industries (Oregon).
- City of Evansville-Vanderburgh County Human Relations Commission (Indiana).

Dated: July 1, 2009.

**John Trasviña,**

*Assistant Secretary for Fair Housing and Equal Opportunity.*

[FR Doc. E9–17853 Filed 7–27–09; 8:45 am]

BILLING CODE 4210–67–P

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5305–N–01]**

**RIN 2502–AZ00**

## Housing and Economic Recovery Act of 2008: Pilot Program for Automated Process for Borrowers Without Sufficient Credit History; Solicitation of Comments on Program Design

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** The Housing and Economic Recovery Act of 2008 requires that HUD carry out a pilot program to establish, and make available to mortgagees, an automated process for providing alternative credit rating information, which might include rent, utilities, and insurance payment histories, etc., for mortgagors and prospective mortgagors who have insufficient credit histories for determining their credit worthiness. With this notice, HUD commences the process for development of the mandated pilot program and solicits public comment and suggestions for a practicable design of the pilot program that is consistent with statutory goals, program requirements, and fair lending standards, and includes comment on how the pilot program might align with existing Federal Housing Administration policy regarding nontraditional credit verification. Comments addressing the information, data, and experience necessary to support an evaluation of the operation, performance, and fair lending compliance of a pilot are welcome as well. All comments will be considered in the development of the pilot program.

**DATES:** *Comment Due Date:* September 28, 2009.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Margaret Burns, Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9278, Washington, DC 20410–8000; telephone number 202–708–2121 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLMENTARY INFORMATION:**

## I. Background

The Housing and Economic Recovery Act of 2008 (Pub. L. 110–289, 122 Stat. 2654, approved July 30, 2008) (HERA) made significant and comprehensive reforms to the National Housing Act (12 U.S.C. 1701 *et seq.*), which governs Federal Housing Administration (FHA) programs. Section 2124 of HERA adds a new section 258 to the National Housing Act (12 U.S.C. 1701 *et seq.*) that requires the Secretary of HUD to ''carry out a pilot program to establish, and make available to mortgagees, an automated process for providing alternative credit rating information for mortgagors and prospective mortgagors who have insufficient credit histories for determining their credit worthiness.'' [1] ''Such alternative credit rating information may include rent, utilities, and insurance payment histories, and such other information as the Secretary considers appropriate.'' In addition, section 258 allows the Secretary to restrict the program to first-time homebuyers and limits annual loan volume under the pilot program to 5 percent of FHA's prior-year aggregate loan volume for the duration of the pilot program, which ends July 30, 2013. The Government Accountability Office is charged with providing Congress with a report on the number of additional mortgagors served using the automated process and the impact on the safety and soundness of the insurance funds supporting the pilot program mortgages, by July 30, 2010.

FHA has long permitted mortgagees to establish a borrower's credit history through nontraditional means, including the compilation of performance on rental payments, utility bills, telephone and cellular phone services, cable television service, payments to local stores, etc. Mortgagee Letter 2008–11 (issued on April 29, 2008) provides further guidance on the issue, and states that ''FHA has no objection to the use of various service providers now operating that are able to develop a bill payment history, as well as a score by obtaining rental payment history, utility trade-lines, and other common recurring non-reporting bill payments. While * * * [FHA does] not endorse any particular service provider, FHA approved lenders may use such services to develop a credit history for borrowers with no or little traditional credit.'' A copy of Mortgagee Letter 2008–11 may be downloaded at *http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/index.cfm.*

The pilot program authorized by section 258 of the National Housing Act builds upon this past FHA practice by requiring that HUD establish an automated process for providing alternative, or nontraditional, credit information.

## II. This Notice—Solicitation of Public Comment on Automated Process

Through publication of this notice, HUD starts the process for developing the mandated pilot program and solicits public comment and suggestions for a practicable design of the pilot program that is consistent with statutory goals, program requirements, and fair lending standards and includes comment on how various pilot programs might align with existing FHA policy regarding nontraditional credit verification. Comments addressing the information, data, and experience necessary to support an evaluation of the operation, performance, and fair lending compliance of a pilot program are welcome as well.

In particular, HUD is interested in obtaining feedback on the following questions:

1. What automated processes for providing alternative credit rating information for mortgagors and prospective mortgagors who have insufficient credit histories for determining their credit worthiness are currently available and operational?

2. For operational automated processes identified in question 1, what factors or information is utilized to develop the alternative credit histories and in what form is the information passed on to end-user mortgagees—*i.e.,* individual items to be assembled into a credit profile by end user, items aggregated into a summary profile or score with distributional reference points, individual and summary information in combination, *etc.*?

3. Which operational automated processes identified in questions 1 and 2 currently can be uniformly applied everywhere in the United States and, if not, what impediments must be overcome before uniform and universal application is possible?

4. What *new and universally available* automated processes for providing alternative credit rating information might be developed and maintained with reasonable accommodation and investment by industry and government? Conversely, are there aspects of manual processes with little potential for automation?

5. For current and potential new automated processes, what criteria and validation methods should be employed to evaluate the relative strength and reliability of alternative processes for establishing accurate and predictive credit profiles? What relevant evaluative information already exists?

6. Which current or potential new automated processes would be likely to prove most beneficial for mortgagees, mortgagors, and FHA and why? For example, such benefits could include acceleration of origination and improving the quality of underwriting.

7. How would automated processes affect the potential for fraud or misrepresentation during underwriting?

8. If no single automated process was universally feasible, how might HUD ensure equal treatment of equals processed by differing HUD-provided systems?

9. Is there any reason the Secretary should not limit the pilot program to first-time homebuyers?

10. What is the total size and characteristics of borrowers who potentially would use automated

[1] Note that HERA inadvertently established two sections 257 of the National Housing Act. Section 1402 of HERA also added a new section 257 to the National Housing Act, which established the HOPE for Homeowners Program. The Helping Families Save Their Homes Act of 2009 (Pub. L. 111–22, approved May 20, 2009) addressed this issue through a technical correction designating the HERA pilot program as a new section 258 to the National Housing Act.

histories? What are the implications of these characteristics for design and implementation of automated processes?

11. How should the pilot program be structured with respect to geographic coverage, to ensure representative results? What criteria should be employed in selecting pilot locations and participants? What control groups could be used to support a rigorous evaluation?

12. What additional concerns should be considered in structuring the pilot program and evaluation design to ensure a successful pilot evaluation?

13. What safeguards to ensure compliance with applicable fair lending and nondiscrimination requirements would be most effective?

14. What are any statutory or regulatory obstacles to automated processes?

As noted in the **ADDRESSES** section of this notice, all public comments submitted to HUD will be made available for public inspection. Accordingly, commenters are cautioned against submitting proprietary or confidential information not intended for public disclosure. All information solicited in this notice is solely for the purpose of assisting HUD in designing the pilot program, and does not imply that HUD will be contracting with any provider of automated credit evaluation services for purposes of the pilot program. Comments must be submitted by the deadline date established in the **DATES** section of this notice, and in accordance with the instructions contained in the **ADDRESSES** section of this notice.

HUD will consider all public comments in the development of the pilot program. HUD will announce the establishment of the pilot program in a follow-up **Federal Register** notice that is based on the consideration of these comments.

Dated: July 21, 2009.

**David H. Stevens,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. E9–17854 Filed 7–27–09; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R8–FHC–2009–N152; 81331–1334–8TWG–W4]**

### Trinity Adaptive Management Working Group

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** The Trinity Adaptive Management Working Group (TAMWG) affords stakeholders the opportunity to give policy, management, and technical input concerning Trinity River (California) restoration efforts to the Trinity Management Council (TMC). The TMC interprets and recommends policy, coordinates and reviews management actions, and provides organizational budget oversight. This notice announces a TAMWG meeting, which is open to the public.

**DATES:** TAMWG will meet from 9 a.m. to 5 p.m. on Thursday, September 10, 2009.

**ADDRESSES:** The meeting will be held at the Trinity County Library, 211 Main St., Weaverville, CA 96093.

**FOR FURTHER INFORMATION CONTACT:** *Meeting information:* Randy A. Brown, TAMWG Designated Federal Officer, U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, CA 95521; telephone: (707) 822–7201. *Trinity River Restoration Program (TRRP) information:* Mike Hamman, Executive Director, Trinity River Restoration Program, P.O. Box 1300, 1313 South Main Street, Weaverville, CA 96093; telephone: (530) 623–1800; e-mail: *mhamman@mp.usbr.gov.*

**SUPPLEMENTARY INFORMATION:** Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), this notice announces a meeting of the TAMWG. The meeting will include discussion of the following topics:

- Perspectives from Grand Canyon and Platte River restoration;
- Status of TAMWG recommendations;
- Progress towards a Request for Proposal (RFP) based science program;
- Channel rehabilitation program;
- Evaluation of hatchery goals and practices;
- Fish population trends; and
- Watershed work program.

Completion of the agenda is dependent on the amount of time each item takes. The meeting could end early if the agenda has been completed.

Dated: July 22, 2009.

**Randy A. Brown,**

*Designated Federal Officer, Arcata Fish and Wildlife Office, Arcata, CA.*

[FR Doc. E9–17888 Filed 7–27–09; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS-R9-IA-2009-N143; 96300-1671-0000-P5]**

### Receipt of Applications for Permit

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of applications for permit.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications for permits to conduct certain activities with endangered species. The Endangered Species Act requires that we invite public comment on these permit applications.

**DATES:** Written data, comments or requests must be received by August 27, 2009.

**ADDRESSES:** Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, Virginia 22203; fax 703/358-2281.

**FOR FURTHER INFORMATION CONTACT:** Division of Management Authority, telephone 703/358-2104.

**SUPPLEMENTARY INFORMATION:**

#### Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Submit your written data, comments, or requests for copies of the complete applications to the address shown in **ADDRESSES**.

Applicant: Hidden Harbor Marine Environmental Project, dba The Turtle Hospital, Marathon, FL, PRT-216464

The applicant requests a permit to import one hawksbill sea turtle (*Eretmochelys imbricata*) of unknown sex that was found injured in the waters of the Netherlands Antilles for the purpose of enhancement of the survival of the species.

Applicant: U.S. Fish and Wildlife Service, Cheyenne, WY, PRT-217648

The applicant requests a permit to export biological samples from the Wyoming toad (*Bufo hemiophrys baxteri*) collected from captive-born specimens, for the purpose of scientific research.

Applicant: Philadelphia Zoo, Philadelphia, PA, PRT-218607

The applicant requests a permit to import one captive-born snow leopard (Uncia uncia) from the Toronto Zoo, Ontario, Canada, for the purpose of enhancement of the survival of the species.

Applicant: Erie Zoo, Erie, PA, PRT-210111

The applicant requests a permit to import one captive-born Amur leopard (*Panthera pardus orientalis*) for the purpose of enhancement of the survival of the species through captive breeding and zoological display.

Applicant: Fort Wayne Zoological Society, Fort Wayne, IN, PRT-217321

The applicant requests a permit to import a captive-born female silvery Javan gibbon (*Hylobates* moloch) from the Belfast Zoo, Belfast, United Kingdom, for the purpose of enhancement of the survival of the species through captive breeding, public education and behavioral observations.

Applicant: Hollywood Animals, Inc., Los Angeles, CA, PRT-064209, PRT-107740, PRT-107741 and PRT-107742

The applicant requests re-issuance of permits to re-export and re-import one male and three female captive-born tigers (*Panthera tigris*) to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: PRT-064209, Katrina/Katie; PRT-107740, Kipling; PRT-107741, Kismet; and PRT-107742, Shickha. This notification covers activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

Applicant: Ferdinand and Anton Fercos-Hantig, Las Vegas, NV, PRT-809334, PRT-114454, and PRT-206853

The applicant requests permits to export/re-export and re-import three female captive-born tigers (*Panthera tigris*) to worldwide locations for the purpose of enhancement of the species through conservation education. The permit numbers and animals are: New – PRT-206853, Allaya; Re-issue – PRT-809334, Sarina; PRT-114454, Dora. This notification covers activities to be conducted by the applicant over a three-year period and the import of any potential progeny born while overseas.

The following applicants request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Earl E. Wismer, Bethlehem, PA, PRT-206026

Applicant: Michael C. Higgins, Morrison, CO, PRT-211919

Applicant: David J. Beck, Jr., Houston, TX, PRT-212209

Applicant: Sassan K. Moghadam, Norman, OK, PRT-212751

Applicant: Patrick D. McCown, New Castle, CO, PRT-215979

Applicant: John C. Sigler, Dover, DE, PRT-217091

Applicant: Larry D. Bernhardt, McAlester, OK, PRT-217132

Applicant: Christopher W. LaBelle, Macomb Township, MI, PRT-217190

Applicant: Jon L. Blocker, Bend, OR, PRT-219116

Applicant: Pamela M. Cooper, Leitchfield, KY, PRT-219123

Dated: July 17, 2009,

**Lisa J. Lierheimer,**

*Senior Permit Biologist, Branch of Permits, Division of Management Authority.*

[FR Doc. E9–17904 Filed 7–27–09; 8:45 am]

BILLING CODE 4310–55–S

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice (09–069)]**

### 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.

**DATES:** Wednesday, August 12, 2009, 1 p.m.–5 p.m.

**ADDRESSES:** Ronald Reagan Building and International Trade Center Amphitheater, 1300 Pennsylvania Avenue, NW., Washington, DC 20004.

**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:

- Committee Deliberations
  - Discussion of Final Options
  - Discussion of Final Report
  - Close-out Activities

**P. Diane Rausch,**

*Advisory Committee Management Officer, National Aeronautics and Space Administration.*

[FR Doc. E9–17979 Filed 7–27–09; 8:45 am]

BILLING CODE 7510–13–P

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice.

**SUMMARY:** NARA is giving public notice that the agency has submitted to OMB for approval the information collections described in this notice. The public is invited to comment on the proposed information collections pursuant to the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted to OMB at the address below on or before August 27, 2009 to be assured of consideration.

**ADDRESSES:** Send comments to Mr. Nicholas A. Fraser, Desk Officer for NARA, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5167; or electronically mailed to *Nicholas_A._Fraser@omb.eop.gov*.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301–837–1694 or fax number 301–713–7409.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995

(Pub. L. 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. NARA published a notice of proposed collection for this information collection on May 4, 2009 (74 FR 20504 and 20505). No comments were received. NARA has submitted the described information collections to OMB for approval.

In response to this notice, comments and suggestions should address one or more of the following points: (a) Whether the proposed information collections are necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (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 the use of information technology; and (e) whether small businesses are affected by this collection. In this notice, NARA is soliciting comments concerning the following information collections:

1. *Title:* Request to Microfilm Records.
*OMB number:* 3095–0017.
*Agency form number:* None.
*Type of review:* Regular.
*Affected public:* Companies and organizations that wish to microfilm archival holdings in the National Archives of the United States or a Presidential library for micropublication.
*Estimated number of respondents:* 2.
*Estimated time per response:* 10 hours.
*Frequency of response:* On occasion (when respondent wishes to request permission to microfilm records).
*Estimated total annual burden hours:* 20
*Abstract:* The information collection is prescribed by 36 CFR 1254.92. The collection is prepared by companies and organizations that wish to microfilm archival holdings with privately-owned equipment. NARA uses the information to determine whether the request meets the criteria in 36 CFR 1254.94, to evaluate the records for filming, and to schedule use of the limited space available for filming.

2. *Title:* National Archives and Records Administration Class Evaluation Forms.
*OMB number:* 3095–0023.
*Agency form number:* NA Form 2019.
*Type of review:* Regular.
*Affected public:* Individuals or households, Business or other for-profit, Nonprofit organizations and institutions, Federal, state, local, or tribal government agencies.
*Estimated number of respondents:* 6,830.
*Estimated time per response:* 5 minutes.
*Frequency of response:* On occasion (when respondent takes NARA sponsored training classes).
*Estimated total annual burden hours:* 569 hours.
*Abstract:* The information collection allows uniform measurement of customer satisfaction with NARA training courses and workshops. NARA distributes the approved form to the course coordinators on diskette for customization of selected elements, shown as shaded areas on the form submitted for clearance.

3. *Title:* Request to film, photograph, or videotape at a NARA facility for news purposes.
*OMB number:* 3095–0040.
*Agency form number:* None.
*Type of review:* Regular.
*Affected public:* Business or other for-profit, not-for-profit institutions.
*Estimated number of respondents:* 660.
*Estimated time per response:* 10 minutes.
*Frequency of response:* On occasion.
*Estimated total annual burden hours:* 110
*Abstract:* The information collection is prescribed by 36 CFR 1280.48. The collection is prepared by organizations that wish to film, photograph, or videotape on NARA property for news purposes. NARA needs the information to determine if the request complies with NARA's regulation, to ensure protections of archival holdings, and to schedule the filming appointment.

4. *Title:* Request to use NARA facilities for events.
*OMB number:* 3095–0043.
*Agency form number:* NA 16008.
*Type of review:* Regular.
*Affected public:* Not-for-profit institutions, individuals or households, business or other for-profit, Federal government.
*Estimated number of respondents:* 22.
*Estimated time per response:* 30 minutes.
*Frequency of response:* On occasion.
*Estimated total annual burden hours:* 11.
*Abstract:* The information collection is prescribed by 36 CFR 1280.80. The collection is prepared by organizations that wish to use NARA public areas for an event. NARA uses the information to determine whether or not we can accommodate the request and to ensure that the proposed event complies with NARA regulations.

5. *Title:* Independent Researcher Listing Application.
*OMB number:* 3095–0054.
*Agency form numbers:* NA Form 14115.
*Type of review:* Regular.
*Affected public:* Individuals or households.
*Estimated number of respondents:* 433.
*Estimated time per response:* 10 minutes.
*Frequency of response:* On occasion.
*Estimated total annual burden hours:* 65.
*Abstract:* In the past, the National Archives has made use of various lists of independent researchers who perform freelance research for hire in the Washington, DC, area. We have sent these lists upon request to researchers who could not travel to the metropolitan area to conduct their own research. To better accommodate both the public and NARA staff, the Customer Services Division (NWCC) of the National Archives maintains a listing of independent researchers for the public. All interested independent researchers provide their contact information via this form. Collecting contact and other key information from each independent researcher and providing such information to the public when deemed appropriate will only increase business. This form is not a burden in any way to any independent researcher who voluntarily submits a completed form. Inclusion on the list will not be viewed or advertised as an endorsement by the National Archives and Records Administration (NARA). The listing is compiled and disseminated as a service to the public.

Dated: July 23, 2009.

**Martha Morphy,**

*Assistant Archivist for Information Services.*

[FR Doc. E9–18067 Filed 7–27–09; 8:45 am]

BILLING CODE 7515–01–P

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that one meeting of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 as follows (ending time is approximate):

*AccessAbility (application review):* August 27, 2009 by teleconference. This meeting, from 2 p.m. to 3:30 p.m., will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 28, 2008, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202–682–5691.

Dated: July 23, 2009.

**Kathy Plowitz-Worden,**

*Panel Coordinator, Panel Operations, National Endowment for the Arts.*

[FR Doc. E9–17885 Filed 7–27–09; 8:45 am]

BILLING CODE 7537–01–P

## NATIONAL SCIENCE FOUNDATION

### National Science Board; Sunshine Act Meetings; Notice

The National Science Board, pursuant to NSF regulations (45 CFR Part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of National Science Board business and other matters specified, as follows:

**AGENCY HOLDING MEETING:** National Science Board.

**DATE AND TIME:** Wednesday, August 5, 2009, at 8:30 a.m.; and Thursday, August 6, 2009 at 8 a.m.

**PLACE:** National Science Foundation, 4201 Wilson Blvd., Rooms 1235 and 1295, Arlington, VA 22230. All visitors must report to the NSF visitor desk at the 9th and N. Stuart Streets entrance to receive a visitor's badge. Public visitors must arrange for a visitor's badge in advance. Call 703–292–7000 to request your badge, which will be ready for pick-up at the visitor's desk on the day of the meeting.

**STATUS:** Some portions open, some portions closed.

**Open Sessions**

August 5, 2009
8:30 a.m.–8:35 a.m.
8:35 a.m.–10:45 a.m.
8:45 a.m.–9:45 a.m.
9:45 a.m.–10:45 a.m.
11 a.m.–11:15 a.m.
11:15 a.m.–11:30 a.m.
August 6, 2009
8 a.m.–9 a.m.
9:15 a.m.–10:15 a.m.
1 p.m.–3 p.m.

**Closed Sessions**

August 5, 2009
11 a.m.–12 p.m.
11:30 a.m.–12 p.m.
1 p.m.–3 p.m.
3:15 p.m.–5:15 p.m.
August 6, 2009
9 a.m.–9:15 a.m.
10:15 a.m.–10:45 a.m.
10:45 a.m.–11 a.m.
11 a.m.–11:45 a.m.

**AGENCY CONTACT:** Dr. Robert E. Webber, *rwebber@nsf.gov,* (703) 292–7000, *http://www.nsf.gov/nsb/.*

**MATTERS TO BE DISCUSSED:**

**Wednesday, August 5, 2009**

*Open Session: 8:30 a.m.–8:35 a.m., Room 1235*
- Chairman's Remarks

**Committee on Programs and Plans (CPP)**

*Open Session: 8:35 a.m.–10:45 a.m., Room 1235*
- Approval of May 4, 2009 and May 27, 2009 CPP Minutes
- Committee Chairman's Remarks
- Report from Task Force on Sustainable Energy

**CPP Subcommittee on Polar Issues (SOPI)**

- SOPI Chairman's Remarks
- Director's Report—Office of Polar Programs
- Developments in Regional Climate Modeling
- Restrictions on Fuels for Southern Ocean Shipping
- *NSB Information Item:* National Ecological Observatory Network (NEON)
- *NSB Information Item:* NSF Data Policy Discussion
- *NSB Information Item:* Management and Operation of the Gemini Observatory

**Committee on Programs and Plans (CPP)**

*Closed Session: 11 a.m.–12 p.m., Room 1235*
- Committee Chairman's Remarks
- *NSB Information Item:* Operations for future coherent light source R&D
- *NSB Action Item:* Cooperative Agreement for the Acquisition of a 21 Tesla Superconducting Magnet and its Incorporation into an Advanced Fourier Transform Ion Cyclotron Resonance Mass Spectrometer

**Committee on Programs and Plans (CPP)**

*Closed Session: 1 p.m.–3 p.m., Room 1235*
- *NSB Information Item:* Status of Track-2 Award
- *NSB Action Item:* TeraGrid Extension: Bridging to XD
- *NSB Action Item:* George E. Brown, Jr., Network for Earthquake Engineering Simulation (NEES) Operations

**Committee on Programs and Plans (CPP)**

*Closed Session: 3:15 p.m.–5:15 p.m., Room 1235*
- *NSB Action Item:* Preliminary Design for the Deep Underground Science and Engineering Laboratory (DUSEL)
- *NSB Action Item:* Approval of Construction Funding for the Advanced Technology Solar Telescope (ATST)

**Committee on Education and Human Resources (CEH)**

*Open Session: 8:45 a.m.–9:45 a.m., Room 1295*
- Approval of May 2009 Minutes
- Update on the Next Generation of STEM Innovators Expert Panel Discussion
- STEM Education Grand Challenges
- Other Committee Business

**Committee on Science and Engineering Indicators (SEI)**

*Open Session: 9:45 a.m.–10:45 a.m., Room 1295*
- Approval of May Minutes
- Committee Chairman's Remarks
- Discussion of Orange Book
- Discussion of *Indicators* Digest
- Discussion of Companion Piece

**Executive Committee**

*Open Session: 11 a.m.–11:15 a.m., Room 1295*
- Approval of Minutes for the May 2009 Meeting
- Executive Committee Chairman's Remarks
- Approval of Closed Session Agenda Items memorandum for September 23–24, 2009 meeting
- Updates or New Business from Committee Members

**Task Force on the NSB 60th Anniversary**

*Open Session: 11:15 a.m.–11:30 a.m., Room 1295*
- Approval of Minutes for the May 13, 2009 Meeting
- Task Force Chairman's Remarks

- Further Discussion and Comments Relating to NSB 60th Anniversary

***ad hoc* Committee on Nominations for NSB Class of 2010–2016**

*Closed Session: 11:30 a.m.–12 p.m., Room 1295*

- Approval of Minutes for the May 13, 2009 Meeting
- Approval of Minutes for the July 28, 2009 Teleconference
- Nominations Committee Acting Chairman's Remarks
- Discussion of Nomination Packets

**Thursday, August 6, 2009**

**Committee on Audit and Oversight (A&O)**

*Open Session: 8 a.m.–9 a.m., Room 1235*

- Approval of Minutes of the May 14, 2009 Meeting
- Committee Chairman's Opening Remarks
- Human Resource Management at the National Science Foundation
- Chief Financial Officer's Update including ARRA status update

**Committee on Audit and Oversight (A&O)**

*Closed Session: 9 a.m.–9:15 a.m., Room 1235*

- FY 2011 Budget for OIG

**Committee on Strategy and Budget (CSB)**

*Open Session: 9:15 a.m.–10:15 a.m., Room 1235*

- Approval of Minutes:
  - May 13–14, 2009 Provisional Minutes
  - June 26, 2009 Teleconference Provisional Minutes
  - July 24, 2009 Teleconference Provisional Minutes
- Committee Chairman's Remarks
- Subcommittee on Facilities (SCF) Update
- NSF Budget Discussion
  - FY 2010 Budget update
  - FY 2009 Budget and ARRA update
- Other Committee Business

**Committee on Strategy and Budget (CSB)**

*Closed Session: 10:15 a.m.–10:45 a.m., Room 1235*

- Discussion of the FY 2011 OMB Budget Submission

**Plenary Executive Closed**

*Closed Session: 10:45 a.m.–11 a.m., Room 1235*

- Approval of Plenary Executive Closed Minutes, May 2009
- Approval of Nominations Committee Recommendations

**Plenary Closed**

*Closed Session: 11 a.m.–11:45 a.m., Room 1235*

- Approval of Plenary Closed Minutes, May 2009
- Awards and Agreements
- Closed Committee Reports

**Plenary Open**

*Open Session: 1 p.m.–3 p.m., Room 1235*

- Director's Award for Collaborative Integration
- Approval of Plenary Open Minutes, May 2009
- Chairman's Report
- Director's Report
- Open Committee Reports

**Ann Ferrante,**

*Technical Writer/Editor.*

[FR Doc. E9–17893 Filed 7–27–09; 8:45 am]

BILLING CODE 7555–01–P

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## NATIONAL SCIENCE FOUNDATION (NSF)

### National Science Board; Sunshine Act Meetings; Notice

The National Science Board, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of National Science Board business and other matters specified, as follows:

**AGENCY HOLDING MEETING:** National Science Board.

**DATE AND TIME:** Wednesday, August 5, 2009, at 8:30 a.m.; and Thursday, August 6, 2009 at 8 a.m.

**PLACE:** National Science Foundation, 4201 Wilson Blvd., Rooms 1235 and 1295, Arlington, VA 22230. All visitors must report to the NSF visitor desk at the 9th and N. Stuart Streets entrance to receive a visitor's badge. Public visitors must arrange for a visitor's badge in advance. Call 703–292–7000 to request your badge, which will be ready for pick-up at the visitor's desk on the day of the meeting.

**STATUS:** Some portions open, some portions closed.

*Open Sessions:*

August 5, 2009
8:30 a.m.–8:35 a.m.
8:35 a.m.–10:45 a.m.
8:45 a.m.–9:45 a.m.
9:45 a.m.–10:45 a.m.
11 a.m.–11:15 a.m.
11:15 a.m.–11:30 a.m.
August 6, 2009
8 a.m.–9 a.m.
9:15 a.m.–10:15 a.m.
1 p.m.–3 p.m.

*Closed Sessions:*

August 5, 2009
11 a.m.–12 p.m.
11:30 a.m.–12 p.m.
1 p.m.–3 p.m.
3:15 p.m.–5:15 p.m.
August 6, 2009
9 a.m.–9:15 a.m.
10:15 a.m.–10:45 a.m.
10:45 a.m.–11 a.m.
11 a.m.–11:45 a.m.

**AGENCY CONTACT:** Dr. Robert E. Webber, *rwebber@nsf.gov,* (703) 292–7000, *http://www.nsf.gov/nsb/.*

**MATTERS TO BE DISCUSSED:**

*Wednesday, August 5, 2009*

Open Session: 8:30 a.m.–8:35 a.m., Room 1235

- Chairman's Remarks.

Committee on Programs and Plans (CPP)

Open Session: 8:35 a.m.–10:45 a.m., Room 1235

- Approval of May 4, 2009 and May 27, 2009 CPP Minutes;
- Committee Chairman's Remarks;
- Report from Task Force on Sustainable Energy.
- CPP Subcommittee on Polar Issues (SOPI)
  - SOPI Chairman's Remarks;
  - Director's Report—Office of Polar Programs;
  - Developments in Regional Climate Modeling;
  - Restrictions on Fuels for Southern Ocean Shipping.
- *NSB Information Item:* National Ecological Observatory Network (NEON);
- *NSB Information Item:* NSF Data Policy Discussion;
- *NSB Information Item:* Management and Operation of the Gemini Observatory.

Committee on Programs and Plans (CPP)

Closed Session: 11:00 a.m.–12 p.m., Room 1235

- Committee Chairman's Remarks;
- *NSB Information Item:* Operations for future coherent light source R&D.

Committee on Programs and Plans (CPP)

Closed Session: 1 p.m.–3 p.m., Room 1235

- *NSB Information Item:* Status of Track-2 Award.
- *NSB Action Item:* TeraGrid Extension: Bridging to XD.
- *NSB Action Item:* George E. Brown, Jr., Network for Earthquake Engineering Simulation (NEES) Operations.

Committee on Programs and Plans (CPP)

Closed Session: 3:15 p.m.–5:15 p.m., Room 1235

- *NSB Action Item:* Preliminary Design for the Deep Underground Science and Engineering Laboratory (DUSEL)
- *NSB Action Item:* Approval of Construction Funding for the Advanced Technology Solar Telescope (ATST)

Committee on Education and Human Resources (CEH)

Open Session: 8:45 a.m.–9:45 a.m., Room 1295

- Approval of May 2009 Minutes;
- Update on the Next Generation of STEM Innovators Expert Panel Discussion;
- STEM Education Grand Challenges;
- Other Committee Business.

Committee on Science and Engineering Indicators (SEI)

Open Session: 9:45 a.m.–10:45 a.m., Room 1295

- Approval of May Minutes;
- Committee Chairman's Remarks;
- Discussion of Orange Book;
- Discussion of *Indicators* Digest;
- Discussion of Companion Piece.

Executive Committee

Open Session: 11 a.m.–11:15 a.m., Room 1295

- Approval of Minutes for the May 2009 Meeting;
- Executive Committee Chairman's Remarks;
- Approval of Closed Session Agenda Items memorandum for September 23–24, 2009 meeting;
- Updates or New Business from Committee Members.

Task Force on the NSB 60th Anniversary

Open Session: 11:15 a.m.–11:30 a.m., Room 1295

- Approval of Minutes for the May 13, 2009 Meeting;
- Task Force Chairman's Remarks;
- Further Discussion and Comments Relating to NSB 60th Anniversary.

*ad hoc* Committee on Nominations for NSB Class of 2010–2016

Closed Session: 11:30 a.m.–12 p.m., Room 1295

- Approval of Minutes for the May 13, 2009 Meeting;
- Approval of Minutes for the July 28, 2009 Teleconference;
- Nominations Committee Acting Chairman's Remarks;
- Discussion of Nomination Packets.

*Thursday, August 6, 2009*

Committee on Audit and Oversight (A&O)

Open Session: 8 a.m.–9:00 a.m., Room 1235

- Approval of Minutes of the May 14, 2009 Meeting.
- Committee Chairman's Opening Remarks.
- Human Resource Management at the National Science Foundation;
- Chief Financial Officer's Update including ARRA status update.

Committee on Audit and Oversight (A&O)

Closed Session: 9:00 a.m.–9:15 a.m., Room 1235

- FY 2011 Budget for OIG.

Committee on Strategy and Budget (CSB)

Open Session: 9:15 a.m.–10:15 a.m., Room 1235

- Approval of Minutes:
  - May 13–14, 2009 Provisional Minutes;
  - June 26, 2009 Teleconference Provisional Minutes;
  - July 24, 2009 Teleconference Provisional Minutes.
- Committee Chairman's Remarks.
- Subcommittee on Facilities (SCF) Update.
- NSF Budget Discussion.
  - FY 2010 Budget update;
  - FY 2009 Budget and ARRA update.
- Other Committee Business.

Committee on Strategy and Budget (CSB)

Closed Session: 10:15 a.m.–10:45 a.m., Room 1235

- Discussion of the FY 2011 OMB Budget Submission.

Plenary Executive Closed

Closed Session: 10:45 a.m.–11:00 a.m., Room 1235

- Approval of Plenary Executive Closed Minutes, May 2009;
- Approval of Nominations Committee Recommendations.

Plenary Closed

Closed Session: 11:00 a.m.–11:45 a.m., Room 1235

- Approval of Plenary Closed Minutes, May 2009;
- Awards and Agreements;
- Closed Committee Reports.

Plenary Open

Open Session: 1 p.m.–3 p.m., Room 1235

- Director's Award for Collaborative Integration;
- Approval of Plenary Open Minutes, May 2009;
- Chairman's Report;
- Director's Report;
- Open Committee Reports.

**Ann Ferrante,**

*Technical Writer/Editor.*

[FR Doc. E9–17999 Filed 7–24–09; 4:15 pm]

BILLING CODE 7555–01–P

## NUCLEAR REGULATORY COMMISSION

**[NRC–2009–0324]**

## Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

### I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 2, 2009 to July 15, 2009. The last biweekly notice was published on July 14, 2009 (74 FR 34044).

### Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 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. The basis for this

proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch (RDB), 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. Written comments may also be faxed to the RDB at 301–492–3446. 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 O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 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/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139), The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor should 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 Meta-System Help Desk, which is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The Meta-System Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MSHD.Resource@nrc.gov*.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the request and/or petition 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 which is available for public inspection 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 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 at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

*Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Maricopa County, Arizona*

*Date of Amendment Request:* May 28, 2009.

*Description of Amendment Request:* The amendments would delete those portions of the Technical Specifications (TSs) for Palo Verde Nuclear Generating Station, Units 1, 2, and 3 that are superseded by the new requirements regarding working hours for nuclear plant staff in 10 CFR part 26, subpart I. This change is consistent with U.S. Nuclear Regulatory Commission (NRC)-approved Technical Specification Task Force (TSTF) Improved Standard Technical Specification change traveler, TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR Part 26.''

The NRC issued a ''Notice of Availability of Model Safety Evaluation, Model No Significant Hazards Determination, and Model Application for Licensees That Wish to Adopt TSTF–511, Revision 0, 'Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26,' '' in the **Federal Register** on December 30, 2008 (73 FR 79923). In its application dated May 28, 2009, the licensee affirmed the applicability of the model no significant hazards consideration.

*Basis for proposed no significant hazards consideration determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

*Criterion 1:* The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Removal of the Technical Specification requirements will be performed concurrent with or after the implementation of the 10 CFR Part 26, Subpart I, requirements. In the event NRC approval for the requested amendment is not obtained before October 1, 2009, the amendment shall be implemented

within 30 days of NRC approval and APS [Arizona Public Service Company] shall comply with the new 10 CFR 26, Subpart I, requirements and current Technical Specifications until the approved TS changes are implemented. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated. Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

*Criterion 2:* The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident from Any Accident Previously Evaluated

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR Part 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and, thereby, create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

*Criterion 3:* The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change removes Technical Specification restrictions on working hours for personnel who perform safety related functions. The Technical Specification restrictions are superseded by the worker fatigue requirements in 10 CFR part 26. The proposed change does not involve any physical changes to the plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition. Removal of plant-specific Technical Specification administrative requirements will not reduce a margin of safety because the requirements in 10 CFR part 26 are adequate to ensure that worker fatigue is managed. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on that review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

*Attorney for licensee:* Michael G. Green, Senior Regulatory Counsel, Pinnacle West Capital Corporation, P.O. Box 52034, Mail Station 8695, Phoenix, Arizona 85072–2034.

*NRC Branch Chief:* Michael T. Markley.

*FirstEnergy Nuclear Operating Company, et al., Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio*

*Date of Amendment Request:* June 2, 2009.

*Description of Amendment Request:* The proposed amendment would revise the Davis-Besse Nuclear Power Station, Unit No. 1 (DBNPS) Technical Specifications (TS) 3.3.9, ''Source Range Neutron Flux,'' and TS 3.9.2, ''Nuclear Instrumentation,'' to exclude testing the source range neutron flux instrument channel preamplifier from the CHANNEL CALIBRATION requirements of the source range neutron flux instrument channels.

*Basis for Proposed No Significant Hazards Consideration Determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:* No.

The proposed TS change excludes the source range neutron flux instrument channel preamplifier from the CHANNEL CALIBRATION requirements for the source range neutron flux instrument channel. The source range neutron flux instrument channels are not involved in accident mitigation. The failure of a source range neutron flux channel does not initiate an accident or transient event. The proposed TS change does not alter the design or function of the source range neutron flux instrument channels, since no physical changes are being made to the plant. The availability of additional equipment to provide source range indication for comparison with the source range neutron flux instrument channels provides assurance of channel operation.

Therefore, the proposed TS 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?

*Response:* No.

The proposed TS change excludes the source range neutron flux instrument channel preamplifier from the CHANNEL CALIBRATION requirements for the source range neutron flux instrument channel. Based upon the current channel testing performed and the availability of alternate source range neutron flux indication for comparison, the operation of the source range neutron flux instrument channel is assured. The proposed TS change does not introduce any failure mechanisms of a different type than those previously evaluated since no physical changes to the plant are being made. No new or different equipment is being installed, and no installed equipment is being operated in a different manner.

Therefore, the proposed TS change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

*Response:* No.

The proposed TS change excludes the source range neutron flux instrument channel preamplifier from the CHANNEL CALIBRATION requirements for the source range neutron flux instrument channel. Based upon the current channel testing performed and the availability of alternate source range neutron flux indication for comparison, the operation of the source range neutron flux instrument channel is assured. The proposed TS change does not alter the design or function of the source range neutron flux instrument channels since no physical changes are being made to the plant.

Therefore, the proposed TS change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for licensee:* David W. Jenkins, Attorney, FirstEnergy Corporation, Mail Stop A–GO–15, 76 South Main Street, Akron, OH 44308.

*NRC Branch Chief:* Stephen J. Campbell.

*Northern States Power Company, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota*

*Date of Amendment Request:* May 29, 2009.

*Description of Amendment Request:* The proposed amendment would revise

Table 3.3.6.1–1, ''Primary Containment Isolation Instrumentation,'' of the Technical Specifications (TS) by adding operational Mode 3, in addition to Modes 1 and 2 currently specified, to the Standby Liquid Control (SLC) System initiation applicability under the Reactor Water Cleanup (RWCU) System. This change would have the effect of aligning the required modes of applicability for the RWCU System isolation function to SLC System initiation. This is correction of a discrepancy that exists between this table and Specification 3.1.7, ''Standby Liquid Control (SLC) System,'' which specifies that the applicability of the SLC System is for Modes 1, 2, and 3.

*Basis for Proposed No Significant Hazards Consideration Determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:* No.

The proposed change to the applicability of this function does not change the actual conditions, operating configurations, or minimum amount of operating equipment assumed in the safety analysis for accident mitigation.

The proposed change does not require any physical change to any plant systems, structures, or components nor does it require any change in systems or plant operations. The proposed change does not require any change in safety analysis methods or results. The SLC System is not an accident initiator. The proposed change to align the required modes of applicability for the RWCU isolation function on SLC initiation provide consistency with the previously NRC approved full-scope alternative source term (AST) analysis [Amendment No. 148] and hence do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

*Response:* No.

There are no hardware changes nor are there any changes in the method by which any plant systems perform a safety function. This request does not affect the normal method of plant operation.

The proposed change does not introduce new equipment, which could create a new or different kind of accident. No new equipment failure modes are created. No new accident scenarios failure mechanisms, or limiting single failures are introduced as a result of this request. Therefore, the implementation of the proposed change will not create a possibility for an accident of a new or different type than those previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

*Response:* No.

There will be no change to the manner in which the SLC System or the RWCU System is operated. This change aligns the requirements in one part of the TS with requirements imposed in another portion of the TS. No new requirements are introduced. The proposed change improves the TS by removing an internal inconsistency and as such does not reduce or involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for Licensee:* Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

*NRC Branch Chief:* Lois M. James.

*Tennessee Valley Authority, Docket Nos. 50–259, 50–260, and 50–296, Browns Ferry Nuclear Plant, Units 1, 2 and 3, Limestone County, Alabama*

*Date of Amendment Request:* April 24, 2009 (TS–464).

*Description of Amendment Request:* The proposed changes would revise the Technical Specifications (TS) Bases sections 3.1.6, ''Rod Pattern Control,'' and 3.3.2.1, ''Control Rod Block Instrumentation'' to allow the Browns Ferry units to reference in the improved control rod banked position withdrawal sequence (BPWS) when performing a reactor shutdown. In addition, the proposed changes would add a footnote to TS Table 3.3.2.1–1, ''Control Rod Block Instrumentation.''

*Basis for Proposed No Significant Hazards Consideration Determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. Consistent with the consolidated line item improvement process (CLIIP) the licensee referenced the no significant hazards consideration published on May 23, 2007 (72 FR 29004) which is provided below:

*Criterion 1:* The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed changes modify the TS to allow the use of the improved banked position withdrawal sequence (BPWS) during shutdowns if the conditions of NEDO–33091–A, Revision 2, ''Improved BPWS Control Rod Insertion Process,'' July 2004, have been satisfied. The staff finds that the licensee's justifications to support the specific TS changes are consistent with the approved topical report and TSTF–476, Revision 1. Since the change only involves changes in control rod sequencing, the probability of an accident previously evaluated is not significantly increased, if at all. The consequences of an accident after adopting TSTF–476 are no different than the consequences of an accident prior to adopting TSTF–476. Therefore, the consequences of an accident previously evaluated are not significantly affected by this change. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

*Criterion 2:* The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated.

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 evaluated. The control rod drop accident (CRDA) is the design basis accident for the subject TS changes. This change does not create the possibility of a new or different kind of accident from an accident previously evaluated.

*Criterion 3:* The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change, TSTF–476, Revision 1, incorporates the improved BPWS, previously approved in NEDO–33091–A, into the improved TS. The control rod drop accident (CRDA) is the design basis accident for the subject TS changes. In order to minimize the impact of a CRDA, the BPWS process was developed to minimize control rod reactivity worth for BWR plants. The proposed improved BPWS further simplifies the control rod insertion process, and in order to evaluate it, the staff followed the guidelines of Standard Review Plan Section 15.4.9, and referred to General Design Criterion 28 of Appendix A to 10 CFR Part 50 as its regulatory requirement. The TSTF stated the improved BPWS provides the following benefits: (1) Allows the plant to reach the all-rods-in condition prior to significant reactor cool down, which reduces the potential for re-criticality as the reactor cools down; (2) reduces the potential for an operator reactivity control error by reducing the total number of control rod manipulations; (3) minimizes the need for manual scrams during plant shutdowns, resulting in less wear on control rod drive (CRD) system components and CRD mechanisms; and, (4) eliminates unnecessary control rod manipulations at low power, resulting in less wear on reactor manual control and CRD system components. The addition of procedural requirements and verifications specified in NEDO–33091–A, along with the proper use of the BPWS will prevent a control rod drop accident (CRDA) from occurring while power is below the low power setpoint (LPSP). The net change to the margin of safety is insignificant. Therefore, this change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for Licensee:* General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 11A, Knoxville, Tennessee 37902.

*NRC Branch Chief:* Thomas H. Boyce.

*Union Electric Company, Docket No. 50–483, Callaway Plant, Unit 1, Callaway County, Missouri*

*Date of Amendment Request:* May 4, 2009.

*Description of Amendment Request:* The proposed amendment would delete the working hours restrictions in paragraph d of Technical Specification (TS) 5.2.2, ''Unit Staff.'' The restrictions would be deleted because they are superseded by Title 10 of *Code of Federal Regulations* (CFR) Part 26, Subpart I, consistent with U.S. Nuclear Regulatory Commission (NRC)-approved TS Task Force (TSTF) change traveler TSTF–511, Revision 0, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.''

The NRC issued a ''Notice of Availability of Model Safety Evaluation, Model No Significant Hazards Determination, and Model Application for Licensees That Wish to Adopt TSTF–511, Revision 0, 'Eliminate Working Hour Restriction From TS 5.2.2 To Support Compliance with 10 CFR Part 26' '' in **Federal Register** on December 30, 2008 (73 FR 79923). In its application dated May 4, 2009, the licensee affirmed the applicability of the model no significant hazards consideration.

*Basis for Proposed No Significant Hazards Consideration Determination:* As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

*Criterion 1:* Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

*Response:* No.

The proposed change removes TS restrictions on working hours for personnel who perform safety related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR 26. Removal of the TS requirements will be performed concurrently with the implementation of the 10 CFR 26, subpart I, requirements. The proposed change does not impact the physical configuration or function of plant structures, systems, or components (SSCs) or the manner in which SSCs are operated, maintained, modified, tested, or inspected. Worker fatigue is not an initiator of any accident previously evaluated. Worker fatigue is not an assumption in the consequence mitigation of any accident previously evaluated.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

*Criterion 2:* Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

*Response:* No.

The proposed change removes TS restrictions on working hours for personnel who perform safety related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR 26. Working hours will continue to be controlled in accordance with NRC requirements. The new rule allows for deviations from controls to mitigate or prevent a condition adverse to safety or as necessary to maintain the security of the facility. This ensures that the new rule will not unnecessarily restrict working hours and thereby create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not alter the plant configuration, require new plant equipment to be installed, alter accident analysis assumptions, add any initiators, or affect the function of plant systems or the manner in which systems are operated, maintained, modified, tested, or inspected.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

*Criterion 3:* Does the proposed amendment involve a significant reduction in a margin of safety?

*Response:* No.

The proposed change removes TS restrictions on working hours for personnel who perform safety related functions. The TS restrictions are superseded by the worker fatigue requirements in 10 CFR 26. The proposed change does not involve any physical changes to plant or alter the manner in which plant systems are operated, maintained, modified, tested, or inspected. The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed change will not result in plant operation in a configuration outside the design basis. The proposed change does not adversely affect systems that respond to safely shutdown the plant and to maintain the plant in a safe shutdown condition.

Removal of plant-specific TS administrative requirements will not reduce a margin of safety because the requirements in 10 CFR 26 are adequate to ensure that worker fatigue is managed.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

*Attorney for Licensee:* John O'Neill, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, NW., Washington, DC 20037.

*NRC Branch Chief:* Michael T. Markley.

## Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

*Carolina Power & Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina*

*Date of Amendment Request:* May 29, 2008, as supplemented by letters dated November 14 and December 11, 2008.

*Description of Amendment Request:* The proposed amendment would transition the fire protection program to a performance-based, risk-informed one based on the National Fire Protection Association (NFPA) Standard 805, ''Performance-Based Standard for Fire Protection For Light Water Reactor Generating Plants,'' 2001 Edition, in accordance with 10 CFR 50.48(c). NFPA 805 allows the use of performance-based methods, such as fire modeling, and risk-informed methods, such as Fire Probabilistic Risk Assessment, to demonstrate compliance with the nuclear safety performance criteria.

*Date of Publication of Individual Notice in **Federal Register**:* June 19, 2009 (74 FR 29241).

*Expiration Date of Individual Notice:* August 18, 2009.

*Florida Power Corporation, et al., Docket No. 50–302, Crystal River Unit No. 3 Nuclear Generating Plant, Citrus County, Florida*

*Date of Amendment Request:* June 3, 2008, as supplemented by letters dated November 17, 2008, and April 8 and May 22, 2009.

*Brief Description of Amendment Request:* The proposed amendment would revise the Crystal River Unit 3 (CR–3) Final Safety Analysis Report Sections 5.4.3, ''Structural Design Criteria'' and 5.4.5.3, ''Missile Analysis,'' to include a statement regarding the design of the east wall of the CR–3 Auxiliary Building. The amendment would change the methodology used to qualify the east wall of the Auxiliary Building. The current methodology used the methods in American Concrete Institute (ACI) Standard 318–63, ''Building Code Requirements for Reinforced Concrete,'' June 1963. The proposed methodology is based on ACI 349–97, ''Code Requirements for Nuclear Safety Related Concrete Structures,'' as endorsed by NRC's Standard Review Plan (NUREG 0800), Revision 2—March 2007, Section 3.8.4 ''Other Seismic Category 1 Structures.''

*Date of Publication of Individual Notice in* ***Federal Register****:* June 23, 2008 (74 FR 29732).

*Expiration Date of Individual Notice:* August 24, 2009.

**Notice of Issuance of Amendments to Facility Operating Licenses**

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr.resource@nrc.gov.*

*Carolina Power & Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina*

*Date of Application for Amendment:* February 26, 2009.

*Brief Description of Amendment:* The proposed amendment would delete the Technical Specifications (TS) requirements related to hydrogen recombiners and hydrogen monitors. The proposed TS changes support implementation of the revisions to 10 CFR 50.44, ''Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors,'' which became effective on October 16, 2003. These changes are consistent with Revision 1 of the NRC-approved Technical Specifications Task Force (TSTF) Standard Technical Specification Change Traveler TSTF–447, ''Elimination of Hydrogen Recombiners and Change to Hydrogen and Oxygen Monitors.'' This technical specification improvement was initially made available in the **Federal Register** by the NRC on September 25, 2003 (68 FR 55416).

*Date of Issuance:* July 2, 2009.

*Effective Date:* Effective as of the date of issuance and shall be implemented within 90 days.

*Amendment No.:* 131.

*Renewed Facility Operating License No. NPF–63:* The amendment revises the Technical Specifications and Facility Operating License.

*Date of Initial Notice in* ***Federal Register****:* June 2, 2009 (74 FR 26431). The Commission's related evaluation of the amendment and final NSHC determination are contained in a safety evaluation dated July 2, 2009.

*Public Comments Requested as to Proposed No Significant Hazards Consideration (NSHC):* No.

*Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont*

*Date of Application for Amendment:* February 24, 2009.

*Brief Description of Amendment:* The proposed amendment would revise the Technical Specification (TS) Surveillance Requirement (SR) that governs operability testing of the pressure suppression chamber-drywell vacuum breakers to incorporate the SR contained within the Standard Technical Specifications (STS), NUREG–1433 and delete the SR that requires inspection of the pressure suppression chamber-drywell vacuum breakers. This requirement is replaced with the STS SR 3.6.1.8.2 to perform operability testing within 12 hours after the discharge of steam into the suppression chamber from the safety/relief valves or following operation that causes any of the vacuum breakers to open.

*Date of Issuance:* July 6, 2009.

*Effective Date:* As of the date of issuance, and shall be implemented within 60 days.

*Amendment No.:* 238.

*Facility Operating License No. DPR–28:* Amendment revised the License and Technical Specifications.

*Date of Initial Notice in* ***Federal Register****:* April 7, 2009 (74 FR 15770).

*No Significant Hazards Consideration Comments Received:* No.

*Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont*

*Date of Application for Amendment:* September 22, 2008, as supplemented by letter dated October 31, 2008.

*Brief Description of Amendment:* The proposed amendment would relocate the contents of the Vermont Yankee (VY) Technical Specification relating to the Reactor Building crane to the VY Technical Requirements Manual.

*Date of Issuance:* July 13, 2009.

*Effective Date:* As of the date of issuance, and shall be implemented within 60 days.

*Amendment No.:* 239.

*Facility Operating License No. DPR–28:* Amendment revised the License and Technical Specifications.

*Date of initial notice in **Federal Register**:* November 18, 2008 (73 FR 68454). The supplemental letter dated October 31, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated July 13, 2009.

*No Significant Hazards Consideration Comments Received:* No.

*Northern States Power Company—Minnesota, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota*

*Date of Application for Amendment:* June 26, 2008, as supplemented on January 27 and July 2, 2009.

*Brief Description of Amendment:* The amendment revised the MNGP Technical Specifications (TS), changing the Required Actions and Completion Times in TS 3.5.1, ''ECCS [Emergency Core Cooling System]—Operating,'' to allow a 72-hour completion time to restore a low-pressure ECCS subsystem to operable status after discovery of two low-pressure ECCS subsystems inoperable.

*Date of Issuance:* July 10, 2009.

*Effective Date:* As of the date of issuance and shall be implemented within 90 days of issuance.

*Amendment No.:* 162.

*Facility Operating License No. DPR–22:* Amendment revised the Technical Specifications.

*Date of Initial Notice in **Federal Register**:* August 12, 2008 (73 FR 46930). The supplemental letters contained clarifying information and did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 10, 2009.

*No Significant Hazards Consideration Comments Received:* No.

*Northern States Power Company—Minnesota, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant, Units 1 and 2, Goodhue County, Minnesota*

*Date of Application for Amendments:* June 26, 2008, as supplemented by letters dated August 4, August 26, and November 14, 2008, and January 30, February 9, February 20, March 12, and May 4 (2 letters), 2009.

*Brief Description of Amendments:* The amendments revise the Technical Specifications (TSs) for Prairie Island Nuclear Generating Plant, Units 1 and 2, to allow the use of Westinghouse 422 VANTAGE+ nuclear fuel and make changes to certain references in the Design Features section of the TSs.

*Date of Issuance:* July 1, 2009.

*Effective Date:* As of the date of issuance and shall be implemented within 90 days.

*Amendment Nos.:* 192, 181.

*Facility Operating License Nos. DPR–42 and DPR–60:* Amendments revised the Technical Specifications.

*Date of Initial Notice in **Federal Register**:* September 23, 2008 (73 FR 54866). The supplemental letters contained clarifying information and did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 1, 2009.

*No Significant Hazards Consideration Comments Received:* No.

*PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania*

*Date of Application for Amendments:* February 20, 2009.

*Brief Description of Amendments:* The amendments modified Technical Specifications (TS) requirements related to control room envelope habitability in TS 3.7.3, ''Plant Systems Control Room Emergency Outside Air Supply (CREOAS) System,'' and TS Section 5.5, ''Administrative Controls Programs and Manuals.''

*Date of Issuance:* July 6, 2009.

*Effective Date:* As of the date of issuance to be implemented within 180 days.

*Amendment Nos.:* 252 for Unit 1 and 232 for Unit 2.

*Facility Operating License Nos. NPF–14 and NPF–22:* The amendments revised the License and Technical Specifications.

*Date of Initial Notice in **Federal Register**:* April 21, 2009 (74 FR 18256).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 6, 2009.

*No Significant Hazards Consideration Comments Received:* No.

*PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania*

*Date of Application for Amendments:* March 24, 2009.

*Brief Description of Amendments:* The amendments deleted Technical Specification (TS) Section 5.2.2.e, which is superseded by Title 10 of the *Code of Federal Regulations* (10 CFR) Part 26, ''Fitness For Duty Programs,'' Subpart I, ''Managing Fatigue.'' This change is consistent with U.S. Nuclear Regulatory Commission approved Revision 0 to Technical Specification Task Force Improved Standard Technical Specification Change Traveler, TSTF–511, ''Eliminate Working Hour Restrictions from TS 5.2.2 to Support Compliance with 10 CFR part 26.''

*Date of Issuance:* July 13, 2009.

*Effective Date:* As of the date of issuance and shall be implemented within 30 days.

*Amendment Nos.:* 253 for Unit 1 and 233 for Unit 2.

*Facility Operating License Nos. NPF–14 and NPF–22:* The amendments revised the Licenses and Technical Specifications.

*Date of initial notice in **Federal Register**:* May 5, 2009, (74 FR 20752). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 13, 2009.

*No Significant Hazards Consideration Comments Received:* No.

Dated at Rockville, Maryland, this 17th day of July 2009.

For The Nuclear Regulatory Commission.

**Joseph G. Giitter,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. E9–17699 Filed 7–27–09; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–25; NRC–2009–0076]**

## U.S. Department of Energy; Idaho Spent Fuel Facility Notice of Order Approving Direct Transfer of Materials License

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Issuance of Order Approving Direct Transfer of Materials License No. SNM–2512.

**FOR FURTHER INFORMATION CONTACT:** Shana Helton, Senior Project Manager, Licensing Branch, Division of Spent

Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards (NMSS), U.S. Nuclear Regulatory Commission (NRC), Rockville, MD 20852. Telephone: (301) 492–3284; fax number: (301) 492–3348; e-mail: *shana.helton@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

**I**

Foster Wheeler Environmental Corporation (FWENC) is the holder of Special Nuclear Materials License No. 2512 (SNM–2512), issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR part 72. SNM–2512 authorizes FWENC to construct and operate the Idaho Spent Fuel (ISF) Facility in accordance with the terms and conditions specified therein. The yet-to-be constructed ISF Facility is an independent spent fuel storage installation (ISFSI) which, if constructed, will be located adjacent to the U.S. Department of Energy's (DOE's) Idaho Nuclear Technology and Engineering Center site on the Idaho National Laboratory grounds in Idaho.

**II**

By application dated May 30, 2008, as supplemented by letter dated June 8, 2009 (Agencywide Documents Access and Management System [ADAMS] Accession Nos. ML081630246 and ML091660593, respectively), DOE submitted a request, to NRC, for approval of a proposed direct transfer of SNM–2512, under section 184 of the Atomic Energy Act of 1954, as amended (AEA), and 10 CFR 72.50.

SNM–2512 was issued to FWENC to construct and operate the ISF Facility ISFSI. As of this date, no facility has been constructed, but FWENC continues to hold SNM–2512. The proposed license transfer would result in DOE holding SNM–2512. The application also requested a conforming license amendment to reflect the proposed transfer of SNM License No. 2512 to DOE. No physical changes to the ISF Facility ISFSI design or operational changes were proposed in the application.

Approval of the application was requested pursuant to section 184 of the AEA, and 10 CFR 72.50. Notice of consideration of approval of the application and an opportunity for a hearing was published in the **Federal Register** on, February 25, 2009 (74 FR 8587). No hearing requests or written comments were received. The June 8, 2009, supplement, which was not identified in the **Federal Register** notice, provided a revision to Chapter 9 of the Safety Analysis Report. The revision delineates a full construction/operating organization, pending a decision by DOE to proceed with the deployment of the ISF Facility ISFSI. This revision to the organizational description has been determined to be administrative in nature and not to present any safety issue.

The Commission's approval of this direct transfer of SNM–2512, and any related, conforming license amendments to SNM–2512, are categorically excluded from further environmental review, pursuant to 10 CFR 51.22(c)(21).

Under 10 CFR 72.50, no license nor any part included in a license issued under 10 CFR part 72 for an ISFSI shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission gives its consent in writing. Upon review of the information submitted in the application and other information before the Commission, the NRC staff has determined that the direct transfer of control of SNM–2512, as described above, is consistent with applicable provisions of the law, and the regulations and orders issued by the Commission. These findings are supported by a Safety Evaluation dated July 17, 2009 (ADAMS No. ML091940481).

**III**

Accordingly, pursuant to sections 161b, 161i, and 184 of the AEA, 42 USC 2201(b), 2201(i), and 2234, and 10 CFR 72.50, the Commission gives notice that it has issued an order (Order) approving DOE's application dated May 30, 2008, as supplemented by letter dated June 8, 2009, for the direct transfer of SNM–2512 from FWENC to DOE, and for conforming license amendments.

The Order is effective upon issuance.

For further details, see the application dated May 30, 2008, as supplemented by letter dated June 8, 2009; the safety evaluation report; and the Order (ADAMS Nos. ML081630246, ML091660593, ML091940481, and ML091940453, respectively). These documents are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and accessible electronically from the 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@nrc.gov*.

Dated at Rockville, Maryland, this 17th day of July 2009.

For the Nuclear Regulatory Commission.

**Michael F. Weber,**

*Director, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. E9–17901 Filed 7–27–09; 8:45 am]

**BILLING CODE 7590–01–P**

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## NUCLEAR REGULATORY COMMISSION

### Sunshine Federal Register Notice

**AGENCY HOLDING THE MEETINGS:** Nuclear Regulatory Commission.

**DATE:** Weeks of July 27, August 3, 10, 17, 24, 31, 2009.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

*Week of July 27, 2009*

There are no meetings scheduled for the week of July 27, 2009.

*Week of August 3, 2009—Tentative*

There are no meetings scheduled for the week of August 3, 2009.

*Week of August 10, 2009—Tentative*

There are no meetings scheduled for the week of August 10, 2009.

*Week of August 17, 2009—Tentative*

There are no meetings scheduled for the week of August 17, 2009.

*Week of August 24, 2009—Tentative*

There are no meetings scheduled for the week of August 24, 2009.

*Week of August 31, 2009—Tentative*

Thursday, September 3, 2009

9:30 a.m.—Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Andrea Jones, 301 415–2309).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

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The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

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**Additional Information**

Affirmation of Southern Nuclear Operating Co. (Vogtle Electric

Generating Plant, Units 3 and 4), LBP–09–3 (Ruling on Standing and Contention Admissibility); Virginia Electric and Power Co. (North Anna Unit 3), LBP–08–15 (Ruling on Standing and Contention Admissibility) tentatively scheduled on July 23, 2009, has been postponed.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html*.

* * * * *

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* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov*.

Dated: July 23, 2009.

**Rochelle C. Bavol,**

*Office of the Secretary.*

[FR Doc. E9–17997 Filed 7–24–09; 4:15 pm]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. CP2009–52; Order No. 253]**

## Global Expedited Package Services Contract

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recently-filed Postal Service request to add a Global Expedited Package Services 1 contract to the Competitive Product List. This notice addresses procedural steps associated with these filings.

**DATES:** Comments are due July 31, 2009.

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

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

**SUPPLEMENTARY INFORMATION:**

I. Introduction
II. Notice of Filing
III. Ordering Paragraphs

### I. Introduction

On July 21, 2009, the Postal Service filed a notice announcing that it has entered into an additional Global Expedited Package Services 1 (GEPS 1) contract.[1] GEPS 1 provides volume-based incentives for mailers that send large volumes of Express Mail International (EMI) and/or Priority Mail International (PMI). The Postal Service believes the instant contract is functionally equivalent to previously submitted GEPS 1 contracts, and is supported by the Governors' Decision filed in Docket No. CP2008–4.[2] Notice at 1. It further notes that in Order No. 86, which established GEPS 1 as a product, the Commission held that additional contracts may be included as part of the GEPS 1 product if they meet the requirements of 39 U.S.C. 3633, and if they are functionally equivalent to the initial GEPS 1 contract filed in Docket No. CP2008–5.[3] Notice at 1.

*The instant contract.* The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. In addition, the Postal Service contends that the contract is in accordance with Order No. 86. The Postal Service states that the instant contract replaces the contract for the customer in Docket No. CP2008–13, which will end on August 31, 2009. *Id.* at 2. It submitted the contract and supporting material under seal, and attached a redacted copy of the contract and certified statement required by 39 CFR 3015.5(c)(2) to the Notice as Attachments 1 and 2, respectively. *Id.* at 1–2. The term of the instant contract is 1 year from the date the Postal Service notifies the customer that all necessary regulatory approvals have been received.

The Notice advances reasons why the instant GEPS 1 contract fits within the Mail Classification Schedule language for GEPS 1. The Postal Service asserts that the instant contract is functionally equivalent to the GEPS 1 contracts filed previously. It states that in Governors' Decision No. 08–7, a pricing formula and classification system were established to ensure that each contract meets the statutory and regulatory requirements of 39 U.S.C. 3633. The Postal Service contends that the instant contract demonstrates its functional equivalence with the previous GEPS 1 contracts because of several factors: The customers are small or medium-sized businesses that mail directly to foreign destinations using EMI and/or PMI, the contract term of 1 year applies to all GEPS 1 contracts, the contracts have similar cost and market characteristics, and each requires payment through permit imprint. *Id.* at 4. It asserts that even though prices may be different based on volume or postage commitments made by the customers, or updated costing information, these differences do not affect the contracts' functional equivalency because the GEPS 1 contracts share similar cost attributes and methodology. *Id.* at 4–5.

The Postal Service also identifies several other contractual differences including provisions that clarify the availability of other Postal Service products and services, exclude certain flat rate products from the mail qualifying for discounts, simplify mailing notice requirements, modify mail tender locations, clarify the mailer's volume and revenue commitment in the event of early termination, and modify the original GEPS 1 agreement to reflect changes unrelated to the mailers or negotiations of either party's obligations under the agreement. *Id.* at 5–6.

The Postal Service states that these differences related to a particular mailer are ''incidental differences'' and do not change the conclusion that these agreements are functionally equivalent in all substantive aspects. *Id.* at 6.

The Postal Service requests that this contract be included within the GEPS 1 product. *Id.* at 7.

The Postal Service maintains that certain portions of the contract and certified statement required by 39 CFR 3015.5(c)(2), names of GEPS 1 customers, related financial information, portions of the certified statement which contain costs and pricing as well as the accompanying analyses that provide prices, terms, conditions, and financial projections should remain under seal. *Id.* at 3.

### II. Notice of Filing

The Commission establishes Docket No. CP2009–52 for consideration of

[1] Notice of United States Postal Service Filing of Functionally Equivalent Global Expedited Package Services 1 Negotiated Service Agreement, July 16, 2009 (Notice).

[2] *See* Docket No. CP2008–4, Notice of United States Postal Service of Governors' Decision Establishing Prices and Classifications for Global Expedited Package Services Contents, May 20, 2008.

[3] *See* Docket No. CP2008–5, Order Concerning Global Expedited Package Services Contracts, June 27, 2008, at 7 (Order No. 86).

matters related to the contract identified in the Postal Service's Notice.

Interested persons may submit comments on whether the Postal Service's contract is consistent with the policies of 39 U.S.C. 3632, 3622 or 3642. Comments are due no later than July 31, 2009. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Paul L. Harrington to serve as Public Representative in the captioned filings.

**III. Ordering Paragraphs**

*It is ordered:*

1. The Commission establishes Docket No. CP2009–52 for consideration of the issues raised in this docket.
2. Comments by interested persons in these proceedings are due no later than July 31, 2009.
3. Pursuant to 39 U.S.C. 505, Paul L. Harrington is appointed to serve as officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.
4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

**Judith M. Grady,**

*Acting Secretary.*

[FR Doc. E9–17917 Filed 7–27–09; 8:45 am]

BILLING CODE 7710–FW–P

## POSTAL SERVICE

### Board of Governors; Sunshine Act Meeting

**DATE AND TIME:** Monday, August 3, 2009, at 4 p.m.; Tuesday, August 4, 2009, at 9 a.m.; Wednesday, August 5, 2009, at 8:30 a.m. and 10:30 a.m.

**PLACE:** Washington, DC, at U.S. Postal Service Headquarters, 475 L'Enfant Plaza, SW., in the Benjamin Franklin Room.

**STATUS:** August 3 at 4 p.m.—Closed; August 4 at 9 a.m.—Closed; August 5 at 8:30 a.m.—Open; August 5 at 10:30 a.m.—Closed

**MATTERS TO BE CONSIDERED:**

*Monday, August 3 at 4 p.m. (Closed)*

1. Financial Matters.
2. Strategic Issues.
3. Pricing.
4. Personnel Matters and Compensation Issues.
5. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

*Tuesday, August 4 at 9:00 a.m. (Closed)*

1. Continuation of Monday's closed session agenda.

*Wednesday, August 5 at 8:30 a.m. (Open)*

1. Call to Order and Approval of Minutes of Previous Meetings.
2. Remarks of the Chairman of the Board.
3. Remarks of the Postmaster General and CEO.
4. Amendments to Board Bylaws.
5. Committee Charters, Assignments and Reports.
6. Quarterly Report on Service Performance.
7. Quarterly Report on Financial Performance.
8. Tentative Agenda for the September 21, 22 and 23, 2009, meeting in Washington, DC, and Adjourn.

*Wednesday, August 5 at 10:30 a.m. (Closed)—If Needed.*

1. Continuation of Monday's closed session agenda.

**CONTACT PERSON FOR MORE INFORMATION:** Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

**Julie S. Moore,**

*Secretary.*

[FR Doc. E9–18015 Filed 7–24–09; 4:15 pm]

BILLING CODE 7710–12–P

## POSTAL SERVICE

### Board of Governors; Sunshine Act Meeting

**Board Votes To Close July 21, 2009, Meeting**

In person and by telephone vote on July 21, 2009, a majority of the members contacted and voting, the Board of Governors of the United States Postal Service voted unanimously to close to public observation its meeting held in Washington, DC via teleconference. The Board determined that no earlier public notice was possible.

**Item Considered**

1. Strategic Issues.

**General Counsel Certification**

The General Counsel of the United States Postal Service has certified that the meeting was properly closed under the Government in the Sunshine Act.

**Contact Person for More Information:**

Requests for information about the meeting should be addressed to the Secretary of the Board, Julie S. Moore, at (202) 268–4800.

**Julie S. Moore,**

*Secretary.*

[FR Doc. E9–18019 Filed 7–24–09; 4:15 pm]

BILLING CODE 7710–12–P

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60252; File No. SR–NYSEAmex–2009–24]**

### Self-Regulatory Organizations; NYSE Amex LLC; Order Granting Accelerated Approval to a Proposed Rule Change Amending Rule 70.25 To Permit All Available Contra-Side Liquidity to Trigger the Execution of a d-Quote

*Correction*

In notice document E9–16545 beginning on page 34067 in the issue of Tuesday, July 14, 2009, make the following correction:

On page 34067, in the first column, the docket number should read as set forth above.

[FR Doc. Z9–16545 Filed 7–27–09; 8:45 am]

BILLING CODE 1505–01–D

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-60211; File No. SR-Phlx-2009-51]**

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Extension of the Penny Pilot Program

*Correction*

In notice document E9–16179 beginning on page 33001 in the issue of Thursday, July 9, 2009, make the following correction:

The docket number is corrected to read as set forth above.

[FR Doc. Z9–16179 Filed 7–27–09; 8:45 am]

BILLING CODE 1505–01–D

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Extension of Existing Collection; Comment Request

*Upon Written Request, Copies Available From:* U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

*Extension:*

Rule 17f–1(b), OMB Control No. 3235–0032, SEC File No. 270–28.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in the following rule: Rule 17f–1(b)—Requirements for reporting and inquiry with respect to missing, lost, counterfeit, or stolen securities (17 CFR 240.17f–1(b)) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (the ''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17f–1(b) (17 CFR 240.17f–1(b)) under the Exchange Act requires approximately 26,000 entities in the securities industry to register in the Lost and Stolen Securities Program (''Program''). Registration fulfills a statutory requirement that entities report and inquire about missing, lost, counterfeit, or stolen securities. Registration also allows entities in the securities industry to gain access to a confidential database that stores information for the Program.

We estimate that 1,000 new entities will register in the Program each year. The staff estimates that the average number of hours necessary to comply with the Rule 17f–1(b) is one-half hour. The total burden is therefore 500 hours (1,000 times one-half) annually for all participants.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimates 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: July 21, 2009.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17859 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 28835; 812–13573]**

## Compagnie de Financement Foncier; Notice of Application

July 22, 2009.

**AGENCY:** Securities and Exchange Commission (the ''Commission'').

**ACTION:** Notice of application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from all provisions of the Act.

**SUMMARY OF APPLICATION:** Applicant Compagnie de Financement Foncier (''CFF''), a specialized credit institution, requests an order exempting it from all provisions of the Act in connection with the offer and sale of its securities in the United States.

**FILING DATES:** The application was filed on September 17, 2008, and amended on June 22, 2009.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 12, 2009, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. Applicant, c/o John D. Watson, Jr., Latham & Watkins LLP, 53, quai d'Orsay, 75007 Paris, France.

**FOR FURTHER INFORMATION CONTACT:** Bruce R. MacNeil, Senior Counsel, at (202) 551–6817, or Janet M. Grossnickle, Assistant Director, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

*Applicant's Representations:*

1. CFF, a limited liability company organized under the laws of the Republic of France, is a Société de Crédit Foncier (''SCF''), a specialized credit institution authorized and licensed under French law and regulated and supervised by French banking authorities. Applicant represents that the sole permitted business of a SCF is to provide financing to the housing and public sectors in France and a limited number of other developed countries. Applicant further states that, subject to a comprehensive statutory and regulatory framework, a SCF conducts this business by (a) making or acquiring mortgage loans (which include loans incurred to acquire real property and secured by a mortgage or, in certain limited circumstances, other high-quality credit support); (b) extending financing to public sector entities by making public sector loans or acquiring public sector obligations; and (c) acquiring debt securities backed by mortgage loans or public sector obligations (collectively, ''Eligible Assets''). Equity securities or other equity interests are not treated as Eligible Assets and are not permitted to be held by a SCF.

2. As a SCF, CFF states that it finances its business through the issuance of covered bonds, a type of debt security governed by French law. French covered bonds, known as obligations foncières, and the SCFs that issue them are governed by the Savings and Financial Security Act of 1999 (the ''SFSA Law'').[1] Applicant states that under the SFSA law, only credit institutions licensed and regulated in France as a SCF may issue obligations foncières. However, CFF is not permitted under the SFSA Law to accept demand deposits and may only carry out the specific banking activities that are consistent with its purpose as a SCF, which is to acquire Eligible Assets and to issue covered bonds (or

[1] Applicant represents that the French public law regime governing obligations foncières, in which the issuing entity is strictly regulated by banking authorities as a credit institution and in which the priority of investors' claims is guaranteed as a matter of law, differs significantly from the private contractually-based covered bond regimes found in certain other countries (such as the United States).

other debt securities) in order to finance the acquistion of Eligible Assets.

3. CFF is a direct, wholly-owned subsidiary of Crédit Foncier de France (''Credit Foncier''), which is licensed and regulated under French law as a commercial bank. Applicant states that Credit Foncier was the first French issuer of covered bonds and an active participant in the covered bond market until 1999, when in connection with the adoption of the SFSA Law, Credit Foncier formed CFF and transferred its covered bond business to it. CFF states that since its formation, it has issued over $147.5 billion in covered bonds in the international capital markets.

4. Applicant represents that the SFSA Law gives the holders of CFF's covered bonds the benefit of a statutory priority in right of payment (the ''Privilege'') on all assets and cash flows of CFF. According to CFF, the Privilege constitutes a legal safeguard for holders of covered bonds in that no creditors of a SCF, including the French State, can claim cash flows generated by Eligible Assets until the SCF's obligations in respect of its covered bonds are discharged in full. The SFSA Law establishes a principle of over-collateralization, which provides that the total amount of the assets of a SCF must exceed the global amount of liabilities benefiting from the Privilege at all times, thereby limiting risk exposure. CFF states that in addition to the Privilege, as an additional investor protection safeguard, the SFSA Law creates important exceptions to the claw-back rules that would otherwise apply under the French insolvency laws.

5. CFF states that, as a licensed credit institution, it is subject to extensive legal and regulatory obligations under French banking regulations and is supervised by the French Banking Commission (''Banking Commission''), a body within the Banque de France. CFF further states that it is not only subject to the general regulatory supervision applicable to all licensed credit institutions, including banks, but also to additional control mechanisms that are specific to its status as a SCF. CFF states that it is subject to continuous off-site monitoring and routine on-site inspections by the Banking Commission, which consists of examination of CFF's prudential and accounting records, regular contacts with CFF's senior management and statutory auditors, and ascertainment that the information disclosed by CFF accurately reflects its financial condition. In addition, CFF states that as an issuer of listed debt securities sold to the general public in France, it is also subject to the rules and regulations of the Financial Markets Authority (the ''AMF''), the French financial market regulator responsible for ensuring investors' protection.

6. Applicant represents that under French banking regulations, CFF must appoint a specific controller (the ''Specific Controller'') as a result of its status as a SCF. The Specific Controller is appointed by CFF's management board with the approval of the Banking Commission. CFF states that the Specific Controller monitors compliance with the legal and regulatory provisions applicable to SCFs, monitors CFF's management of its assets and liabilities and ensures that CFF only undertakes transactions that are consistent with its specific purpose as a SCF. The Specific Controller verifies that the assets held by CFF are Eligible Assets and certifies compliance with collateralization requirements.

7. CFF states that it is also subject to special internal control procedures. The SFSA Law requires that the asset and liabilities of a SCF be managed by a credit institution pursuant to servicing agreements. Because of this legal requirement, CFF relies on Credit Foncier to operate its business. Credit Foncier, a licensed bank, administers CFF in accordance with permanent and periodic control procedures that are centralized at the level of Credit Foncier.

8. CFF proposes to offer and sell in the United States its covered bonds and other debt securities that benefit from the Privilege as described in the application (collectively, the ''Privileged Debt Securities''). CFF states that any such offer and sale shall occur only in transactions exempt from registration under the Securities Act of 1933 (''1933 Act''), including transactions effected as traditional private placements with institutional investors or in transactions in which the securities may be resold to ''qualified institutional buyers'' as contemplated by rule 144A under the 1933 Act. CFF believes that investors in its Privileged Debt Securities would have the protections provided by the Privilege, the protections provided by the French government's regulation of CFF and its operations, and the protections of the laws in the United States applicable to securities offered and sold to qualified institutional buyers and other institutional investors, as well as the antifraud provisions of the Securities Exchange Act of 1934. CFF intends to use the proceeds from any sale of its securities in the United States as an additional source of financing for the housing and public sectors in France and other developed countries, including the United States.

**Applicant's Legal Analysis**

1. Section 3(a)(1)(C) of the Act defines an investment company to include any issuer engaged in the business of investing, reinvesting, owning, holding or trading in securities, and that owns or proposes to acquire investment securities having a value exceeding 40% of the issuer's total assets. Section 3(a)(2) of the Act defines ''investment securities'' to include all securities except Government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner which (a) are not investment companies, and (b) are not relying on the exclusions from the definition of investment company in section 3(c)(1) or 3(c)(7) of the Act.

2. CFF states that a majority of its assets consist of loans, debt securities and cash equivalents, and that these assets could be considered ''investment securities'' within the meaning of section 3(a)(2) of the Act. As a result, CFF states that it could be deemed to be an ''investment company'' under section 3(a)(1)(C) of the Act.

3. Section 6(c) of the Act provides, in relevant part, that the Commission, by order upon application, may conditionally or unconditionally exempt any person, security, or transaction from any provision of the Act, if and to the extent necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

4. Rule 3a–6 under the Act excludes foreign banks from the definition of an investment company under the Act. A ''foreign bank'' is defined in the rule to include a banking institution ''engaged substantially in commercial banking activity'' which in turn is defined to include ''extending commercial and other types of credit, and accepting demand and other types of deposits.'' CFF states that while a large part of its business activity is to extend commercial credit such as mortgage loans and loans to public sector entities and it is subject to extensive supervision and regulation by French banking authorities, it is not considered a comercial bank under French law. Further, Applicant states that as a credit institution licensed as a SCF, it cannot accept ''demand and other types of deposits.'' Therefore, CFF states that it is not eligible for the exclusion provided by rule 3a-6 under the Act.

5. CFF states that it engages in several banking activities, that it is controlled as to financing it can undertake and loans it can extend through French banking laws and through oversight and regulation implemented by the Banking Commission. CFF asserts that as a SCF, it is governed by a legal regime in many respects stricter than the regime applicable to commercial banks in France. CFF further states that it fulfills a public interest objective of providing financial resources for the favored sectors in France and the United States and other developed nations, and that its activities do not lend themselves to the abuses against which the Act was directed. Therefore, CFF states that it satisfies the standards for relief under section 6(c) of the Act.

**Applicant's Conditions**

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. In connection with any offering by Applicant of its Privileged Debt Securities in the United States, Applicant will appoint an agent to accept service of process in any suit, action or proceeding brought on such Privileged Debt Securities and instituted in any State or Federal court presiding in the City and County of New York by any such holder of any such Privileged Debt Securities. Applicant will expressly submit to the jurisdiction of the New York State and United States Federal courts presiding in the City and County of New York with respect to any such suit, action or proceeding. Applicant will also waive the defense of forum *non conveniens* to the maintenance of any such action or proceeding in the New York State or United States Federal courts presiding in the City and County of New York. Such appointment of an agent to accept service of process and such submission to jurisdiction shall be irrevocable until all amounts due and to become due in respect of such Privileged Debt Securities have been paid. No such submission to jurisdiction or appointment of agent for service of process will affect the right, if any, of a holder of any such security to bring suit in any court that will have jurisdiction over Applicant by virtue of the offer and sale of such Privileged Debt Securities or otherwise.

2. Applicant's activities will conform in all material respects to the activities described in the application.

3. Applicant is regulated as a SCF by the French banking authorities, as described in the application.

4. Applicant will only offer and sell Privileged Debt Securities on a private basis in the United States to persons reasonably believed by Applicant to be (i) institutional accredited investors as defined in paragraphs (1), (2), (3) and (7) of Rule 501(a) under the 1933 Act, (ii) any entity in which all of the equity owners come within such paragraphs, or (iii) qualified institutional buyers, as defined in Rule 144A under the 1933 Act.

5. Applicant will not make public offers or sales of equity or debt securities in the United States and will not make offers or sales of equity securities on either a public or private basis in the United States.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17892 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 28834; File No. 812–13503]**

## Pax World Funds Trust II, et al.; Notice of Application

July 22, 2009.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

**SUMMARY OF APPLICATION:** Applicants request an order that would permit (a) certain open-end management investment companies and their series, to issue shares (''Fund Shares'') that can be redeemed only in large aggregations (''Creation Units''); (b) secondary market transactions in Fund Shares to occur at negotiated prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Fund Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Fund Shares.

**APPLICANTS:** Pax World Funds Trust II (''Trust''), Pax World Management Corp. (''Advisor'') and ALPS Distributors, Inc. (''Distributor'').

**DATES:** *Filing Dates:* The application was filed on February 29, 2008, and amended on May 8, 2008, November 17, 2008, May 8, 2009, and July 7, 2009.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on August 12, 2009, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090; Applicants: Pax World Management Corp. and Pax World Funds Trust II, 30 Penhallow Street, Suite 400, Portsmouth, NH 03801; ALPS Distributors, Inc., 1290 Broadway, Suite 1100, Denver, CO 80203.

**FOR FURTHER INFORMATION CONTACT:** Laura J. Riegel, Senior Counsel at (202) 551–6873, or Julia Kim Gilmer, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

**Applicants' Representations**

1. The Trust is registered as an open-end management investment company and is organized as a Massachusetts trust that will offer multiple series. The Trust will initially offer Fund Shares of two series (the ''Initial Funds''). Applicants may offer additional registered open-end investment companies in the future as well as additional series of the Trust and series of any existing or future open-end

investment companies registered under the Act, which will be advised by the Advisor or an entity controlling, controlled by, or under common control with the Advisor (''Future Funds'' and together with the Initial Funds, the ''Funds'').[1]

2. The Advisor will serve as the investment adviser to the Initial Funds. The Advisor is registered as an investment adviser under the Investment Advisers Act of 1940, as amended (the ''Advisers Act''). In the future, the Advisor may enter into sub-advisory agreements with one or more additional investment advisers to act as sub-advisors to particular Funds (''Sub-Advisors''). Each Sub-Advisor will be registered under the Advisers Act. The Distributor is a broker-dealer registered under the Securities Exchange Act of 1934 (the ''Exchange Act'') and will act as the principal underwriter and distributor for the Creation Units of Fund Shares. The Distributor is not affiliated with the Advisor or any Sub-Advisor.

3. Each Fund will hold certain equity securities (''Portfolio Securities'') and financial instruments selected to correspond, before fees and expenses, generally to the price and yield performance of a specified equity securities index (each, an ''Underlying Index'' and collectively, ''Underlying Indices'').[2] Certain of the Underlying Indices are composed of equity securities of domestic issuers and non-domestic issuers meeting the requirements for trading in U.S. markets (''Domestic Indices''). Other Underlying Indices include equity securities trading in non-U.S. markets or a combination of such securities with domestic equity securities (collectively ''Foreign Indices''). Funds which track Domestic Indices are referred to as ''Domestic Funds'' and Funds which track Foreign Indices are referred to as ''Foreign Funds.'' No entity that compiles, creates, sponsors or maintains an Underlying Index (''Index Provider'') is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Trust or a Fund, of the Advisor, of any Sub-Advisor to or promoter of a Fund, or of the Distributor.[3]

4. The investment objective of each Fund will be to provide investment results that correspond, before fees and expenses, generally to the price and yield performance of its Underlying Index.[4] The value of a Foreign Index and the value of a Domestic Index will be disseminated every 15 seconds, throughout the trading day. A Fund will utilize either a replication or representative sampling strategy which will be disclosed with regard to each Fund in its statutory prospectus (''Prospectus'').[5] A Fund using a replication strategy will invest in the Component Securities in its Underlying Index in approximately the same proportions as in the Underlying Index. In certain circumstances, such as when there are practical difficulties or substantial costs involved in holding every security in an Underlying Index or when a Component Security is less liquid, illiquid or unavailable, a Fund may use a representative sampling strategy pursuant to which it will invest in some, but not all of the Component Securities of its Underlying Index.[6] Applicants anticipate that a Fund that utilizes a representative sampling strategy will not track the performance of its Underlying Index with the same degree of accuracy as an investment vehicle that invests in every Component Security of the Underlying Index with the same weighting as the Underlying Index. Applicants expect that each Fund will have a tracking error relative to the performance of its Underlying Index of less than 5 percent.

5. The Trust will issue Creation Units in specified large aggregations of Fund Shares (*e.g.*, 25,000 Fund Shares for each Fund) as will be clearly stated in the relevant Fund's Prospectus. Applicants expect that the initial price of a Creation Unit will fall in the range of $1,000,000 to $10,000,000. All orders to purchase Creation Units must be placed with the Distributor, by or through a party that has entered into an agreement with the Distributor (''Authorized Participant''). The Distributor will be responsible for transmitting the orders to the Funds. An Authorized Participant must be either: (a) A broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation (''NSCC''), a clearing agency registered with the Commission, or (b) a participant in the Depository Trust Company (''DTC'', and such participant, ''DTC Participant''). Fund Shares of each Fund generally will be sold in Creation Units in exchange for an in-kind deposit by the purchaser of a portfolio of securities designated by the Advisor or Sub-Advisor to correspond generally to the price and yield performance of the relevant Underlying Index (the ''Deposit Securities''), together with the deposit of a specified cash payment (''Balancing Amount''). The Balancing Amount is an amount equal to the difference between (a) the net asset value (''NAV'') (per Creation Unit) of a Fund and (b) the total aggregate market value (per Creation Unit) of the Deposit Securities.[7] Each Fund may permit a purchaser of Creation Units to substitute cash in lieu of depositing some or all of the Deposit Securities if the Advisor or Sub-Advisor believes such method would reduce the Fund's transaction costs or enhance the Fund's operating efficiency.[8]

[1] All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the application.

[2] The Underlying Indices for the Initial Funds are KLD Europe Asia Pacific Sustainability SM Index and KLD North America Sustainability SM Index.

[3] The Index Provider to the Initial Funds is KLD Research & Analytics, Inc.

[4] Applicants represent that each Fund will invest at least 80% of its total assets in the component securities that comprise its Underlying Index (''Component Securities'') or, in the case of Foreign Funds, Component Securities and depositary receipts representing such securities. ''Depositary Receipts'' will typically be American Depositary Receipts, but also include Global Depositary Receipts and European Depositary Receipts. Each Fund also may invest up to 20% of its assets in certain futures, options and swap contracts, cash and cash equivalents, as well as in stocks not included in its Underlying Index, but which the Advisor or Sub-Advisor believes will help the Fund track its Underlying Index.

[5] All representations and conditions contained in the application that require a Fund to disclose particular information in the Fund's Prospectus and/or annual report shall be effective with respect to the Fund until the time that the Fund complies with the disclosure requirements adopted by the Commission in Investment Company Act Release No. 28584 (Jan. 13, 2009).

[6] Under the representative sampling strategy, the Advisor or the Sub-Advisor will seek to construct a Fund's portfolio so that its market capitalization, industry weightings, fundamental investment characteristics (such as return variability, earnings valuation and yield) and liquidity measures perform like those of the Underlying Index.

[7] Each Fund will sell and redeem Creation Units only on a ''Business Day'' which includes any day that a Fund is required to be open under section 22(e) of the Act. Each Business Day, prior to the opening of trading on the Listing Exchange (defined below), the list of names and amount of each security constituting the current Deposit Securities and the Balancing Amount will be made available. Any national securities exchange (as defined in section 2(a)(26) of the Act) (''Exchange'') on which Fund Shares are primarily listed (''Listing Exchange'') will disseminate, every 15 seconds during its regular trading hours, through the facilities of the Consolidated Tape Association, an amount per individual Fund Shares representing the sum of the estimated Balancing Amount and the current value of the Deposit Securities.

[8] Applicants state that in some circumstances or in certain countries, it may not be practicable or convenient, or permissible under the laws of certain countries or the regulations of certain foreign stock exchanges, for a Foreign Fund to operate exclusively on an ''in-kind'' basis. Applicants also note that when a substantial rebalancing of a Fund's portfolio is required, the Advisor or Sub-Advisor might prefer to receive cash rather than stocks so that the Fund may avoid transaction costs involved

Continued

6. An investor purchasing or redeeming a Creation Unit from a Fund will be charged a fee (''Transaction Fee'') to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase or redemption of Creation Units.[9] The maximum Transaction Fees relevant to each Fund and the method of calculating such Transaction Fees will be fully disclosed in the Prospectus of such Fund or statement of additional information (''SAI''). The Distributor will be responsible for delivering the Fund's Prospectus to those persons purchasing Creation Units, and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the applicable Fund to implement the delivery of its Fund Shares.

7. Purchasers of Fund Shares in Creation Units may hold such Fund Shares or may sell such Fund Shares into the secondary market. Fund Shares will be listed and traded on an Exchange. It is expected that one or more member firms of a Listing Exchange will be designated to act as a specialist or a market maker and maintain a market for Fund Shares trading on the Listing Exchange. Prices of Fund Shares trading on an Exchange will be based on the current bid/ask market. Fund Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

8. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). A specialist or market maker, in providing a fair and orderly secondary market for the Fund Shares, also may purchase Creation Units for use in its market-making activities. Applicants expect that secondary market purchasers of Fund Shares will include both institutional investors and retail investors.[10] Applicants expect that the price at which Fund Shares trade will be disciplined by arbitrage opportunities created by the option to continually purchase or redeem Creation Units at their NAV, which should ensure that Fund Shares will not trade at a material discount or premium in relation to their NAV.

9. Fund Shares will not be individually redeemable, and owners of Fund Shares may acquire those Fund Shares from the Fund, or tender such Fund Shares for redemption to the Fund, in Creation Units only. To redeem, an investor will have to accumulate enough Fund Shares to constitute a Creation Unit. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit generally will receive (a) Portfolio Securities designated to be delivered for Creation Unit redemptions (''Fund Securities'') on the date that the request for redemption is submitted [11] and (b) a ''Cash Redemption Payment,'' consisting of an amount calculated in the same manner as the Balancing Amount, although the actual amount of the Cash Redemption Payment may differ if the Fund Securities are not identical to the Deposit Securities on that day. An investor may receive the cash equivalent of a Fund Security in certain circumstances, such as if the investor is constrained from effecting transactions in the security by regulation or policy.

10. No Fund will be marketed or otherwise held out as a traditional open-end investment company or a mutual fund. Instead, each Fund will be marketed as an ''ETF,'' an ''investment company,'' a ''fund,'' or a ''trust.'' All marketing materials that describe the features or method of obtaining, buying or selling Creation Units or Fund Shares traded on an Exchange, or refer to redeemability, will prominently disclose that Fund Shares are not individually redeemable and that the owners of Fund Shares may purchase or redeem Fund Shares from the Fund in Creation Units only. The same approach will be followed in the SAI, shareholder reports and investor educational materials issued or circulated in connection with the Fund Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to shareholders.

**Applicants' Legal Analysis**

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

*Sections 5(a)(1) and 2(a)(32) of the Act*

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent. Because Fund Shares will not be individually redeemable, applicants request an order that would permit the Funds to register as open-end management investment companies and issue Fund Shares that are redeemable in Creation Units only. Applicants state that investors may purchase Fund Shares in Creation Units

in liquidating part of its portfolio to achieve the rebalancing.

[9] Where a Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Securities, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Securities, including operational processing and brokerage costs, and part or all of the spread between the expected bid and the offer side of the market relating to such Deposit Securities.

[10] Fund Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Fund Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Fund Shares.

[11] As a general matter, the Deposit Securities and Fund Securities will correspond pro rata to the Portfolio Securities held by each Fund, but Fund Securities received on redemption may not always be identical to Deposit Securities deposited in connection with the purchase of Creation Units for the same day. The Funds will comply with the Federal securities laws in accepting Deposit Securities and satisfying redemptions with Fund Securities, including that the Deposit Securities and Fund Securities are sold in transactions that would be exempt from registration under the Securities Act.

and redeem Creation Units from each Fund. Applicants state that because Creation Units may always be purchased and redeemed at NAV, the market price of the Fund Shares should not vary substantially from their NAV.

*Section 22(d) of the Act and Rule 22c–1 Under the Act*

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Fund Shares will take place at negotiated prices, not at a current offering price described in a Fund's Prospectus, and not at a price based on NAV. Thus, purchases and sales of Fund Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Fund Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Fund Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Fund Shares does not involve a Fund as a party and will not result in dilution of an investment in Fund Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Fund Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because competitive forces will ensure that the difference between the market price of Fund Shares and their NAV remains narrow.

*Section 22(e)*

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants state that settlement of redemptions for the Foreign Funds is contingent not only on the settlement cycle of the United States market, but also on currently practicable delivery cycles in local markets for underlying foreign securities held by the Foreign Funds. Applicants state that local market delivery cycles for transferring Fund Securities to redeeming investors, coupled with local market holiday schedules, will, under certain circumstances, require a delivery process longer than seven calendar days for Foreign Funds. Applicants request relief under section 6(c) of the Act from section 22(e) to allow the Foreign Funds to pay redemption proceeds up to fourteen calendar days after the tender of any Creation Units for redemption. Except as disclosed in the relevant Foreign Fund's Prospectus and/or SAI, applicants expect that each Foreign Fund will be able to deliver redemption proceeds within seven days.[12] With respect to Future Funds that are Foreign Funds, applicants seek the same relief from section 22(e) only to the extent that circumstances similar to those described in the application exist.

8. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the payment of redemption proceeds. Applicants assert that the requested relief will not lead to the problems that section 22(e) was designed to prevent. Applicants state that the SAI will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days, and the maximum number of days, up to fourteen calendar days, needed to deliver the proceeds for the relevant Foreign Fund. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect creations and redemptions of Creation Units in-kind.

*Section 12(d)(1)*

9. Section 12(d)(1)(A) of the Act, in relevant part, prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

10. Applicants request an exemption to permit management investment companies (''Purchasing Management Companies'') and unit investment trusts (''Purchasing Trusts'') registered under the Act that are not sponsored or advised by the Advisor or any entity controlling, controlled by, or under common control with the Advisor and are not part of the same ''group of investment companies,'' as defined in section 12(d)(1)(G)(ii) of the Act, as the Trust (collectively, ''Purchasing Funds'') to acquire shares of a Fund beyond the limits of section 12(d)(1)(A). Purchasing Funds do not include the Funds. In addition, applicants seek relief to permit a Fund or broker-dealer (''Broker'') that is registered under the Exchange Act to sell Fund Shares to a Purchasing Fund in excess of the limits of section 12(d)(1)(B).

11. Each Purchasing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the ''Purchasing Fund Advisor'') and may be sub-advised by one or more investment advisers within the meaning of section 2(a)(20)(B) of the Act (each a ''Purchasing Fund Sub-Advisor''). Any investment adviser to a Purchasing Management Company will be registered under the Advisers Act. Each Purchasing Trust will be sponsored by a sponsor (''Sponsor'').

[12] Rule 15c6–1 under the Exchange Act requires that most securities transactions be settled within three business days of the trade. Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations applicants may have under rule 15c6–1.

12. Applicants submit that the proposed conditions to the requested relief adequately address the concerns underlying the limits in sections 12(d)(1)(A) and (B), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees and overly complex fund structures. Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

13. Applicants believe that neither the Purchasing Funds nor a Purchasing Fund Affiliate would be able to exert undue influence over the Funds.[13] To limit the control that a Purchasing Fund may have over a Fund, applicants propose a condition prohibiting a Purchasing Fund Advisor or a Sponsor, any person controlling, controlled by, or under common control with a Purchasing Fund Advisor or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Purchasing Fund Advisor or Sponsor, or any person controlling, controlled by, or under common control with a Purchasing Fund Advisor or Sponsor (''Purchasing Fund's Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Purchasing Fund Sub-Advisor, any person controlling, controlled by or under common control with the Purchasing Fund Sub-Advisor, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Purchasing Fund Sub-Advisor or any person controlling, controlled by or under common control with the Purchasing Fund Sub-Advisor (''Purchasing Fund's Sub-Advisory Group''). Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Purchasing Fund Advisor, Purchasing Fund Sub-Advisor, employee or Sponsor of a Purchasing Fund, or a person of which any such officer, director, member of an advisory board, Purchasing Fund Advisor, Purchasing Fund Sub-Advisor, employee, or Sponsor is an affiliated person (except that any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

14. Applicants assert that the proposed conditions address any concerns regarding excessive layering of fees. The board of directors or trustees of any Purchasing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested directors or trustees''), will find that the advisory fees charged to the Purchasing Management Company are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Fund in which the Purchasing Management Company may invest. In addition, except as provided in condition 12, a Purchasing Fund Advisor or a trustee (''Trustee'') or Sponsor of a Purchasing Trust will, as applicable, waive fees otherwise payable to it by the Purchasing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received by the Purchasing Fund Advisor or Trustee or Sponsor or an affiliated person of the Purchasing Fund Advisor, Trustee or Sponsor, from the Fund in connection with the investment by the Purchasing Fund in the Fund. Applicants state that any sales loads or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds set forth in Conduct Rule 2830 of the National Association of Securities Dealers (''NASD'').[14]

15. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund may acquire securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of a money market fund for short-term cash management purposes. To ensure that Purchasing Funds comply with the terms and conditions of the requested relief from section 12(d)(1), any Purchasing Fund that intends to invest in a Fund in reliance on the requested order will enter into a Purchasing Fund Agreement between the Fund and the Purchasing Fund requiring the Purchasing Fund to adhere to the terms and conditions of the requested order. The Purchasing Fund Agreement also will include an acknowledgement from the Purchasing Fund that it may rely on the requested order only to invest in the Funds and not in any other investment company.

16. Applicants also note that a Fund may choose to reject a direct purchase of Fund Shares in Creation Units by a Purchasing Fund. To the extent that a Purchasing Fund purchases Fund Shares in the secondary market, a Fund would still retain its ability to reject initial purchases of Fund Shares made in reliance on the requested order by declining to enter into the Purchasing Fund Agreement prior to any investment by a Purchasing Fund in excess of the limits of section 12(d)(1)(A).

*Sections 17(a)(1) and (2) of the Act*

17. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person (''Second-Tier Affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include (a) any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and (c) any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities.

[13] A ''Purchasing Fund Affiliate'' is a Purchasing Fund Advisor, Purchasing Fund Sub-Advisor, Sponsor, promoter, and principal underwriter of a Purchasing Fund, and any person controlling, controlled by, or under common control with any of these entities. A ''Fund Affiliate'' is an investment adviser, promoter, or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities.

[14] Any references to NASD Conduct Rule 2830 include any successor or replacement rule to NASD Conduct Rule 2830 that may be adopted by the Financial Industry Regulatory Association.

18. Applicants request an exemption from section 17(a) of the Act pursuant to sections 17(b) and 6(c) of the Act to permit persons to effectuate in-kind purchases and redemptions with a Fund when they are affiliated persons of the Fund or Second-Tier Affiliates solely by virtue of one or more of the following: (a) Holding 5% or more, or in excess of 25%, of the outstanding Fund Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25%, of the shares of one or more other registered investment companies (or series thereof) advised by the Advisor.

19. Applicants assert that no useful purpose would be served by prohibiting these types of affiliated persons from purchasing or redeeming Creation Units through ''in-kind'' transactions. The deposit procedures for both in-kind purchases and in-kind redemptions of Creation Units will be the same for all purchases and redemptions. Deposit Securities and Fund Securities will be valued in the same manner as Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the specified affiliated persons, or Second-Tier Affiliates, of a Fund to effect a transaction detrimental to other holders of Fund Shares. Applicants also believe that in-kind purchases and redemptions will not result in self-dealing or overreaching of the Fund.

20. Applicants also seek relief from section 17(a) to permit a Fund that is an affiliated person of a Purchasing Fund to sell its Fund Shares to and redeem its Fund Shares from a Purchasing Fund, and to engage in the accompanying in-kind transactions with the Purchasing Fund.[15] Applicants state that the terms of the transactions are fair and reasonable and do not involve overreaching. Applicants note that any consideration paid by a Purchasing Fund for the purchase or redemption of Fund Shares directly from a Fund will be based on the NAV of the Fund.[16] Applicants believe that any proposed transactions directly between the Funds and Purchasing Funds will be consistent with the policies of each Purchasing Fund. The purchase of Creation Units by a Purchasing Fund directly from a Fund will be accomplished in accordance with the investment restrictions of any such Purchasing Fund and will be consistent with the investment policies set forth in the Purchasing Fund's registration statement. The Purchasing Fund Agreement will require any Purchasing Fund that purchases Creation Units directly from a Fund to represent that the purchase of Creation Units from a Fund by a Purchasing Fund will be accomplished in compliance with the investment restrictions of the Purchasing Fund and will be consistent with the investment policies set forth in the Purchasing Fund's registration statement.

**Applicants' Conditions**

Applicants agree that any order of granting the requested relief will be subject to the following conditions:[17]

*ETF Relief*

1. As long as the Funds operate in reliance on the requested order, Fund Shares will be listed on an Exchange.

2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Fund's Prospectus will prominently disclose that Fund Shares are not individually redeemable shares and will disclose that the owners of Fund Shares may acquire those Fund Shares from the Fund and tender those Fund Shares for redemption to the Fund in Creation Units only. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that Fund Shares are not individually redeemable, and that owners of Fund Shares may acquire those Fund Shares from the Fund and tender those Fund Shares for redemption to the Fund in Creation Units only.

3. The Web site maintained for each Fund, which will be publicly accessible at no charge, will contain the following information, on a per individual Fund Share basis, for each Fund: (a) The prior Business Day's NAV and the mid-point of the bid-ask spread at the time of the calculation of the NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the Bid/Ask Price at the time of calculation of the NAV against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

4. The Prospectus and annual report for each Fund also will include: (a) The information listed in condition 3(b), (i) in the case of the Fund's Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per individual Fund Share basis for one, five and ten year periods (or life of the Fund), (i) the cumulative total return and the average annual total return based on NAV and Bid/Ask Price, and (ii) the cumulative total return of the relevant Underlying Index.

5. Each Fund's Prospectus will clearly disclose that, for purposes of the Act, Fund Shares are issued by the Fund, which is a registered investment company, and that the acquisition of Fund Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits in section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into a Purchasing Fund Agreement with the Fund regarding the terms of the investment.

6. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based exchange-traded funds.

*Section 12(d)(1) Relief*

7. The members of a Purchasing Fund's Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of a Purchasing Fund's Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If as a result of a decrease in the outstanding Fund Shares of a Fund, a Purchasing Fund's Advisory Group or a Purchasing Fund's Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding Fund Shares of a Fund, it will vote its Fund Shares in the same proportion as the vote of all other holders of the Fund Shares. This condition does not apply to the Purchasing Fund's Sub-Advisory Group with respect to a Fund for which the Purchasing Fund's Sub-Advisor or a

[15] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of a Purchasing Fund, or an affiliated person of such person, for the purchase by the Purchasing Fund of Fund Shares of a Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Fund Shares to a Purchasing Fund, may be prohibited by section 17(e)(1) of the Act. The Purchasing Fund Agreement also will include this acknowledgment.

[16] Applicants believe that a Purchasing Fund will purchase Fund Shares in the secondary market and will not purchase or redeem Creation Units directly from a Fund. However, the requested relief would apply to direct sales of Creation Units by a Fund to a Purchasing Fund and redemptions of those Fund Shares.

[17] *See* note 5, *supra*.

person controlling, controlled by, or under common control with the Purchasing Fund Sub-Advisor acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

8. No Purchasing Fund or Purchasing Fund Affiliate will cause any existing or potential investment by the Purchasing Fund in a Fund to influence the terms of any services or transactions between the Purchasing Fund or Purchasing Fund Affiliate and the Fund or a Fund Affiliate.

9. The board of directors or trustees of a Purchasing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Purchasing Fund Advisor and Purchasing Fund Sub-Advisor are conducting the investment program of the Purchasing Management Company without taking into account any consideration received by the Purchasing Management Company or a Purchasing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

10. No Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any Affiliated Underwriting.

11. Before investing in the Fund Shares of a Fund in excess of the limits in section 12(d)(1)(A), each Purchasing Fund and the Fund will execute a Purchasing Fund Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers or Sponsors and Trustees, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Fund Shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), a Purchasing Fund will notify such Fund of the investment. At such time, the Purchasing Fund will also transmit to the Fund a list of names of each Purchasing Fund Affiliate and Underwriting Affiliate. The Purchasing Fund will notify the Fund of any changes to the list of the names as soon as reasonably practicable after a change occurs. The relevant Fund and the Purchasing Fund will maintain and preserve a copy of the order, the Purchasing Fund Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

12. The Purchasing Fund Advisor, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Purchasing Fund in an amount at least equal to any compensation (including fees received under any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Purchasing Fund Advisor, Trustee or Sponsor, or an affiliated person of the Purchasing Fund Advisor, Trustee or Sponsor, other than any advisory fees paid to the Purchasing Fund Advisor, Trustee or Sponsor, or its affiliated person by a Fund, in connection with the investment by the Purchasing Fund in the Fund. Any Purchasing Fund Sub-Advisor will waive fees otherwise payable to the Purchasing Fund Sub-Advisor, directly or indirectly, by the Purchasing Management Company in an amount at least equal to any compensation received from a Fund by the Purchasing Fund Sub-Advisor, or an affiliated person of the Purchasing Fund Sub-Advisor, other than any advisory fees paid to the Purchasing Fund Sub-Advisor or its affiliated person by a Fund, in connection with any investment by the Purchasing Management Company in a Fund made at the direction of the Purchasing Fund Sub-Advisor. In the event that the Purchasing Fund Sub-Advisor waives fees, the benefit of the waiver will be passed through to the Purchasing Management Company.

13. Any sales charges and/or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

14. Once an investment by a Purchasing Fund in the Fund Shares of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the Board of a Fund, including a majority of the directors or trustees that are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested Board members''), will determine that any consideration paid by the Fund to a Purchasing Fund or Purchasing Fund Affiliate in connection with any services or transactions: (a) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (b) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

15. The Board, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by a Fund in an Affiliated Underwriting once an investment by the Purchasing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Purchasing Fund in a Fund. The Board will consider, among other things: (a) Whether the purchases were consistent with the investment objectives and policies of the Fund; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by a Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders of the Fund.

16. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by a Purchasing Fund in the Fund Shares of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

17. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Purchasing Management Company, including a majority of the disinterested

directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Purchasing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Purchasing Management Company.

18. No Fund will acquire securities of any investment company or companies relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of a money market fund for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17884 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60360; File No. 4–429]**

## Joint Industry Plan; Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.; Notice of Filing of Amendments to the Intermarket Options Linkage Plan To Withdraw From the Plan

July 21, 2009.

### I. Introduction

Pursuant to Section 11A of the Securities Exchange Act of 1934 (the ''Act'') [1] and Rule 608 of Regulation NMS thereunder (''Rule 608''),[2] notice is hereby given that on June 25, 2009, June 25, 3009, July 2, 2009, July 2, 2009, July 7, 2009, July 17, 2009, July 20, 2009, NYSE Arca, Inc. (''NYSE Arca''), NYSE Amex, LLC (''NYSE Amex''), International Securities Exchange, LLC (''ISE''), Chicago Board Options Exchange, Incorporated (''CBOE''), NASDAQ OMX BX, Inc. (''BX''), NASDAQ OMX PHLX, Inc. (''Phlx''), and The NASDAQ Stock Market LLC (''Nasdaq'') (collectively, ''Participants'') [3] respectively submitted to the Securities and Exchange Commission (''Commission'') amendments to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (''Linkage Plan'') (''Amendments'').[4] Each Amendment proposes to modify Section 4(a) of the Linkage Plan to delete the name of the submitting Participant. The Commission is publishing this notice to solicit comments from interested persons on the proposed Amendments to the Linkage Plan.

### II. Description of the Proposed Amendments

The purpose of each Amendment is for the Participant submitting such Amendment to withdraw from the Linkage Plan. Pursuant to Section 4(d) of the Linkage Plan, a Participant may withdraw by: (i) Providing not less than 30 days' prior written notice to each of the other Participants and to The Options Clearing Corporation (''OCC,'' the facilities manager) of such intent to withdraw; and (ii) effecting an amendment to the Linkage Plan as specified in Section 5(c)(iii) of the Linkage Plan. In turn, Section 5(c)(iii) of the Linkage Plan states that a Participant can withdraw from the Linkage Plan by filing an amendment deleting its name in Section 4(a) of the Linkage Plan and submitting such amendment to the Commission for approval. The submitting Participant must state how it plans to accomplish, by alternate means, the goals of the Linkage Plan regarding limiting Trade-Throughs. The amendment is effective upon Commission approval.

The Participants plan to accomplish the Linkage Plan's goals through membership in the Options Order Protection and Locked/Crossed Market Plan (''New Plan''). The Commission has published the New Plan for comment.[5] The participants to the New Plan currently plan to begin implementing that plan on August 31st, subject to Commission approval. The New Plan contains a requirement that each participant establish, maintain and enforce written procedures and policies that are reasonably designed to prevent Trade-Throughs.[6] The New Plan will accomplish this in a more efficient manner than the Linkage Plan. Specifically, the New Plan eliminates a central hub and addresses Trade-Through compliance through the use of intermarket sweep orders. This is based on the concepts of Regulation NMS, which, among other things, addresses trade-throughs in the equity market. The New Plan also requires its participants to conduct surveillance of their markets to ascertain the effectiveness of these policies and procedures.[7] Finally, the New Plan contains provisions requiring its participants to establish, maintain and enforce written rules addressing locked and crossed markets.[8] The Participants believe that the New Plan will fully accomplish the same goals of the Plan, including imposing limits on Trade-Throughs.

### III. Implementation of the Plan Amendment

The proposed Amendments to the Linkage Plan will be effective upon approval by the Commission pursuant to Rule 608.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the Amendments to the Linkage Plan are consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–429 on the subject line.

[1] 15 U.S.C. 78k-1(a).

[2] 17 CFR 242.608.

[3] *See* letter from Peter G. Armstrong, NYSE Arca, to Elizabeth Murphy, Secretary, Commission, dated June 24, 2009; letter from Michael Babel, NYSE Amex, to Elizabeth Murphy, Secretary, Commission, dated June 24, 2009; letter from Michael J. Simon, ISE, to Elizabeth Murphy, Secretary, Commission, dated July 1, 2009; letter from Edward J. Joyce, CBOE, to Elizabeth Murphy, Secretary, Commission, dated July 1, 2009; letter from Maura A. Looney, Associate Vice President, BX, to Elizabeth Murphy, Secretary, Commission, dated July 6, 2009; letter from letter from Richard S. Rudolph, Assistant General Counsel, Phlx, to Elizabeth Murphy, Secretary, Commission, dated July 16, 2009; and letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, Nasdaq, to Elizabeth Murphy, Secretary, Commission, dated July 17, 2009.

[4] On July 28, 2000, the Commission approved a national market system plan for the purpose of creating and operating an intermarket options market linkage proposed by the American Stock Exchange LLC (n/k/a Amex), CBOE, and ISE. *See* Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, Philadelphia Stock Exchange, Inc. (n/k/a Phlx), Pacific Exchange, Inc. (n/k/a NYSE Arca), Boston Stock Exchange, Inc. (n/k/a BX), and Nasdaq joined the Linkage Plan. *See* Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000); 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004); and 57545 (March 21, 2008), 73 FR 16394 (March 27, 2008).

[5] *See* Securities Exchange Act Release No. 59647 (March 30, 2009), 74 FR 15010 (April 2, 2009).

[6] Section 5(a)(i) of the New Plan.

[7] Section 5(a)(ii) of the New Plan.

[8] Section 6 of the New Plan.

*Paper Comments*

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

All submissions should refer to File Number 4–429. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Amendments that are filed with the Commission, and all written communications relating to the Amendments between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the Amendments also will be available for inspection and copying at the respective principal office of BX, CBOE, ISE, Nasdaq, Phlx, NYSE Amex, and NYSE Arca. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–429 and should be submitted on or before August 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17880 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

[9] 17 CFR 200.30–3(a)(29).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60365; File No. 4–443]**

## Joint Industry Plan; Notice of Filing of Amendment No. 3 to the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options

July 22, 2009.

### I. Introduction

On June 30, 2009, June 16, 2009, June 12, 2009, June 22, 2009, June 12, 2009, June 18, 2009, June 23, 2009, July 8, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE''), International Securities Exchange, LLC (''ISE''), NASDAQ Stock Market LLC (''NASDAQ''), NASDAQ OMX BX, Inc. (''BX''), NASDAQ OMX PHLX (''Phlx''), NYSE Amex LLC (''NYSE Amex''), NYSE Arca Inc. (''NYSE Arca''), and The Options Clearing Corporation (''OCC''), respectively, filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] Amendment No. 3 to the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (''Plan'' or ''OLPP'').[3] The amendment would apply uniform objective standards to the range of options series exercise (or strike) prices available for trading on the Plan Sponsor exchanges. This notice solicits comment on Amendment No. 3 from interested persons.

### II. Description of the Proposed Amendment

Amendment No. 3 proposes to apply uniform objective standards to the range of options series exercise (or strike) prices available for trading on the Plan Sponsor exchanges as a quote mitigation strategy.[4] According to the Plan Sponsors, by agreeing to uniform standards, the Plan Sponsor exchanges intend to reduce the overall number of option series available for trading, which will in turn lessen the rate of increase in quote traffic.

Specifically, the proposal applies certain ''range limitations'' to the addition of new series strike prices for options classes overlying equity securities, Exchange Traded Fund Shares, or Trust Issued Receipts. As proposed, if the price of the underlying security is less than or equal to $20, the Series Selecting Exchange would not list new option series with an exercise price more than 100 percent above or below the price of the underlying security.[5] If the price of the underlying security is greater than $20, the Series Selecting Exchange would not list new option series with an exercise price more than 50 percent above or below the price of the underlying security.

The proposal provides for an objective basis upon which the underlying prices for the price range limitations described above shall be determined, specifically, in regards to intra-day add-on series and next-day series additions, new expiration months and for option series to be added as a result of pre-market trading. Furthermore, 8 a.m. Chicago time is proposed as the earliest permissible time at which a Series Selecting Exchange may notify the OCC, and each other exchange also trading the same options class, that it has commenced trading new series as a result of pre-market trading. This earliest permissible time is established to ensure that outlier prices for the underlying security which occur at 6 a.m. Chicago time, for example (*i.e.,* well in advance of the opening of the standard trading session), are not relied upon for purposes of the exercise price range limitations.

*Example:* XYZ closes on Tuesday at $20, but trades in the evening aftermarket trading session from a range of $35–$40 on speculation of a merger. At 8:15 a.m. Chicago time the next day (Wednesday), the exchanges wish to list additional series, for trading that day, with strike prices that reflect the anticipated price increase in XYZ relative to the previous trading day. There is no official high/low price since the market has not yet opened for trading for Wednesday, so the exchanges use the most recent pre-open trade price of $40. The exchanges could therefore add series with strike prices from $20–$60 based upon the proposed exercise price range limitations.

As of 2 p.m. Chicago time during the Wednesday standard trading session XYZ has traded from a range of a low price of $40 to

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] On July 6, 2001, the Commission approved the OLPP, which was originally proposed by the American Stock Exchange LLC (k/n/a NYSE Amex), CBOE, ISE, OCC, Philadelphia Stock Exchange, Inc. (k/n/a Phlx), and Pacific Exchange, Inc. (k/n/a NYSE Arca). *See* Securities Exchange Act Release No. 44521, 66 FR 36809 (July 13, 2001). On February 5, 2004, the Boston Stock Exchange, Inc. (k/n/a BX) was added as a sponsor to the OLPP. *See* Securities Exchange Act Release No. 49199, 69 FR 7030 (February 12, 2004). On March 21, 2008, NASDAQ was added as a sponsor to the OLPP. *See* Securities Exchange Act Release No. 57546 (March 21, 2008), 73 FR 16393 (March 27, 2008).

[4] CBOE, ISE, NASDAQ, BX, Phlx, NYSE Amex, and OCC have represented that the Penny Pilot Program has resulted in an explosion of quote traffic.

[5] This restriction would not prohibit the listing of at least three options series per expiration month in an option class.

a high price of $45. An exchange wishes to add additional series during the standard trading session (''intra-day add-on series''). According to the proposed exercise price range limitations the exchanges may list series with strike prices between $20 and $67.50 (*i.e.,* $40 − (40 × .50) and $45 + (45 × .50). Note that the exchanges were already able to list series with strike prices as low as $20 based upon the pre-open determinations).

As of the 3 p.m. Chicago time close on Wednesday XYZ hit a low price of $35 and a high price of $50 during Wednesday's standard trading session. The exchanges wish to add additional series for trading the following day (Thursday) (''next-day series additions''). According to the proposed exercise price range limitations, the exchanges may list additional series with strikes between $17.50–$75 (*i.e.,* $35 − (35 × .50) and $50 + (50 × .50)). The exchanges also wish to add XYZ series the following Monday to replace the series expiring this Friday (''new expiration months''), and would use this same range ($17.50–$75) for those additional series.

The proposal also allows each Plan Sponsor exchange to designate up to five underlying securities to except from the aforementioned 50 percent restriction and instead apply the 100 percent restriction. These designations would be made on an annual basis and cannot be removed during the calendar year unless the option class is delisted by the designating exchange, in which case the designating exchange may designate another class to replace the delisted class. If a designated class is delisted by the designating exchange but continues to trade on at least one other exchange, any additional series for the class which are added from that point forward would again be subject to the proposed exercise price range limitations, unless the class is subsequently designated by another exchange. The proposal also provides an exchange with a procedure to request, if conditions warrant, additional case-by-case exceptions even when it has already so designated five underlying securities.

In addition, a procedure is created for a Series Listing Exchange to request an exemption, on a case-by-case basis, from the 100 percent range limitation, whereby, if unanimously agreed upon by all exchanges that list the particular options class, the Series Listing Exchange may list options series with strike prices that are more than 100 percent above or below the price of the underlying security.[6]

*Example:* Exchange E has designated ABC as one of its five classes for which the 100 percent exercise price range limitations shall apply despite ABC's price exceeding $20. ABC hit a low price of $25 and a high price of $30 during the standard trading session as of the 3 p.m. Chicago time market close on Wednesday. The exchanges are considering next-day series additions for Thursday's opening, and, according to the proposed exercise price range limitations, may list additional series with strikes ranging from $0–$60. However, Exchange E believes that $60 as the high strike available to add will be insufficient to allow for adequate customer demand should ABC's price fluctuate to the high side.[7] Exchange E requests an exemption from the 100% range limitation for the purpose of adding strikes beyond $60 beginning on Thursday. If all exchanges that trade ABC unanimously consent then Exchange E, and all other exchanges that list ABC, may exceed the $60 upper strike price limitation when adding new series. If unanimous consent is not given then all exchanges will be limited to the 100 percent exercise price range limitations. The exchanges may add strikes beyond $60 to all existing series months at the time of consent. They may also add strikes beyond $60 in the series month that will be created at the next standard expiration after consent is provided, and if appropriate, any non-standard expiration that occurs prior to the standard expiration.

The proposal would not allow for the listing of options series that would otherwise be prohibited by the rules of a Series Selecting Exchange or the Plan, nor does it restrict the ability of an exchange to list options series that have been properly listed by another exchange. The proposal also expressly eliminates the applicability of the strike price range limitations with regard to: (1) The listing of $1 strike prices in option classes participating in the $1 Strike Program, where instead, the Series Selecting Exchange shall be permitted to list $1 strike prices to the fullest extent as permitted under its rules for the $1 Strike Program; and (2) the listing of series of Flexible Exchange Options.

The Commission directed the then-current options exchanges to act jointly to develop strategies to address overall capacity concerns in an Order dated September 8, 1999, as confirmed in a letter from the Director of the Division of Market Regulation dated September 13, 2000. According to the Plan Sponsors, this amendment is an additional strategy to meet this goal. According to one study cited by the Plan Sponsor exchanges, the options industry would expect an approximate four percent reduction in the number of series traded, with only a nominal reduction in trading volume, upon implementation of the changes proposed in this amendment.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether proposed Amendment No. 3 is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–443 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number 4–443. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at principal offices of the exchanges. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–443 and should be submitted on or before August 18, 2009.

[6] Application of any of the aforementioned exceptions and/or exemptions to the strike price range limitations for an underlying security would be available to all exchanges listing options on such security.

[7] This belief could be based upon an expected announcement by ABC during the after or premarket hours or an impending announcement which would directly impact ABC's industry.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17883 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

[8] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Tuesday, July 28, 2009 at 3 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(10) and 17 CFR 200.402(a)(10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session, and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Tuesday, July 28, 2009 will be:

A litigation matter; and

Consideration of amicus participation.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: July 24, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–18070 Filed 7–24–09; 4:15 pm]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission Investor Advisory Committee will hold an Open Meeting on Monday, July 27, 2009, in the Auditorium, Room L–002. The meeting will begin at 10 a.m. and will be open to the public, with seating on a first-come, first-served basis. Doors will open at 9:30 a.m. Visitors will be subject to security checks.

On July 8, 2009, the Commission published notice of the Committee meeting (Release No. 33–9049), indicating that the meeting is open to the public and inviting the public to submit written comments to the Committee. This Sunshine Act notice is being issued because a majority of the Commission plans to attend the meeting. Commissioner Walter, as duty officer, determined that no earlier Sunshine Act notice was possible.

The agenda for the meeting includes opening remarks, introduction of Committee members, discussion of Committee agenda and organization, and discussion of investor views of possible refinements to the disclosure regime.

For further information, please contact the Office of the Secretary at (202) 551–5400.

Dated: July 22, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–17861 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, July 30, 2009 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Walter, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, July 30, 2009 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Other matters relating to enforcement proceedings; and an adjudicatory matter.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: July 22, 2009.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–17860 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60366; File No. SR–FINRA–2009–030]**

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Amend Rules 6440 and 6540 To Require Members To Create a Contemporaneous Record of Certain Customer and Order Information

July 22, 2009.

On May 22, 2009, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''SEA'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rules 6440 and 6540 to require members to create a contemporaneous record of certain customer and order information. The proposed rule change was published for comment in the **Federal Register** on June 17, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

#### I. Description of the Proposed Rule Change

FINRA has proposed to amend Rules 6440 and 6540 to, among other things,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 60085 (June 10, 2009), 74 FR 28741 (June 17, 2009).

require members to create a contemporaneous record of certain customer and order information demonstrating eligibility for the unsolicited customer order exception of SEA Rule 15c2–11 when the member is relying on such exception. SEA Rule 15c2–11 sets forth the information review and maintenance requirements for broker-dealers that publish quotations [4] in a quotation medium [5] for certain over-the-counter equity securities (*e.g.,* those quoted on the OTC Bulletin Board and Pink Sheets).

Specifically, SEA Rule 15c2–11 prohibits a broker-dealer from publishing, or submitting for publication, a quotation for a covered OTC equity security unless it has obtained and reviewed current information about the issuer whose security is the subject of the quotation that the broker-dealer believes is accurate and obtained from a reliable source. There are several exceptions to SEA Rule 15c2–11, including paragraph (f)(2) of the Rule, which excepts quotations that represent a customer's unsolicited order or indication of interest (unsolicited customer order exception).

FINRA Rule 6440 sets forth the standards applicable to member firms for demonstrating compliance with SEA Rule 15c2–11. FINRA has indicated that it has found that member firms maintain varying levels of documentation for demonstrating eligibility for the unsolicited customer order exception and, in some cases, are unable to produce any proof that a quote in fact represented a customer's unsolicited order or indication of interest (''IOI'').

While a member relying on this or any exception should be able to proffer evidence of its eligibility for and compliance with the exception, FINRA believes that providing specific recordkeeping requirements for demonstrating eligibility for the SEA Rule 15c2–11(f)(2) exception is appropriate and will promote more uniform record-keeping and compliance with this exception.

Specifically, FINRA has proposed that contemporaneous with the receipt of any unsolicited customer order or IOI, members would be required to record the following details: The identity of the associated person who receives the order or IOI directly from the customer, if applicable; [6] the identity of the customer; the date and time the order or IOI was received; and the terms of the order or IOI that is the subject of the quotation (*e.g.,* security name and symbol, size, side of the market, the duration (if specified) and, if priced, the price). To the extent a member is displaying a quote representing an unsolicited customer order or IOI that was received from another broker-dealer, the member is still required to create a contemporaneous record of the identity of the person from whom information regarding the unsolicited customer order or IOI was received, if applicable; [7] the date and time the unsolicited customer order or IOI was received by the member displaying the quotation; and the terms of the order that is the subject of the quotation.[8] The member displaying the quotation may rely on the information provided by the routing firm if the member has a reasonable basis for believing that the information is valid.

In addition, FINRA proposed to amend Rule 6540 (Requirements Applicable to Market Makers). The proposed amendment would delete footnote #1 under Rule 6540. Footnote #1 sets forth a summary of exemptive relief granted by the SEC from the requirements of SEA Rule 15c2–11 (subject to certain conditions). FINRA noted that because the Commission has granted additional exemptive requests from the requirements of SEA Rule 15c2–11 that are not included in footnote #1, and believes the Commission may continue to grant such requests in the future, FINRA has proposed to delete footnote #1 in its entirety and specify in Rule 6540 that members must demonstrate compliance with, or qualify for an exception or exemption from, SEA Rule 15c2–11.[9]

## II. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[10] In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposed amendments to Rules 6440 and 6540 will protect the public interest by promoting more uniform record-keeping and compliance with SEA Rule 15c2–11.

## III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (File No. SR–FINRA–2009–030) be and hereby is approved.

[4] SEA Rule 15c2–11 defines ''quotation'' as any bid or offer at a specified price with respect to a security, or any indication of interest by a broker or dealer in receiving bids or offers from others for a security, or any indication by a broker or dealer that advertises its general interest in buying or selling a particular security.

[5] ''Quotation medium'' means any ''inter-dealer quotation system'' or any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell. ''Inter-dealer quotation system'' means any system of general circulation to brokers or dealers that regularly disseminates the quotations of identified brokers or dealers.

[6] FINRA stated that in cases where a member is displaying a quote representing an unsolicited customer order or IOI that was received electronically, it is understood that there may not be a ''person'' associated with the receipt or submission of such unsolicited customer order or IOI. Thus, with respect to the requirement that members record (1) the identity of the associated person who received the unsolicited customer order or IOI; or (2) the identity of the person from whom information regarding the unsolicited customer order or IOI was received where the order or IOI is received from another broker-dealer, members are only required to record such information if applicable.

[7] *See supra* note 6.

[8] FINRA stated that it is critical that the member receiving an order be advised of and understand the terms of the order that are relevant to the exception so that the receiving member may reasonably and accurately rely on the unsolicited customer order exception. For example, if the customer order is a ''day'' order, the receiving member must be advised of that fact so that it can withdraw the quote upon the expiration of the order. Similarly, to the extent that the terms of the order change or other significant information is received by the firm routing the order (*e.g.,* a ''good-till-cancelled'' order is cancelled or there is a change in the terms of the order), the firm routing such order must promptly update the member displaying the quote as to the change in the terms of the order. To the extent the firm routing the order is not a member, the member should make periodic inquiry as to whether the terms of the order have changed. Members may not rely on the unsolicited customer order exception where a displayed quote no longer accurately represents current unsolicited customer interest.

[9] SEA Rule 15c2–11(h) sets forth the SEC's exemptive authority with respect to the requirements of SEA Rule 15c2–11 and provides that SEA Rule 15c2–11 shall not prohibit any publication or submission of any quotation if the SEC, upon written request or upon its own motion, exempts such quotation either unconditionally or on specified terms and conditions, as not constituting a fraudulent, manipulative or deceptive practice comprehended within the purpose of the rule.

[10] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17858 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60363; File No. SR–Phlx–2009–61]**

## Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of Proposed Rule Change Relating to Exchange Rules for the Options Order Protection and Locked/Crossed Market Plan

July 22, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on July 20, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act [3] and Rule 19b–4 thereunder,[4] proposes to modify the Exchange's rules to reflect its participation in the Options Order Protection and Locked/Crossed Market Plan (''Plan''). The proposed rules implement the Exchange's participation in the Plan, and will be substantially similar to the rules of other exchanges that are also implementing the Plan with minor variations to account for differences between the exchanges' market structures.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

On June 17, 2008, the Exchange filed an executed copy of the Options Order Protection and Locked/Crossed Market Plan (''Plan''), joining all other approved options markets in adopting [sic] the Plan. The Plan requires each options exchange to adopt rules implementing various requirements specified in the Plan. This proposal is designed to fulfill that obligation.

*Background*

The Plan will replace the current Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (''Linkage Plan''). That plan requires its participant exchanges to operate a stand-alone system or ''Linkage'' for sending order-flow between exchanges to limit trade-throughs. The Options Clearing Corporation (''OCC'') operates the Linkage system (the ''System''). The Linkage rules provide for unique types of Linkage orders, with a complicated set of requirements as to who may send such orders and under what conditions. Before a market maker can trade through another exchange's quote, it first must send a Linkage order and then wait three seconds for a response.

While the Linkage largely has operated satisfactorily, it is under significant strain. When the Commission approved the Linkage Plan in 2000, average daily volume (''ADV'') in the options market was approximately 2.6 million contracts across all exchanges. By 2007, the ADV had increased four-fold to more than 10.8 million contracts, putting added strain on the ability of market makers to comply with the complex Linkage rules. At the same time, the options markets have been moving towards quoting in pennies. This greatly increases the number of price changes in an option, giving rise to greater chances of trade-throughs and missing markets as market makers send Linkage orders and have to wait three seconds for a response.

Based upon experience in the equities markets following the adoption of Regulation NMS in 2005, the options exchanges have determined to replace the System with the Plan providing for a set of rules and procedures designed to avoid trade-throughs and locked markets. The key to Regulation NMS's price-protection provisions is the Intermarket Sweep Order (''ISO''). Each equity exchange must adopt rules ''reasonably designed to prevent trade-throughs.'' Exempted from trade-through liability is an ISO, which is an order a member sends to an exchange displaying a price inferior to the national best bid and offer (''NBBO''), while simultaneously sending orders to trade against the full size of any other exchange that is displaying the NBBO. A simple prohibition against most trade-throughs, coupled with the ISO mechanism, has given the equities markets a straight-forward system to provide customers with price protection in a fast-moving, high-volume market that is quoted in pennies.

*Proposed Temporary Linkage Rule.* The Exchange proposes to adopt Rule 1088 which provides that the Exchange will continue to accept Principal Acting as Agent (''P/A'') and Principal Orders from options exchanges that continue to use such orders to address trade-throughs via the existing linkage for a temporary period.

*Deletion of References to Linkage Orders.* The Exchange proposes to delete references to Linkage P and P/A orders from its rules. Specifically, the Exchange proposes to delete current Rules 1081 and 1083 through 1087, which currently make up the Exchange's rules that track the Linkage Plan. Additionally, for consistency, the Exchange proposes to delete references to Linkage P and P/A Orders from Rule 1080.

*The Proposed New Definitions.* The proposed Plan incorporates a number of defined terms, some identical to definitions from the existing Linkage Plan and others that have been developed along with the proposed Plan itself. Accordingly, Phlx is proposing to adopt new Rule 1083, which sets forth the defined terms for use under the proposed Plan.

*The Proposed Trade Through Rule.* The Plan essentially would apply the Regulation NMS price-protection provisions to the options markets. Similar to Regulation NMS, the Plan would require participants to adopt

rules ''reasonably designed to prevent Trade-Throughs,'' while exempting ISOs from that prohibition.

Accordingly, the Exchange is proposing to adopt new Rule 1084, which codifies the requirement that the Exchange and other Plan participants avoid trading through superior prices on other markets. The Exchange is also proposing to add an ISO order in Rule 1066 based upon the definition of ISO currently used by Nasdaq for compliance with Regulation NMS when trading equities. Rule 1080(b) would be amended to reflect that an ISO is a permitted order that may be entered on the Exchange's systems. The ISO order will be exempt from the prohibition against trading-through, as well as several additional exceptions to the trade-through prohibition that track the exceptions under Regulation NMS or correspond to unique aspects of the options market, or both. Specifically:

• *System Issues:* Proposed Rule 1084(b)(i) tracks Section 5(b)(i) of the Plan which corresponds to the system-failure exception in Regulation NMS [5] for equity securities and permits trading through an Eligible Exchange that is experiencing system problems.

• *Trading Rotations:* Proposed Rule 1084(b)(ii) tracks Section 5(b)(ii) of the Plan which carries forward the current Trade-Through exception in the Old Plan [6] and is the options equivalent to the single price opening exception in Regulation NMS for equity securities.[7] Some Options exchanges use a trading rotation to open an option for trading, or to reopen an option after a trading halt. The rotation is effectively a single price auction to price the option and currently there are no practical means to include prices on other exchanges in that auction.

• *Crossed Markets:* Proposed Rule 1084(b)(iii) tracks Section 5(b)(iii) which corresponds to the crossed quote exception in Regulation NMS for equity securities.[8] If a Protected Bid is higher than a Protected Offer, it indicates that there is some form of market dislocation or inaccurate quoting. Permitting transactions to be executed without regard to Trade-Throughs in a Crossed Market will allow the market to quickly return to equilibrium.

• *Intermarket Sweep Orders (''ISOs''):* These two exceptions correspond to the ISO exceptions in Regulation NMS for equity securities.[9] Proposed Rule 1084(b)(iv) tracks Section 5(b)(iv) of the Plan which permits a Participant to execute orders it receives from other Participants or members that are marked as ISO even when it is not at the NBBO. Proposed Rule 1084(b)(v) tracks Section 5(b)(v) of the Plan which allows a Participant to execute inbound orders when it is not at the NBBO, provided it simultaneously ''sweeps'' all better-priced interest displayed by Eligible Exchanges.

• *Quote Flickering:* Proposed Rule 1084(b)(vi) tracks Section 5(b)(vi) of the Plan which corresponds to the flickering quote exception in Regulation NMS for equity securities.[10] Options quotations change as rapidly, if not more rapidly, than equity quotations. Indeed, they track the price of the underlying security and thus change when the price of the underlying security changes. This exception provides a form of ''safe harbor'' to market participants to allow them to trade through prices that have changed within a second of the transaction causing a nominal Trade-Through.

• *Non-Firm Quotes:* Proposed Rule 1084(b)(vii) tracks Section 5(b)(vii) of the Plan which carries forward the current non-firm quote Trade-Through exception in the Old Plan.[11] By definition, an Eligible Exchange's quotations may not be firm for automatic execution during this trading state and thus should not be protected from Trade-Throughs. In effect, these quotations are akin to ''manual quotations'' under Regulation NMS.

• *Complex Trades:* Proposed Rule 1084(b)(viii) tracks Section 5(b)(viii) of the Plan which carries forward the current complex trade exception in the Old Plan [12] and will be implemented through rules adopted by the Participants and approved by the Commission. Complex trades consist of multiple transactions (''legs'') effected at a net price, and it is not practical to price each leg at a price that does not constitute a Trade-Through. Narrowly-crafted implementing rules will ensure that this exception does not undercut Trade-Through protections.

• *Customer Stopped Orders:* Proposed Rule 1084(b)(ix) tracks Section 5(b)(ix) of the Plan which corresponds to the customer stopped order exception in Regulation NMS for equity securities.[13] It permits broker dealers to execute large orders over time at a price agreed upon by a customer, even though the price of the option may change before the order is executed in its entirety.[14]

• *Stopped Orders and Price Improvement:* Proposed Rule 1084(b)(x) tracks Section 5(b)(x) of the Plan which would apply if an order is stopped at price that did not constitute a Trade-Through at the time of the stop. In this case, an exchange could seek price improvement for that order, even if the market moves in the interim, and the transaction ultimately is effected at a price that would trade through the then currently-displayed market.

• *Benchmark Trades:* Proposed Rule 1084(b)(xi) tracks Section 5(b)(xi) of the Plan which would cover trades executed at a price not tied to the price of an option at the time of execution, and for which the material terms were not reasonably determinable at the time of the commitment to make the trade. This corresponds to a Trade-Through exemption in Regulation NMS for equity trades.[15] Phlx does not currently permit these types of options trades, and any transaction-type relying on this exemption would require Phlx to adopt implementing rules, subject to Commission review and approval.

*The Proposed Locked and Crossed Markets Rule.* Similar to Regulation NMS, the Plan requires its participants to adopt, maintain and enforce rules requiring members: to avoid displaying locked and crossed markets; to reconcile such markets; and to prohibit members from engaging in a pattern or practice of displaying locked and crossed markets. These provisions are subject to exceptions that are contained in the rules of each participant and that are to be approved by the Commission.

Accordingly, the Exchange proposes to adopt new Rule 1086, which would set forth the general prohibition against locking/crossing other eligible exchanges as well as several exceptions that the Plan participants approved that permit locked markets in limited circumstances. Specifically, the exceptions to the general prohibition on locking and crossing occur when (1) the locking or crossing quotation was displayed at a time when the Exchange was experiencing a failure, material delay, or malfunction of its systems or equipment; (2) the locking or crossing quotation was displayed at a time when there is a Crossed Market; or (3) the Member simultaneously routed an ISO to execute against the full displayed size of any locked or crossed Protected Bid or Protected Offer.

[5] *See* Rule 611(b)(1) under the Act.

[6] *See* Linkage Plan Section 8(c)(iii)(E).

[7] *See* Rule 611(b)(3) under the Exchange Act.

[8] *See* Rule 611(b)(4) under the Exchange Act.

[9] *See* Rule 611(b)(5) and (6) under the Exchange Act.

[10] *See* Rule 611(b)(8) under the Exchange Act.

[11] *See* Linkage Plan Section 8(c)(iii)(C).

[12] *See* Linkage Plan Section 8(c)(iii)(G).

[13] *See* Rule 611(b)(9) under the Exchange Act.

[14] For a further discussion on how this exemption operates, *see* Regulation NMS Adopting Release, Exchange Act Release No. 51808 (June 9, 2005) at notes 322–325.

[15] *See* Rule 611(b)(7) under the Exchange Act.

*Phlx Routing Arrangements.* The Exchange proposes to rely upon the order routing arrangements already in place on its market, except that the Exchange proposes amendments to Rules 1080(m)(iv)(B) and (C) concerning FIND [16] and SRCH [17] Orders.

Currently, when the Phlx Best Bid/Offer (''PBBO'') is inferior to the Away Best Bid/Offer (''ABBO'') FIND and SRCH Orders are routed to the ABBO markets (following a ''Route Timer'' during which Phlx participants may price improve) and, if size remains in the FIND or SRCH Order following such routing, the Exchange will trade the order at the next PBBO price up to one minimum price variation (''MPV'') through the ABBO price subject to the order's limit price, or be entered into the Phlx XL II book and posted at its limit price one MPV inferior to the ABBO price if its limit price is equal to or through the ABBO price.

Under the instant proposal, Rules 1080(m)(iv)(B) and (C) would be amended to provide that if, at the end of the Route Timer, the ABBO is still the best price, the FIND Order will route to the away market(s) whose disseminated price is better than the PBBO (not just to the ABBO markets), up to a size equal to the lesser of either: (a) the away markets' size, or (b) the remaining size of the FIND Order. If the FIND Order still has remaining size after such routing, it will (i) trade at the next PBBO price (with no limitation of one MPV through the ABBO price), subject to the order's limit price, and, if contracts still remain unexecuted, the remaining size will be routed to away markets disseminating the same price as the PBBO, or (ii) be entered into the Phlx XL II book and posted at its limit price. A FIND Order that is routed to an away market will be marked as an ISO. Such ISO will conform to the requirements contained in proposed Rules 1066(i) and 1083(h).

Under the proposal, respecting SRCH Orders, if, at the end of the Route Timer, the ABBO is still the best price, the SRCH order will route to the away market(s) whose disseminated price is better than the PBBO, up to a size equal to the lesser of either: (a) The away markets' size, or (b) the remaining size of the SRCH order. If the SRCH order still has remaining size after such routing, it may (1) trade at the next PBBO price (or prices) if the order price is locking or crossing that price (or prices) up to the ABBO price, and/or (2) be entered into the Phlx XL II book at its limit price if not locking or crossing the Phlx price or the ABBO. The Phlx XL II system will route and execute contracts contemporaneously at the end of the Route Timer. Once on the book, the SRCH order is eligible for routing if it is locked or crossed by an away market. A SRCH Order that is routed to an away market will be marked as an ISO. Such ISO will conform to the requirements contained in proposed Rules 1066(i) and 1083(h).

Thus, the limitation on execution and/or booked limit order prices of one MPV away from the ABBO following routing of a FIND or SRCH Order to the ABBO markets (and all better-priced away markets) would be eliminated. This is consistent with the Plan and with the ISO Order type.

The Exchange proposes to amend its rules concerning orders that have been subject to its Quote Exhaust and Market Exhaust processes.

Respecting the Quote Exhaust feature, Exchange Rule 1082(a)(ii)(B)(3)(g)(iv)(A) and (B) currently state that remaining order volume from orders that have been subject to Quote Exhaust and routed to away markets will be posted on the Exchange at the ABBO price. Under the current proposal, if there still remain unexecuted contracts after trading at the Phlx and/or routing, the Quote Exhaust process of evaluating the Best Price will be repeated for any remaining order volume that is marketable.

Specifically, if the Exchange's Best Price is the Exchange's next available price standing alone, the Phlx XL II system will execute the initiating quote or order at the Exchange's next available price up to the Exchange's disseminated size. If the Best Price is equal to the ABBO price, the Phlx XL II system will execute the initiating quote or order at the Exchange's next available price up to the Exchange's disseminated size, and any remaining order volume from the execution on the Exchange will be routed away to the away market(s). If the Best Price is equal to the Exchange's pre-determined ''Acceptable Range'' price (based on a table published on the Exchange's web site), the Phlx XL II system will execute the initiating quote or order at the Exchange's next available price up to the Exchange's disseminated size, and any remaining volume from the execution on the Exchange will be posted at the Acceptable Range price for the remaining size, for a period of time not to exceed ten seconds and then cancelled after such period of time has elapsed.

Under the proposal, Rule 1082(a)(ii)(B)(4)(d)(vi) would be amended to state that, under the various Best Price scenarios, if after trading at the Phlx and/or routing, there is a remainder of the initiating order, and such remainder is still marketable, the entire process of evaluating the Best Phlx price and the ABBO will be repeated until: (A) The order size is exhausted, or (B) the order reaches its limit price. If there still remain unexecuted contracts after routing but the order has reached its limit price, the remainder will be posted at the order's limit price, except that, when the limit price crosses the Acceptable Range Price, the remainder will be posted at the Acceptable Range Price for a period of time not to exceed ten seconds and then cancelled after such period of time has elapsed. For a pilot period scheduled to expire November 30, 2009, during this up to ten second period, the Phlx XL II system will disseminate on the opposite side of the market from remaining unexecuted contracts: (i) A bid price of $0.00, with a size of one contract if the remaining size is a seller, or (ii) an offer price of $200,000, with a size of one contract if the remaining size is a buyer.

Respecting the Market Exhaust Auction, Exchange Rule 1082(a)(ii)(B)(4)(d)(iv) describes what happens to remaining order volume respecting orders subject to Market Exhaust. Currently, if the total number of contracts priced at the ABBO would not satisfy the number of marketable contracts the Exchange has, the Phlx XL II system will determine how many contracts it has available on the Exchange at a price equal to the ABBO. If the total number of ABBO contracts plus the number of contracts available on the Exchange at the ABBO price would satisfy the number of marketable contracts the Exchange has, the ABBO price becomes the ''Exchange Auction Price'' and the Phlx XL II system will trade available contracts on the Exchange at the Exchange Auction Price and contemporaneously route any remaining contracts to away markets at the Exchange Auction Price. Additionally, if the total number of ABBO contracts plus the number of contracts available on the Exchange at the ABBO price would not satisfy the number of marketable contracts the Exchange has, the Phlx XL II system currently will determine how many contracts are available on the Exchange at a price that is one Minimum Price Variation (''MPV'') through the ABBO price. If the total number of ABBO contracts plus the number of contracts

[16] A FIND order is an order that is routable upon receipt, or any time the option goes through an opening process. *See* Exchange Rule 1080(m)(iv)(B).

[17] A SRCH order is an order that is routable at any time. *See* Exchange Rule 1080(m)(iv)(C).

available on the Exchange at the ABBO price plus the number of contracts available on the Exchange at a price that is one MPV through the ABBO price would satisfy the number of marketable contracts the Exchange has, the price that is one MPV through the ABBO becomes the Exchange Auction Price.

Under the proposal, the ''one MPV away'' calculation will be deleted, and the Exchange's system will determine how many marketable contracts can be routed to all better priced away markets, not limited to the ABBO markets as stated in the current rule. This is because under the Plan, orders may be traded on the Exchange at the best Exchange price without the ''one MPV'' limitation if ISOs are routed to better priced away markets. Under both Quote Exhaust and Market Exhaust, all orders routed to away markets will be marked as ISOs. Such ISOs will conform to the requirements contained in proposed Rules 1066(i) and 1083(h).

Proposed Rule 1082(a)(ii)(B)(4)(d)(iv)(B) would state that, if the total number of contracts priced at the ABBO would not satisfy the number of marketable contracts the Exchange has, the Phlx XL II system will determine how many contracts are available on all better priced away markets. If the total number of contracts available on better priced away markets would satisfy the number of marketable contracts available on the Exchange, the Phlx XL II system will route all marketable contracts on the Exchange to other markets at the better prices.

If the total number of contracts priced at better priced away markets would not satisfy the number of marketable contracts the Exchange has, the Phlx XL II system will determine how many contracts it has available on the Exchange at the best Exchange price. If the total number of better priced away contracts plus the number of contracts available on the Exchange at the best Exchange price would satisfy the number of marketable contracts the Exchange has, the best Exchange price becomes the Exchange Auction Price and the Phlx XL II system will contemporaneously route the full size of displayed interest at better priced away markets to such better priced away markets, and trade remaining contracts on the Exchange at the Exchange Auction Price. In this situation, the Phlx XL II system will price any contracts routed to other markets at the away market price.

If the total number of better priced away contracts plus the number of contracts available on the Exchange at the PBBO price would not satisfy the number of marketable contracts the Exchange has, the Phlx XL II system will determine an Exchange Auction Price, using all available better priced away markets plus all available Exchange contracts, that will satisfy the number of marketable contracts the Exchange has. If that price is equal to or within the order limit price and the ''Auction Quote Range'' (''AQR'') determined by the Exchange, that price becomes the Exchange Auction Price and the system will contemporaneously route the full size of displayed interest at better priced away markets to such better priced away markets, and trade remaining contracts on the Exchange at the Exchange Auction Price. In this situation, the Phlx XL II system will price any contracts routed to other markets at the Exchange Auction Price.

Finally, the Exchange proposes similar changes to its ''Provisional Auction.'' Again, the ''one MPV'' calculation would be deleted, and pricing will be based on the best Exchange price instead of the ABBO.

Under the proposal, if the total number of better priced away contracts plus the number of contracts available on the Exchange at the Exchange Auction Price would not satisfy the number of marketable contracts the Exchange has, the system may repeat the auction process up to three times. If after that number of times, the Phlx XL II system still cannot either route and/or trade the entire initiating order, the Phlx XL II system will conduct a Provisional Auction by establishing the Exchange Auction Price at the AQR Price, routing to all away markets disseminating prices better than or equal to the Exchange Auction Price for their disseminated size, and trading as many contracts as possible on the Exchange at the AQR price. In this situation, the Phlx XL II system will price any contracts routed to other markets at the AQR price. Any unexecuted contracts from the initiating order will be displayed in the Exchange quote at the Exchange Auction Price for the remaining size for a brief period not to exceed ten seconds and subsequently cancelled back to the entering participant if they remain unexecuted and priced through the Auction Price. Just as under current rules, for a pilot period scheduled to expire November 30, 2009, during the brief period, the Phlx XL II system will disseminate, on the opposite side of the market from remaining unexecuted contracts: (i) A bid price of $0.00, with a size of one contract if the remaining size is a seller, or (ii) an offer price of $200,000, with a size of one contract if the remaining size is a buyer.

*Miscellaneous.* The Exchange proposes miscellaneous changes to its rules in connection with the new Plan. Specifically, The Exchange proposes the following amendments:

- Exchange By-Law Article XII, Section 12–11 would be amended to delete references to the Linkage Plan.
- Exchange Rule 1017(k) respecting automated openings on the Phlx XL II system, would be amended to state that any order volume that is routed to away markets pursuant to Rule 1017 will be marked as an ISO. Such ISO will conform to the requirements contained in proposed Rules 1066(i) and 1083(h).
- Exchange Rule 1033(a)(ii) and Options Floor Procedure Advice (''OFPA'') F–32, Solicitation of Quotations, currently state that, in response to a floor broker's solicitation of a single bid or offer, the members of a trading crowd (including the specialist and ROTs) may discuss, negotiate and agree upon the price or prices at which an order of a size greater than the AUTO–X guarantee can be executed at that time. The Rule and OFPA would be amended to delete references to the Linkage Plan and instead refer to the new Plan, and to delete references to Exchange rules that are being deleted in this filing. Additionally, the Rule and OFPA would be updated to reflect that the rule applies to single crowd bids and offers for orders of a size greater than the Exchange's disseminated size, instead of the obsolete ''AUTO–X guarantee'' (the Exchange's disseminated size is firm and is the guaranteed electronic order execution size).
- Rule 1034(a)(i)(C) currently states that a Linkage P/A Order that has been sent from the Exchange to, and price-improved on, another exchange at a price expressed in other than the appropriate minimum trading increment described in this rule, and then submitted to the Exchange for execution against the original customer limit order that gave rise to the Linkage P/A Order, may be traded on the Exchange at such price. Under the proposal, Rule 1034(a)(i)(C) would be amended to state that the Phlx XL II system will reject any order received at a price expressed in other than the appropriate minimum trading increment.
- The Exchange proposes to amend Rule 1066, Certain Types of Orders Defined, by adopting Rule 1066(i), which defines an ISO as a limit order that is designated as an ISO in the manner prescribed by the Exchange and is executed within the system by Participants at multiple price levels without respect to Protected Quotations of other Eligible Exchanges as defined in

Rule 1083. ISOs are immediately executable within the Phlx XL II system or cancelled, and shall not be eligible for routing as set out in Rule 1080.

Simultaneously with the routing of an ISO to the Phlx XL II system, one or more additional limit orders, as necessary, are routed by the entering party to execute against the full displayed size of any Protected Bid or Offer (as defined in Rule 1083(n)) in the case of a limit order to sell or buy with a price that is superior to the limit price of the limit order identified as an ISO. These additional routed orders must be identified as ISOs.

- Rules 1080(b)(i)(A), (B) and (C) would be amended to permit ISOs on the Phlx XL II system.
- Rule 1080(c)(iv)(F), currently states that the specialist will handle an order manually when the price of a limit order is not in the appropriate minimum trading increment pursuant to Rule 1034, including a Linkage P/A Order that has been sent from the Exchange to, and price-improved on, another exchange at a price expressed in other than such appropriate minimum trading increment, and then submitted to the Exchange for execution against the original customer limit order that gave rise to the Linkage P/A Order. As stated above in the proposed amendment to Rule 1034(a)(i)(C), the Phlx XL II system will reject any order received at a price expressed in other than the appropriate minimum trading increment. Therefore, Rule 1080(c)(iv)(F) will be deleted.
- Rule 1080(vi) would be deleted in its entirety because it contains obsolete language the concerning routing of Linkage P/A Orders and the handling of broker-dealer orders in the legacy Phlx XL system.

*Implementation.* The Exchange proposes to implement this proposed rule change upon withdrawal from the current Linkage Plan and effectiveness of the new Plan. Implementation is currently scheduled for August 31, 2009.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[18] in general, and with Section 6(b)(5) of the Act,[19] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of, a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the Exchange believes that adopting rules that implement the Plan will facilitate the trading of options in a national market system by establishing more efficient protection against trade-throughs and locked and crossed markets.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice in the **Federal Register.** The Commission is considering granting accelerated approval of the proposed rule change at the end of a 21-day comment period.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2009–61 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–Phlx–2009–61. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2009–61 and should be submitted on or before August 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17882 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

[18] 15 U.S.C. 78f.

[19] 15 U.S.C. 78f(b)(5).

[20] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60368; File No. SR–NSCC–2009–05]**

## Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Haircuts Applied to Eligible Clearing Fund Securities

July 22, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on July 10, 2009, the National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to modify the haircuts applied to Eligible Clearing Fund Securities.[2]

[1] 15 U.S.C. 78s(b)(1).

[2] NSCC Rule 1 (Definitions and Descriptions) defines Eligible Clearing Fund Securities and its components which are Eligible Clearing Fund Treasury Securities, Eligible Clearing Fund Agency Securities, and Eligible Clearing Fund Mortgage-Backed Securities.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

*(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

Under NSCC's Rules and Procedures, Members are required to make deposits to the Clearing Fund with the amount of each Member's required deposit being established by NSCC in accordance with one or more formulas (''Required Deposit''). A Member may satisfy its Required Deposit with a cash deposit, and NSCC may permit a portion of the Member's Required Deposit (with the exception of the deposit of a Mutual Fund/Insurance Services Member) to be evidenced by an open account indebtedness secured by Eligible Clearing Fund Securities. Eligible Clearing Fund Securities consist of certain Treasury, Agency, and mortgage-backed securities.

NSCC's Rules and Procedures permit NSCC to fund settlement by pledging Clearing Fund deposits as collateral for loans. NSCC maintains a committed borrowing facility for this purpose. Due to elevated volatility experienced in the financial markets, collateral haircuts imposed on NSCC under the borrowing facility have increased. Therefore, NSCC is required to make corresponding increases in Clearing Fund collateral haircuts to maintain alignment with this facility.

NSCC proposes to modify Procedure XV (Clearing Fund Formula and Other Matters) to update the correlating range of haircuts applied to the types of Eligible Clearing Fund Securities. In general, NSCC proposes to increase the haircuts for: (i) Interest bearing Treasuries with terms greater than 10 years but less than 15 years from 5 percent to a 6 percent and (ii) zero coupon Treasury and Agency securities from 2 to 10 percent based on term to 5 to 12 percent based on term. A complete listing of the haircut schedule, showing modifications, is as follows:

[3] The Commission has modified the text of the summaries prepared by NSCC.

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| Security Type | Remaining Maturity | Haircut |
|---|---|---|
| 1. Treasury | | |
| Bills, Notes, Bonds, TIPS | Zero to 1 year | 2.0% |
| | 1 year to 2 years | 2.0% |
| | 2 years to 5 years | 3.0% |
| | 5 years to 10 years | 4.0% |
| | 10 years to 15 years | [~~5.0%~~] **6.0%** |
| | 15 years or greater | 6.0% |
| Zero Coupon | Zero to 1 year | ~~[2.0%]~~ **5.0%** |
| | 1 year to 2 years | ~~[2.0%]~~ **5.0%** |
| | 2 years to 5 years | ~~[4.0%]~~ **5.0%** |
| | 5 years to 10 years | ~~[6.0%]~~ **12.0%** |
| | 10 years to 15 years | ~~[7.0%]~~ **12.0%** |
| | 15 years or greater | ~~[9.0%]~~ **12.0%** |
| 2. Agency | | |
| Notes, Bonds | Zero to 1 year | 2.0% |
| | 1 year to 2 years | 3.0% |
| | 2 years to 5 years | 4.0% |
| | 5 years to 10 years | 5.0% |
| | 10 years to 15 years | 6.0% |
| | 15 years or greater | 7.0% |
| Zero Coupon | Zero to 1 year | ~~[2.0%]~~ **5.0%** |
| | 1 year to 2 years | ~~[3.0%]~~ **5.0%** |
| | 2 years to 5 years | 5.0% |
| | 5 years to 10 years | ~~[7.0%]~~ **12.0%** |
| | 10 years to 15 years | ~~[8.0%]~~ **12.0%** |
| | 15 years or greater | ~~[10.0%]~~ **12.0%** |
| 3. Mortgage-Backed Security | | |
| Pass-Throughs | Ginnie Mae | 6.0% |
| | Fannie Mae/Freddie Mac | 7.0% |
| Self-issued | | 14% (or 21% if Concentration limit is exceeded). |

These changes will become effective as of August 3, 2009.

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NSCC believes that the proposed rule change is consistent with the requirements of Section 17A of the Act[4] and the rules and regulations thereunder applicable to NSCC because the proposed rule change should facilitate the prompt and accurate clearance and settlement of securities transactions by adjusting NSCC's haircut levels on Clearing Fund collateral and facilitating NSCC's ability to ensure adequate collateral levels are maintained to facilitate settlement in the event of a participant default.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

NSCC does not believe that the proposed rule change will have any impact on or impose any burden on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments relating to the proposed rule change have been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii) of the Act[5] and Rule 19b–4(f)(4)[6] thereunder because the proposed rule change effects a change in an existing service of NSCC that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of NSCC or for which it is responsible and (ii) does not significantly affect the respective rights of the clearing agency or persons using the service. At any time within sixty days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2009–05 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–NSCC–2009–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at *http://www.dtcc.com/legal/rule_filings/nscc/2009.php.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2009–05 and should be submitted on or before August 18, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. E9–17935 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

[4] 15 U.S.C. 78q–1.

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(4).

[7] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60358; File Nos. SR–BX–2009–040, SR–Phlx–2009–60]**

## Self-Regulatory Organizations; NASDAQ OMX BX, Inc. and NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Changes Amending the By-Laws of The NASDAQ OMX Group, Inc., Their Parent Company

July 21, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 16, 2009, NASDAQ OMX BX, Inc. (''BX'') and NASDAQ OMX PHLX, Inc. (''Phlx'') (collectively, the ''NASDAQ OMX Exchange Subsidiaries'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes as described in Items I, II, and III below, which Items have been substantially prepared by the NASDAQ OMX Exchange Subsidiaries. The Commission is publishing this notice to solicit comments on the proposed rule changes from interested persons.

**I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Changes**

The NASDAQ OMX Exchange Subsidiaries are filing these proposed rule changes with regard to proposed changes to the By-Laws of their parent corporation, The NASDAQ OMX Group, Inc. (''NASDAQ OMX''). The proposed rule changes will be implemented as soon as practicable following submission of these filings. The text of the proposed rule changes is available at *http://nasdaqomxbx.cchwallstreet.com* and *http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/phlx,* respectively, and at the respective NASDAQ OMX Exchange Subsidiary's principal office, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes**

In their filings with the Commission, each of the NASDAQ OMX Exchange Subsidiaries included statements concerning the purpose of and basis for its proposed rule change and discussed any comments it received on its proposed rule change. The text of these statements may be examined at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

places specified in Item IV below. Each of the NASDAQ OMX Exchange Subsidiaries has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes*

1. Purpose

NASDAQ OMX has proposed making certain amendments to its By-Laws to make improvements in its governance and update several provisions. In SR–NASDAQ–2009–039, The NASDAQ Stock Market LLC (the ''NASDAQ Exchange'') sought Commission approval to adopt these By-Law changes as part of the rules of the NASDAQ Exchange, and the Commission granted approval to these changes in an order dated June 26, 2009.[3] The NASDAQ OMX Exchange Subsidiaries are now submitting these filings on an immediately effective basis to adopt the same By-Law changes as rules of each Exchange.

The proposed changes to the By-Laws are as follows:

• Article I is being amended to reflect the recent name changes of the Philadelphia Stock Exchange and the Boston Stock Exchange to NASDAQ OMX Phlx, Inc. and NASDAQ OMX BX, Inc., respectively.

• Article III is being amended to modify the procedures governing proposals by stockholders, including proposals by stockholders to nominate directors. Specifically, the amendment will require a stockholder making a proposal to supply more complete information about the stockholder's background, including a description of any agreement, arrangement, or understanding between the stockholder, the beneficial owner of the stock, and any other persons acting in concert with them; a description of any agreement, arrangement or understanding (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares), the effect or intent of which is to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease the voting power of, such stockholder or such beneficial owner, with respect to shares of stock of NASDAQ OMX; and any other information regarding the stockholder and beneficial owner that would be required to be disclosed in a proxy statement under Section 14(a) of the Act. These changes are designed to provide the NASDAQ OMX Board of Directors and its stockholders with greater insight into the identity and intentions of persons presenting stockholder proposals to allow more thorough consideration of the merits of such proposals. These requirements are deemed satisfied, however, in the case of a proposal that is validly submitted under the rules and regulations promulgated under the Act (*i.e.,* SEC Rule 14a–8) and included in NASDAQ OMX's proxy. However, compliance with the By-Laws or with SEC Rule 14a–8 provides the exclusive means for stockholders to make proposals. The amendments also provide that a representative of a stockholder qualified to appear at an annual meeting must be an officer, manager or partner of the stockholder or must have written authorization from the stockholder. The amendments also make several minor clarifying changes to the text of Article III.

• Article IV is being amended to state explicitly that the Management Compensation Committee and the Audit Committee must be composed exclusively of independent directors within the meaning of the rules of the NASDAQ Stock Market that govern NASDAQ OMX's listing (and, in the case of the Audit Committee, Section 10A of the Act).[4] Although NASDAQ OMX adheres scrupulously to the independence requirements imposed by the NASDAQ Stock Market and the Act, it believes that these requirements should be explicitly stated in the By-Laws as well. NASDAQ OMX is also removing language making its Chief Executive Officer an ex-officio, non-voting member of the Management Compensation Committee. In this regard, listing standards of the NASDAQ Stock Market require management compensation determinations regarding executive officers to be made by vote of the Board's independent directors, or by vote of or upon the recommendation of a committee composed solely of independent directors.[5] NASDAQ OMX has satisfied this requirement by submitting compensation decisions to the vote of all of NASDAQ OMX's independent directors, but removing the Chief Executive Officer as an ex-officio director will provide it with flexibility to act upon the vote or upon the recommendation of the committee.

• Currently, NASDAQ OMX's Nominating Committee is required to be composed of persons who are not directors or who are directors not standing for re-election. This compositional requirement, which NASDAQ OMX's predecessor, The Nasdaq Stock Market, Inc., originally adopted while it was a wholly owned subsidiary of the National Association of Securities Dealers (''NASD''), is highly unusual for a public company such as NASDAQ OMX. In light of NASDAQ OMX's continued evolution into a public company with global operations, NASDAQ OMX believes that it is appropriate to adopt a standard nominating committee structure in which the committee is composed exclusively of independent directors. Under the amended by-law, the nominating committee shall consist of four or five directors, each of whom shall be an independent director within the meaning the rules of the NASDAQ Exchange. In addition, the number of Non-Industry Directors (*i.e.,* Directors without material ties to the securities industry) must equal or exceed the number of Industry Directors, and at least two members of the committee must be Public Directors (*i.e.,* directors who have no material business relationship with a broker or dealer, NASDAQ OMX or its affiliates, or FINRA).

• Article VIII is being amended to provide that NASDAQ OMX shall provide indemnification against liability, advancement of expenses, and the power to purchase and maintain insurance on behalf of persons serving as a director, officer, or employee of any wholly owned subsidiary of NASDAQ OMX to the same extent as indemnification, advancement of expenses, and the power to maintain insurance is provided for directors, officers, or employees of NASDAQ OMX. Thus, for example, a director of one of NASDAQ OMX's US or Nordic exchanges would be entitled to indemnification (and advancement of expenses) by NASDAQ OMX if made a party to a lawsuit to the same extent as a director of NASDAQ OMX. Similarly, the discretionary authority of NASDAQ OMX under Section 8.1(c) of the By-Laws to provide indemnification to persons serving as an agent of NASDAQ OMX is being extended to persons serving as an agent of any wholly owned

[3] Securities Exchange Act Release No. 59858 (May 4, 2009), 74 FR 22191 (May 12, 2009) (SR–NASDAQ–2009–039); Securities Exchange Act Release No. 60183 (June 26, 2009), 74 FR 32207 (July 7, 2009) (SR–NASDAQ–2009–039).

[4] 15 U.S.C. 78j–1(m). Notably, ''Staff Directors,'' who are officers of NASDAQ OMX serving on the NASDAQ OMX Board, are not considered independent under these provisions, and are therefore ineligible for service on the Audit Committee or Management Compensation Committee, or, as discussed below, the newly constituted Nominating Committee.

[5] NASDAQ Exchange Rule 4350(c)(3).

subsidiary of NASDAQ OMX. Article VIII is also amended to clarify that any repeal, modification or amendment of, or adoption of any provision inconsistent with, the indemnification and advancement of expenses provided for in Article VIII will not adversely affect the right of any person covered by the provision if the act or omission that any proceeding arises out of or is related to had occurred prior to the time for the repeal, amendment, adoption or modification.

• Article IX is being amended to modernize the language of the provisions dealing with capital stock to reflect possible participation in the Direct Registration System (the ''DRS''). The DRS provides for the electronic registration of eligible securities in an investor's name on the books of the transfer agent or corporation, eliminating the need for physical stock certificates or shares held in book-entry form by the beneficial owner's broker. Although under the Delaware General Corporation Law, NASDAQ OMX can authorize participation in the program through a resolution, the various amendments to Article IX track more closely the language of Section 158 of the Delaware General Corporation Law, as recently revised, to explicitly reference the possibility of capital stock in uncertificated form. The amendments, however, do not require NASDAQ OMX to participate in the DRS or to eliminate stock certificates.

• Article XII is being amended to conform certain of its provisions more closely to corresponding provisions in the Amended and Restated By-Laws of NYSE Euronext (the ''NYSE Euronext By-Laws''). Article XII contains provisions that govern the relationship between NASDAQ OMX and each of its subsidiaries that is a self-regulatory organization. First, the article requires NASDAQ OMX's ''[d]irectors, officers, employees, and *agents''* (emphasis added) to give due regard to the preservation of the independence of each self-regulatory subsidiary, not to take any actions that would interfere with each self-regulatory subsidiary's regulatory functions, to cooperate with the Commission, to consent to U.S. jurisdiction, and to consent in writing to the applicability of these provisions. Corresponding provisions of Articles VII, VIII, and IX of the NYSE Euronext By-Laws, however, do not include the ambiguous and potentially expansive word ''agent.'' NASDAQ OMX is concerned that a broad construction of the term—to include not only parties with which it establishes an explicit contractual agency relationship, but also other service providers such as law firms and financial advisors that may act on NASDAQ OMX's behalf on certain occasions—may deter some parties from providing services to NASDAQ OMX. However, in lieu of the requirement to obtain specific consents from agents, NASDAQ OMX proposes to adopt a provision from the NYSE Euronext By-Laws providing that NASDAQ OMX shall comply with the U.S. federal securities laws and the rules and regulations thereunder and shall cooperate with the SEC and the Self-Regulatory Subsidiaries pursuant to and to the extent of their respective regulatory authority, and shall take reasonable steps necessary to cause its agents to cooperate, with the SEC and, where applicable, the Self-Regulatory Subsidiaries pursuant to their regulatory authority. Second, Article XII provides that NASDAQ OMX and its officers, directors and employees [6] agree to maintain an agent for service of process in the U.S. By contrast, Article VII of the NYSE Euronext By-Laws includes a statement that officers, directors and employees shall be deemed to agree that the Corporation may serve as the U.S. agent for service of process. Accordingly, NASDAQ OMX proposes to adopt this more self-executing version. Finally, while the NASDAQ OMX By-Laws provide that NASDAQ OMX shall take such action as is necessary to insure that officers, directors and employees consent in writing to the applicability of these provisions, Article IX of the NYSE Euronext By-Laws requires only that NYSE Euronext take reasonable steps necessary to cause officers, directors, and employees to consent. Although NASDAQ OMX has begun the process of collecting written consents from current officers, directors, and employees, it believes that the current language may be unreasonably demanding as applied to a multinational exchange operator with over 2,000 employees in over 20 countries. Accordingly, NASDAQ OMX proposes to adopt a version of NYSE Euronext's language, which will require reasonable steps to obtain consent from both current officers, directors, and employees, as well as prospective officers, directors, and employees prior to their acceptance of a position.

2. Statutory Basis

The NASDAQ OMX Exchange Subsidiaries believe that the proposed rule changes are consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(1) and (b)(5) of the Act,[8] in particular, in that the proposals enable them to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply with and enforce compliance by members and persons associated with members with provisions of the Act, the rules and regulations thereunder, and self-regulatory organization rules, and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed changes will enhance the clarity of NASDAQ OMX's governance documents and improve its Board committee structures.

*B. Self-Regulatory Organizations' Statements on Burden on Competition*

The NASDAQ OMX Exchange Subsidiaries do not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

*C. Self-Regulatory Organizations' Statements on Comments on the Proposed Rule Changes Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action**

The foregoing rule changes have become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [9] and subparagraph (f)(6) of Rule 19b–4 thereunder.[10] At any time within 60 days of the filing of the respective proposed rule change by the applicable NASDAQ OMX Exchange Subsidiary, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

A proposed rule change filed under Rule 19b–4(f)(6) [11] normally does not become operative for 30 days after the

[6] The existing reference to ''agents'' in the sentence is proposed to be deleted.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(1), (5).

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6).

date of filing. However, Rule 19b–4(f)(6)(iii) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The NASDAQ OMX Exchange Subsidiaries request that the Commission waive the 30-day operative delay so that the proposals may become operative immediately upon filing. The NASDAQ OMX Exchange Subsidiaries state that the proposed rule changes do not significantly affect the protection of investors or the public interest and do not impose any significant burden on competition.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[13] As mentioned above, the Commission recently approved the proposed rule change by The NASDAQ Stock Market LLC to adopt as part of its rules these same proposed changes to the By-Laws of NASDAQ OMX.[14]

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes are consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Nos. SR–BX–2009–040 and SR–Phlx–2009–60 on the subject line.

*Paper Comments*

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

All submissions should refer to File Nos. SR–BX–2009–040 and SR–Phlx–2009–60. These file numbers should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at the principal offices of the respective Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Nos. SR–BX–2009–040 and SR–Phlx–2009–60, and should be submitted on or before August 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17889 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] *See supra,* note 3 and accompanying text.

[15] 17 CFR 200.30–3(a)(12).

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60362; File No. SR–FINRA–2009–046]**

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update Rule Cross-References and Make Other Various Non-Substantive Technical Changes to FINRA Rules

July 22, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 17, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to correct or update certain cross-references within certain FINRA rules that have been adopted in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

FINRA is in process [sic] of developing a new consolidated rulebook (''Consolidated FINRA Rulebook'').[4] That process involves FINRA submitting to the Commission for approval a series of proposed rule changes over time to adopt rules in the consolidated FINRA Rulebook. The phased adoption and implementation of those rules necessitates periodic amendments to update rule cross-references and other

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see* FINRA *Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

non-substantive technical changes in the Consolidated FINRA Rulebook.

The proposed rule change would make non-substantive changes to FINRA Rule 2310 (Direct Participation Programs) and would also update rule cross-references within FINRA Rules 5110 (Corporate Financing Rule—Underwriting Terms and Arrangements), 5122 (Private Placements of Securities Issued by Members), 5130 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings), 6635 (FINRA Rules), 9610 (Application), 12805 (Expungement of Customer Dispute Information under Rule 2080) and 13805 (Expungement of Customer Dispute Information under Rule 2080) that are needed as the result of Commission approval of two recent FINRA proposed rule changes.[5] In addition, with respect to FINRA Rule 9610, the proposed rule change would update rule cross-references to reflect the adoption of Rule 5122.[6] FINRA has filed the proposed rule change for immediate effectiveness. The implementation date will be August 17, 2009, the date on which FINRA–2009–016 will also be implemented (FINRA–2008–020 became effective on June 17, 2009).

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[7] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2009–046 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–FINRA–2009–046. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2009–046 and should be submitted on or before August 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17881 Filed 7–27–09; 8:45 am]

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[5] *See* Securities Exchange Act Release No. 59599 (March 19, 2009), 74 FR 12913 (March 25, 2009) (Order Approving File No. SR–FINRA–2008–020) and Securities Exchange Act Release No. 59987 (May 27, 2009), 74 FR 26902 (June 4, 2009) (Order Approving File No. SR–FINRA–2009–016).

[6] *See* Securities Exchange Act Release No. 59599 (March 19, 2009), 74 FR 12913 (March 25, 2009) (Order Approving File No. SR–FINRA–2008–020).

[7] 15 U.S.C. 78*o*–3(b)(6).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60356; File No. SR–NYSE–2009–08]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Rescinding NYSE Rule 110 Which Establishes the Role of Competitive Traders and Exchange Rule 107A Which Establishes the Role of the Registered Competitive Market Makers

July 21, 2009.

**I. Introduction**

On April 6, 2009, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to rescind NYSE Rule 110, which establishes the role of Competitive Traders (''CTs''), and Exchange Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

107A, which establishes the role of the Registered Competitive Market Makers (''RCMMs'').[3] The proposed rule change was published for comment in the **Federal Register** on April 16, 2009.[4] The Commission received two comment letters on the proposal.[5] On July 10, 2009 the Exchange filed a comment response letter.[6] This order approves the proposed rule change.

## II. Description of the Proposal

Currently, NYSE Rule 107A governs the registration and obligations of RCMMs. Similarly, NYSE Rule 110 governs the registration and obligations of CTs. CTs and RCMMs were first established by the Exchange in 1964 and 1978, respectively, as classes of floor traders that could commit capital to trade in a manner that provides additional liquidity, contribute to mitigating price fluctuations, and enhance competition.[7] In 1981, the Commission adopted Rule 11a1–5, which provides that:

> Any transaction by a New York Stock Exchange registered competitive market maker * * * effected in compliance with [NYSE's] governing rules shall be deemed to be of a kind which is consistent with the purposes of section 11(a)(1) of the Act, the protection of investors, and the maintenance of fair and orderly markets.[8]

Included among RCMM's affirmative obligations under Section B of Rule 107A are requirements for a RCMM to: (i) Make a bid or offer in a stock that contributes to the maintenance of a fair and orderly market in such stock whenever called upon by certain parties, and (ii) effect all purchases and sales for the RCMM's proprietary account in a manner that contributes to the maintenance of price continuity with reasonable depth and minimizes the effects of a temporary disparity between supply and demand. In addition, NYSE Rule 107A requires a RCMM to avoid participation as a dealer during the opening of the stock in a manner that would disrupt the public balance of supply and demand, subject to certain exceptions. Further, a RCMM may not effect transactions for its own account or the account of its member organization that are not a part of a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth and to the minimizing of the effects of any temporary disparity between supply and demand. NYSE Rule 107A.10 describes the conditions under which a RCMM must be ready to enter the market if called upon by a Floor Official or Floor broker to narrow the quotation spread or add liquidity to the market.

NYSE Rule 110 describes the obligations applicable to CTs. For example, members acting as CTs that desire to purchase or sell stock for accounts in which they have an interest are prohibited from congregating in a particular stock, and individually or as a group, intentionally or unintentionally, dominating the market in that stock. CTs are also subject to meeting certain stabilization tests which are computed on a monthly basis.

The Exchange proposes to rescind NYSE Rule 110 and NYSE Rule 107A, eliminating CTs and RCMMs as recognized classes of floor traders on the Exchange.[9] The Exchange notes that the volume and speed of the securities markets has increased dramatically since the inception of the CTs and RCMMs and that the majority of trades on the Exchange are now executed electronically. When the Exchange introduced its Hybrid Market,[10] the Exchange determined that a review of the viability of RCMMs and CTs to trade in the more electronic trading environment was warranted and undertook to assess the contributions of RCMMs and CTs to the liquidity available to the NYSE. Thus, in October 2005, the Exchange implemented a moratorium on the qualification and registration of new CTs and RCMMs while the Exchange conducted a study on the future viability of CTs and RCMMs (''Moratorium'').[11] The Moratorium was extended six times[12] while the Exchange continued its evaluation of CT and RCMM trading.

In October 2008, the Commission approved the Exchange's new market model filing (''Next Generation NYSE'').[13] In light of the implementation of the NYSE's new market model, the Exchange again extended the Moratorium several times to evaluate the viability of the RCMMs and CTs under its revised structure.[14]

The Exchange notes that, at the time the Moratorium was first imposed, there were 11 registered RCMMs and one registered, but inactive, CT. In December 2006, the largest RCMM firm ceased its RCMM business and left the floor, eliminating 6 RCMMs from the floor. This reduced the number of RCMMs operating on the Exchange to five.[15] These remaining five RCMMs are associated with two member organizations.

In its study of the CT and RCMM trading in the more electronic environment, the Exchange reviewed the trading data associated with the CT and RCMM order execution. The Exchange's review found that the CT class of floor trader had not executed

[3] The Exchange also proposes to make conforming amendments to NYSE Rules 36, 98, 123, 111, 476A, 800, 900 and 1600 to eliminate references to RCMMs and CTs.

[4] *See* Securities Exchange Act Release No. 59746 (April 10, 2009), 74 FR 17702 (the ''Notice'').

[5] *See* letter from Robert Baxter and Charles Bocklet, Partners, Green Mountain Trading LLC (''GMT'') to Elizabeth M. Murphy, Secretary, Commission (''Elizabeth Murphy'') (''GMT Comment Letter''). *See also* e-mail from Chris Forbes to Elizabeth Murphy, dated July 9, 2009 (''Forbes E-mail'').

[6] *See* letter from Pia K. Thompson, Assistant Secretary, New York Stock Exchange LLC to Elizabeth Murphy, dated July 10, 2009 (''NYSE Response Letter'').

[7] For a detailed discussion on the background and functions of RCMMs and CTs, *see* Notice, *supra* note 4.

[8] 17 CFR 240.11a1–5. *See* Securities Exchange Act Release No. 17569 (February 24, 1981), 46 FR 14888 (March 3, 1981). Section 11(a)(1) of the Act prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion unless an exception applies. 15 U.S.C. 78k(a).

[9] The Exchange also proposes to make conforming amendments to NYSE Rules 36, 98, 476A, 111, 800, 900 and 1600 to eliminate references to RCMMs and CTs.

[10] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR–NYSE–2004–05) (establishing the Hybrid Market).

[11] *See* Securities Exchange Act Release No. 52648 (October 21, 2005), 70 FR 62155 (October 28, 2005) (SR–NYSE–2005–63).

[12] *See* Securities Exchange Act Release Nos. 54140 (July 13, 2006), 71 FR 41491 (July 21, 2006) (SR–NYSE–2006–48); 54985 (December 21, 2006), 72 FR 171 (January 3, 2007) (SR–NYSE–2006–113); 55992 (June 29, 2007), 72 FR 37289 (July 9, 2007) (SR–NYSE–2007–57); 56556 (September 27, 2007), 72 FR 56421 (October 3, 2007) (SR–NYSE–2007–86); 57072 (December 31, 2007), 73 FR 1252 (January 7, 2008) (SR–NYSE–2007–125); and 57601 (April 2, 2008), 73 FR 19123 (April 8, 2008) (SR–NYSE–2008–22). The Moratorium was also amended to grant RCMM firms the ability to replace a RCMM who relinquishes his or her registration and ceases to conduct business as a RCMM during the Moratorium with a newly qualified and registered RCMM. *See* Securities Exchange Act Release No. 53549 (March 24, 2006), 71 FR 16388 (March 31, 2006) (SR–NYSE–2006–11).

[13] *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46).

[14] *See* Securities Exchange Act Release Nos. 58033 (June 26, 2008), 73 FR 38265 (July 3, 2008) (SR–NYSE–2008–49); 58713 (October 2, 2008), 73 FR 59024 (October 8, 2008) (SR–NYSE–2008–96); and 59069 (December 8, 2008), 73 FR 76081 (December 15, 2008) (SR–NYSE–2008–124). The Exchange extended the Moratorium three additional times due to the filing of this current proposed rule change in order to maintain the Moratorium until the completion of the Rule 19b–4 rule filing process for this proposed rule change. *See* Securities Exchange Act Release Nos. 59551 (March 10, 2009), 74 FR 11624 (March 18, 2009) (SR–NYSE–2009–24); 60062 (June 8, 2009), 74 FR 28297 (June 15, 2009) (SR–NYSE–2009–53); and 60197 (June 30, 2009), 74 FR 32663 (July 8, 2009) (SR–NYSE–2009–62).

[15] Registration as an RCMM is applicable only to individual members, not member organizations. *See* NYSE Rule 107A(1). Accordingly, RCMM trading licenses are issued to individual members.

any transactions on the floor as a result of the non-usage of the CT license and therefore provided no contribution to the quality of the NYSE Market.

The Exchange also states that, from May 2004 to December 2004, RCMM trading volume comprised only .018% of the total NYSE trading volume for that time period. In 2005, the year that the Moratorium was implemented, RCMM trading volume comprised only .017% of the total NYSE trading volume for the year. In 2006, the RCMM trading volume comprised .008% of the total NYSE trading volume for the year. After the largest RCMM firm ceased its business in December 2006, RCMM trading volume in 2007 and 2008 comprised only .001% of the NYSE total trading volume for each of those years.

The Exchange also represents that, from August 2005 through February 2008, RCMM monthly average trading volume for that time period never exceeded .021% of the Exchange's total trading volume for that time period. On average during this time period, RCMMs comprised only .006% of the NYSE's trading volume. The Exchange asserts that review of the trading volume prior to and during the Moratorium indicates that RCMM/CT trading volume was minimally affected by the Moratorium.

The Exchange further states that, for the time period from July 2008 to December 2008, RCMM and CT average trading volume did not exceed .0011% of the Exchange's total trading volume per month for that time period. On average over these six months, RCMMs comprised only .001% of the NYSE's trading volume. The Exchange's review also found that the CT class of floor trader still had not executed any transactions on the floor as a result of the non-usage of the CT license and therefore provided no contribution to the market quality on the NYSE. The Exchange reports that RCMM trading in 2009 (as of the date the Exchange filed this proposed rule change) comprised approximately .001% of the total NYSE trading volume.

In light of these statistics, the Exchange concluded that the level of participation of the RCMMs and CTs no longer serve as viable supplemental market makers because they no longer contribute significantly to the overall liquidity available on the NYSE.

In addition to reviewing the trading statistics of the RCMMs and the sole, inactive CT, NYSE Market and NYSE Regulation reviewed the technology, operational and regulatory costs required to adequately support and surveil RCMM and CT trading activity in a predominantly electronic trading environment. Following such review, the Exchange concluded that the development of technology specifically designed to comport with the RCMM and CT trading rules in the context of Next Generation NYSE would not be cost effective in view of the minimal current trading volume of the five RCMMs and the nonexistent trading volume of the one registered CT.

Moreover, NYSE notes that it has developed a new class of electronic liquidity providers, Supplemental Liquidity Providers (''SLPs'') [16] that, the Exchange contends, has largely supplanted the role once filled by RCMMs and CTs. SLPs are off-floor entities that quote and trade on the NYSE electronically. The operation of SLPs is intended to provide incentives for quoting and to add competition to the existing group of floor-based liquidity providers, the designated market makers (''DMMs'').[17]

## III. Summary of Comments [18]

In its comment letter, GMT objects to the Exchange's elimination of CTs and RCMMs as classes of floor traders on the NYSE for several reasons. First, GMT argues that the Exchange's assertion that CTs and RCMMs provide only limited liquidity to the Exchange as compared to the overall trading volume on the NYSE is invalid because the Exchange itself imposed a limitation on the growth of the RCMM community by placing the Moratorium on the registration of new RCMMs.[19] As such, the GMT Comment Letter speculates that, had the Exchange permitted the registration of additional RCMMs, the group's trading volume would have been much greater, and contended that over 100 NYSE members desired to become RCMMs.

In addition, GMT questions the reliability of the Exchange's data on RCMM trading because it ''only accounts for trading done through hand-held systems or 'paper' trading on the floor.'' [20] GMT asserts that, had the Exchange included volume traded away from the floor via the DOT system in its review, the trading data would have been ''dramatically larger,'' particularly if NYSE had not placed the Moratorium on RCMMs and if the number of RCMMs had numbered ''500 or 1000.''

Finally, GMT argues that RCMMs should be maintained as an additional source of liquidity on the floor, in addition to the liquidity supplied from DMMs and from off the floor by SLPs, and advocates for a trial period during which RCMMs could receive rebate incentives and upgraded handheld technology, among other things, to determine whether RCMMs could benefit the Exchange's market.[21]

In the NYSE Response Letter, the Exchange notes that the RCMM community has never been large.[22] Specifically, the Exchange states that there were only eleven registered RCMMs at the time the Moratorium was imposed and, since the year 2000, the number of registered RCMMs has never exceeded thirteen.[23] Further, the Exchange notes that, in the filing, it had included volume data for a period preceding the imposition of the Moratorium and, as indicated, that volume was small in comparison to overall trading volume on the Exchange. In addition, the Exchange responded that the elimination of the RCMM and CT categories would not revoke the Exchange memberships of these individuals.[24] If they retain their memberships, the Exchange notes that they would be able to trade from off the floor through the Exchange's electronic systems, without the obligations currently applicable to RCMMs trading on the Exchange. Moreover, the Exchange states that the current RCMMs would be able to seek to become Floor brokers or DMMs if they wish to continue to trade on the floor of the Exchange.[25] Thus, the Exchange contends that the elimination of RCMMs and CTs would not prevent these individuals from trading and adding liquidity to the Exchange.

Finally, the Exchange states that it has consulted with the RCMM community over a period of years to determine whether to continue the RCMM trading category.[26] However, the Exchange has

[16] *See* Securities Exchange Act Release No. 58877 (October 29, 2008), 73 FR 65904 (November 5, 2008) (SR–NYSE–2008–108). *See also* NYSE Rule 107B.

[17] A SLP is required to quote at the National Best Bid (''NBB'') or the National Best Offer (''NBO'') at least 5% of the trading day for each assigned security in round lots to maintain its status as an SLP. If a SLP posts liquidity in its assigned securities that results in an execution, the Exchange will pay the SLP a financial rebate per share for such executions provided that the SLP meets its monthly quoting requirement for rebates averaging 3% at the NBB or NBO in its assigned securities in round lots.

[18] In addition to the GMT Comment Letter, the Commission also received the Forbes E-mail from Chris Forbes, who identified himself as a RCMM on the floor of the NYSE. *See supra* note 5. Mr. Forbes expressed his belief that RCMMs can provide a vital service on the NYSE. Mr. Forbes did not provide any further substantive arguments against the NYSE's proposal to eliminate CTs and RCMMs as classes of floor traders.

[19] *See* GMT Comment Letter, *supra* note 5.

[20] *Id.*

[21] *Id.*

[22] *See* NYSE Response Letter, *supra* note 6.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

concluded that it is not cost effective to devote resources to the facilitation and regulation of RCMM or CT trading in view of the limited liquidity provided by these floor traders.[27]

## IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[28] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[29] which requires that an exchange have rules designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that it is reasonable and consistent with the Act for the Exchange to eliminate RCMMs and CTs as classes of floor traders on the Exchange. The Commission notes that the Exchange analyzed this issue over a three-year period to review the contributions of RCMMs and CTs to the liquidity of the Exchange in light of its more electronic trading environment. As detailed above, the Exchange's data demonstrated that the trading of RCMMs and CTs on the Exchange amounted to a negligible portion of the overall trading volume of the Exchange. For example, according to NYSE, from August 2005 through February 2008, RCMM monthly average trading volume for that time period never exceeded .021% of the Exchange's total trading volume and, on average, RCMMs comprised only .006% of the NYSE's trading volume. In addition, NYSE represents that, during the time period reviewed, there was no trading on the Exchange by CTs.

The GMT Comment Letter takes issue with the Exchange's RCMM trading data, stating that the low RCMM trading volume figures were the result of the Exchange imposing the Moratorium and thereby restricting the size of the RCMM community. However, as the NYSE Response Letter notes, the GMT Comment Letter fails to address the fact that NYSE did review and provide data for a period of time prior to the Moratorium. Specifically, the Notice stated that from May 2004 to December 2004, before the Moratorium was imposed, RCMM trading volume comprised only .018% of the total trading volume on the Exchange and that in 2005, the year that the Moratorium was implemented (in October 2005), RCMM trading volume comprised only .017% of the total NYSE trading volume for the year. Thus, it appears that RCMM trading volume was quite limited in comparison to the overall trading volume of the Exchange, even before the Exchange imposed the Moratorium. In addition, the NYSE Response Letter represents that, even before the implementation of the Moratorium, the RCMM community has always been relatively small, with a maximum of only 13 individuals registered as RCMMs since the year 2000.

The GMT Comment Letter also criticizes the RCMM trading data because it fails to take into account trading done on the DOT System. However, the Commission notes that GMT itself concedes that adding the DOT trading data for the five active RCMMs would not have made a significant difference in the figures.

In light of the above, the Commission believes that the Exchange's conclusion that RCMMs and CTs no longer serve as viable supplemental market makers and no longer contribute significantly to the overall liquidity available on the NYSE is reasonable.

Further, the Commission notes that the Exchange also considered the technological, operational and regulatory costs required to adequately support and surveil RCMM and CT trading activity. According to the Exchange, the rules and functions of RCMMs and CTs were developed when NYSE was a manual trading center and are not well-suited for the electronic, high speed trading environment found on the Exchange today.[30] The Commission notes that the Exchange concluded that it would not be cost effective to develop technology specifically designed to comport with the RCMM and CT trading rules in the context of Next Generation NYSE in view of the minimal current trading volume of the five RCMMs and the nonexistent trading volume of the one registered CT. Instead, the Exchange argues that SLPs ''largely supplanted'' the role that the RCMMs and CTs once filled on the Exchange.

Though the GMT Comment Letter argues that more floor traders mean more liquidity and efficient price discovery and thus the Exchange should retain RCMMs and CTs as classes of floor traders,[31] the Commission agrees with NYSE that there are a number of other types of market participants to provide liquidity, competition, and price discovery, even after the elimination of the CTs and RCMMs. Along with SLPs who quote and trade electronically from off the floor, DMMs and Floor brokers will still provide liquidity and competition on the floor of the Exchange. Importantly, as NYSE noted in its Response Letter, the Exchange is not rescinding RCMM and CT traders' membership to the Exchange.[32] Members currently operating as RCMMs and CTs may choose to continue to trade and provide liquidity to the Exchange either by trading from off of the floor through the Exchange's electronic systems or by trading as a different class of trader, such as Floor brokers or DMMs, assuming they are willing and able to meet the requirements applicable to such classes of traders.

The GMT Comment Letter also argues that the rule change should be delayed to allow for additional input and testing, and to implement a one-year trial period.[33] However, according to NYSE, the continuation of RCMM and CT trading would require trading system enhancements, the cost of continued development of surveillance technology and procedures, and staff training and hours spent in these efforts. Moreover, as noted in the NYSE Response Letter, the Exchange has consulted with RCMM firms over several years regarding whether this class of traders should be continued. The Commission also notes that the Exchange has already extended the Moratorium a number of times over a period of more than three years. Thus, the Commission finds NYSE's proposal to be reasonable in balancing the costs of maintaining RCMMs and CTs as classes of trades on the Exchange against the benefits that they provide to the Exchange.

Finally, the Commission recognizes that the Exchange operates in a competitive marketplace and believes that the Exchange should have the ability to structure its rules to accommodate the implementation of its own business model, provided that such rules comply with the Act and the rules promulgated thereunder. Given the considerations noted above—the limited trading volume of RCMMs and CTs, the high costs of maintaining and surveiling these classes of floor traders, the existence of other market participants to provide liquidity and competition, as

[27] *Id.*

[28] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78f(b)(5).

[30] *See* Notice, *supra* note 4.

[31] *See* GMT Comment Letter, *supra* note 5.

[32] *See* Notice, *supra* note 4.

[33] *Id.*

well as the fact that those currently trading as RCMMs or CTs may choose to continue trading in another role as members of the Exchange—the Commission believes that the Exchange's decision to eliminate RCMMs and CTs from the Exchange is reasonable and within the business judgment of the Exchange, and is consistent with the Act.

## IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[34] that the proposed rule change (SR–NYSE–2009–08) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17879 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–60364; File No. SR–BATS–2009–026]**

## Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change To Amend BATS Fee Schedule to Impose Fees for Ports Used for Order Entry and Receipt of Market Data

July 22, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 21, 2009, BATS Exchange, Inc. (''BATS'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange has filed a proposed rule change to amend the fee schedule applicable to Members[3] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Pursuant to the proposed rule change the Exchange will commence charging fees to Members and non-members for ports used to enter orders into Exchange systems and to receive data from the Exchange. The Exchange will implement the proposed rule change on the first day of the month immediately following Commission approval (or on the date of approval, if on the first business day of a month).

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of the proposed rule change is to begin charging a monthly fee for ports used to enter orders in the Exchange's trading system and to receive data from the Exchange. The Exchange proposes to charge $250.00 per month per pair[4] of any port type other than a Multicast PITCH Spin Server Port or a GRP Port. Thus, this proposed charge will apply to all Exchange FIX, FIXDROP, DROP, TCP PITCH, TCP FAST PITCH and TOP ports.[5] In addition, the Exchange proposes to provide all Exchange constituents that receive the Exchange's Multicast PITCH Feed with 12 pairs of Multicast PITCH Spin Server Ports free of charge and, if such ports are used, one free pair of GRP Ports. The Exchange proposes to charge such customers $250.00 per month per additional pair of GRP Ports or additional set of 12 pairs of Multicast PITCH Spin Server Ports. The Exchange's proposal to provide certain ports free of charge to Multicast Pitch customers is designed to encourage use of the Exchange's Multicast PITCH Feed because such feed is a relatively new offering by the Exchange and because the Exchange believes that the feed is its most efficient feed, and thus, will reduce infrastructure costs for both the Exchange and those who utilize the feed. Any Member or non-member that has entered into the appropriate agreements with the Exchange is permitted to receive Multicast Pitch Spin Server Ports and GRP Ports from the Exchange.

Based on the proposal, the change applies to Members that obtain ports for direct access to the Exchange, non-member service bureaus that act as a conduit for orders entered by Exchange Members that are their customers, and market data recipients. The Exchange has previously provided ports free of charge to all Members and non-members that use such ports for order entry to the Exchange or for receipt of market data. However, over time, the Exchange's infrastructure costs have increased. In addition, the Exchange believes that providing ports free of charge has not encouraged Members and non-members to reserve and maintain ports efficiently, but rather, has led to a significant number of ports that are reserved and enabled by such market participants but are never used or are under used. Accordingly, the Exchange believes that the imposition of port fees will help the Exchange to continue to maintain and improve its infrastructure, while also encouraging Exchange customers to request and enable only the ports that are necessary for their operations related to the Exchange.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes that the proposed change is consistent with Section 6(b)(4) of the Act,[7] because it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that its proposed port fees are reasonable in light of the benefits to members of direct market access and

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[34] 15 U.S.C. 78s(b)(2).

[35] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[4] Each pair of ports will consist of one port at the Exchange's primary data center and one port at the Exchange's secondary data center.

[5] BATS FIX ports are the only ports that may be used to send orders and related instructions to the Exchange. All other port types, including Multicast PITCH and GRP Ports, permit Members and non-members to receive information from the Exchange.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

receipt of data, which data, other than the proposed access fee, is currently provided free of charge. In addition, the Exchange believes that its fees are equitably allocated among its constituents based upon the number of access ports that they require to submit orders to the Exchange or receive data from the Exchange. The Exchange believes that its fees for access services will enable it to better cover its infrastructure costs and to improve its market technology and services.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Fees for market access will be a component of the overall fees charged by the Exchange to execute and route orders through the Exchange. As the Commission has recognized, the market for execution and routing services is extremely competitive.[8] Market participants that choose not to connect directly to the Exchange can readily access liquidity available on the Exchange by directing their order flow to other venues that, under Regulation NMS, must route to the Exchange if it has posted the best price. Accordingly, the Exchange must set its fees, including access service fees, at a level that will not deter market participants from connecting to the Exchange; otherwise, potential users of the Exchange's services will simply direct order flow to the Exchange's multiple competitors. In addition, the Exchange believes that the proposed port fees are consistent with or less than the port fees charged by its competitors. With respect to market data, the Exchange does not charge any fees for such data. Although it will now begin imposing a fee related to access to such data, for market participants that receive such data directly from the Exchange, the Exchange believes that its free provision of data justifies such market participants paying some amount in order to help the Exchange offset the infrastructure costs of providing such data.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has neither solicited nor received written comments on the proposed rule change.

[8] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–BATS–2009–026 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR–BATS–2009–026. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2009–026 and should be submitted on or before August 18, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–17865 Filed 7–27–09; 8:45 am]

**BILLING CODE 8010–01–P**

## DEPARTMENT OF STATE

**[Public Notice 6708]**

### Culturally Significant Objects Imported for Exhibition Determinations: ''Eccentric Visions: The Worlds of Luo Ping (1733–1799)''

**SUMMARY:** Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition ''Eccentric Visions: The Worlds of Luo Ping (1733–1799),'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, NY, from on or about October 6, 2009, until on or about January 10, 2010, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the exhibit objects, contact Carol B.

[9] 17 CFR 200.30–3(a)(12).

Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/453–8048). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: July 20, 2009.

**C. Miller Crouch,**

*Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.*

[FR Doc. E9–17912 Filed 7–27–09; 8:45 am]

**BILLING CODE 4710–05–P**

## DEPARTMENT OF STATE

**[Public Notice 6709]**

### Waiver of Restriction on Assistance to the Central Government of the Kyrgyz Republic

Pursuant to section 7088(c)(2) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 (Division H, Pub. L. 111–8) (''the Act''), and Department of State Delegation of Authority Number 245–1, I hereby determine that it is important to the national interest of the United States to waive the requirements of section 7088(c)(1) of the Act with respect to the Government of the Kyrgyz Republic, and I hereby waive such restriction.

This determination shall be reported to the Congress, and published in the **Federal Register**.

Dated: July 14, 2009.

**Jacob L. Lew,**

*Deputy Secretary of State for Management and Resources, Department of State.*

[FR Doc. E9–17911 Filed 7–27–09; 8:45 am]

**BILLING CODE 4710–46–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2009–0170]**

### Agency Information Collection Activities; Revision of a Currently Approved Information Collection Request: Annual and Quarterly Report of Class I Motor Carriers of Passengers (OMB 2139–0003)

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit to the Office of Management and Budget (OMB) for approval its request to revise a currently approved information collection request (ICR) entitled, ''Annual and Quarterly Report of Class I Motor Carriers of Passengers.'' This information collection is necessary to ensure that motor carriers comply with financial and operating statistics requirements at chapter III of title 49 CFR part 369 entitled, ''*Reports of Motor Carriers.*'' On March 24, 2009, FMCSA published a **Federal Register** notice (at 74 FR 12436) allowing for a 60-day comment period on the revision of this ICR. The comment received in response to the notice expressed support for this ICR.

**DATES:** Please send your comments by August 27, 2009. OMB must receive your comments by this date in order to act quickly on the ICR.

**ADDRESSES:** All comments should reference Federal Docket Management System (FDMS) Docket Number FMCSA–2009–0170. Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/Office of the Secretary, and sent via electronic mail to *oira_submission@omb.eop.gov*, or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Ms. Vivian Oliver, Office of Research and Information Technology, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–2974; e-mail *Vivian.Oliver@dot.gov*.

**SUPPLEMENTARY INFORMATION:**

*Title:* Annual and Quarterly Report of Class I Motor Carriers of Passengers (formerly OMB Control Number 2139–0003).

*OMB Control Number:* 2126–0031.

*Type of Request:* Revision of a currently-approved information collection request.

*Respondents:* Class I Motor Carriers of Passengers.

*Estimated Number of Respondents:* 6.

*Estimated Time per Response:* 18 minutes per response.

*Expiration Date:* 09/30/2009.

*Frequency of Response:* Quarterly and annually.

*Estimated Total Annual Burden:* 9 hours [30 responses × 18 minutes per response/60 minutes = 9].

*Background:* For-hire Class I motor carriers of passengers (including interstate and intrastate) [1] are required to file Motor Carrier Annual and Quarterly Reports (Form MP–1) that provide financial and operating data (see 49 U.S.C. 14123; and implementing FMCSA regulations at 49 CFR part 369). The agency uses this information to assess the health of the industry and identify industry changes that may affect national transportation policy. The data also show company financial stability and traffic patterns. Motor carriers of passengers required to comply with the regulations are classified on the basis of their annual gross carrier operating revenues. Under the Financial & Operating Statistics (F&OS) program, the FMCSA collects balance sheet and income statement data along with information on tonnage, mileage, employees, transportation equipment, and other related data.

The data and information collected is made publicly available as prescribed in 49 CFR part 369. Class I motor carriers are required by 49 U.S.C. 14123 to file annual financial reports with the Secretary. The Secretary has exercised his discretion under section 14123 to also require Class I property carriers (including dual-property carriers), Class I household goods carriers and Class I passengers carriers to file quarterly reports.

Over the years, the regulations were formerly administered by the Interstate Commerce Commission (ICC), but the ICC Termination Act of 1995 (ICCTA) (Pub. L. 104–88, 109 Stat. 803 (Dec. 29, 1995); now codified at 49 U.S.C. 14123) abolished the ICC and transferred the responsibility for collecting and disseminating motor carrier financial information to the Secretary of Transportation (Secretary). On September 30, 1998, the Secretary delegated and transferred the authority

[1] For purposes of the Financial & Operating Statistics (F&OS) program, passenger carriers are classified into the following two groups; (1) Class I carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of $5 million or more from passenger motor carrier operations after applying the revenue deflator formula as shown in the Note at 49 CFR 369.3; and (2) Class II passenger carriers are those having average annual gross transportation operating revenues (including interstate and intrastate) of less than $5 million from passenger motor carrier operations after applying the revenue deflator formula as shown in the Note at 49 CFR 369.3. Only Class I carriers of passengers are required to file the Annual and Quarterly Report Form MP–1. Class II passenger carriers, however, must notify the agency when there is a change in their classification or their revenues exceed the Class II limit.

to administer the F&OS program to the former Bureau of Transportation Statistics (BTS), now a part of the Research and Innovative Technology Administration (RITA), to former Chapter XI, subchapter 13 of 49 CFR part 1420 (63 FR 52192).

On September 29, 2004, the Secretary transferred the responsibility for the F&OS program from BTS to FMCSA in the belief that the program was more aligned with FMCSA's safety mission and its other motor carrier responsibilities (69 FR 51009). On August 10, 2006 (71 FR 45740), the Secretary published a final rule that transferred and redesignated the motor carrier financial and statistical reporting regulations of BTS that were formerly located at chapter XI of title 49 CFR to FMCSA in 49 chapter III of title 49 CFR part 369.

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize and/or include your comments in the request for OMB's clearance of this information collection request.

Issued on July 16, 2009.

**David Anewalt,**

*Acting Associate Administrator, Research and Information Technology.*

[FR Doc. E9–17956 Filed 7–27–09; 8:45 am]

**BILLING CODE 4910–EX–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket ID. FMCSA–2009–0174]**

### Qualification of Drivers; Exemption Applications; Diabetes

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA).

**ACTION:** Notice of applications for exemptions from the diabetes standard; request for comments.

**SUMMARY:** FMCSA announces receipt of applications from 41 individuals for exemptions from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate commercial motor vehicles in interstate commerce.

**DATES:** Comments must be received on or before August 27, 2009.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2009–0174 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statutes also allow the Agency to renew exemptions at the end of the 2-year period. The 41 individuals listed in this notice have recently requested an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

### Qualifications of Applicants

*Michael D. Arnold*

Mr. Arnold, age 56, has had ITDM since 2004. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Arnold meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class B Commercial Driver's License (CDL) from Ohio.

*Michael F. Arthur*

Mr. Arthur, 43, has had ITDM since 2001. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Arthur meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have

diabetic retinopathy. He holds a Class C operator's license from Maine.

*Roelf F. Aufforth*

Mr. Aufforth, 35, has had ITDM since 1983. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Aufforth meets the requirements of the vision standard at 49 CFR 391.41(b)(10).

His ophthalmologist examined him in 2009 and certified that he has stable proliferative diabetic retinopathy. He holds a Class A CDL from Minnesota.

*Gerald L. Bell*

Mr. Bell, 57, has had ITDM since 1988. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Minnesota.

*Steven H. Bergheger*

Mr. Bergheger, 54, has had ITDM since 1998. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bergheger meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Illinois.

*Kevin N. Bigham*

Mr. Bigham, 49, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Bigham meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

*Blaine T. Boellstroff*

Mr. Boellstroff, 31, has had ITDM since 2009. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Boellstroff meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Nebraska.

*Dane R. Broach*

Mr. Broach, 52, has had ITDM since mid 1990's. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Broach meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Arizona.

*Richard B. Brookshire*

Mr. Brookshire, 56, has had ITDM since 2007. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Brookshire meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Alaska.

*David J. Campbell*

Mr. Campbell, 45, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Campbell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Colorado.

*Christopher S. Cate*

Mr. Cate, 50, has had ITDM since 1978. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cate meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class C operator's license from New Hampshire.

*Lynne M. Childers*

Ms. Childers, 46, has had ITDM since 2002. Her endocrinologist examined her in 2009 and certified that she has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Childers meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her ophthalmologist examined her in 2009 and certified that she does not have

diabetic retinopathy. She holds a Class A CDL from Arizona.

*Moses O. Crespo*

Mr. Crespo, 29, has had ITDM since 2005. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Crespo meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from New York.

*Raymond A. Dietz*

Mr. Dietz, 39, has had ITDM since 2002. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Dietz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Florida.

*Steven C. Ellenberger*

Mr. Ellenberger, 52, has had ITDM since 2006. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ellenberger meets the requirements of the vision standard at 49 CFR 391.41(b)(10).

His optometrist examined him in 2009 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Nebraska.

*Ralph M. Ellis*

Mr. Ellis, 57, has had ITDM since 2005. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ellis meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Indiana.

*Troy E. Freeman*

Mr. Freeman, 47, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Freeman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Mississippi.

*Glenn T. Grace*

Mr. Grace, 54, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Grace meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Michigan.

*Byron K. Hicks*

Mr. Hicks, 50, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hicks meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

*Dori A. Hoffman*

Ms. Hoffman, 47, has had ITDM since 2002. Her endocrinologist examined her in 2009 and certified that she has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Hoffman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her optometrist examined her in 2009 and certified that she does not have diabetic retinopathy. She holds a Class O operator's license from Nebraska, which allows her to drive any non-commercial vehicle except motorcycles.

*William C. Howard*

Mr. Howard, 60, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Howard meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

*Adam C. Hyatt*

Mr. Hyatt, 26, has had ITDM since 1998. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hyatt meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does

not have diabetic retinopathy. He holds a Class D operator's license from Tennessee.

*Clarence B. Jackson*

Mr. Jackson, 36, has had ITDM since 2007. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jackson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Georgia.

*Robert F. Jolly, Jr.*

Mr. Jolly, 60, has had ITDM since 2005. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jolly meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Colorado.

*Dale Jones*

Mr. Jones, 45, has had ITDM since 1993. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jones meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Illinois.

*Matthew G. Matheson*

Mr. Matheson, 29, has had ITDM since 1993. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Matheson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Texas.

*Steven A. Mayhew*

Mr. Mayhew, 54, has had ITDM since 1977. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mayhew meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New York.

*Michael G. Mulder*

Mr. Mulder, 28, has had ITDM since 1985. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mulder meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

*Gary S. Myers*

Mr. Myers, 49, has had ITDM since 2002. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Myers meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oklahoma.

*Bradley D. Nickles, Jr.*

Mr. Nickles, 48, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nickles meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class C operator's license from New Hampshire.

*Sherwin M. Nurse, III*

Mr. Nurse, 46, has had ITDM since 2007. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nurse meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

*Frank R. Radice*

Mr. Radice, 28, has had ITDM since 1996. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Radice meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from New York.

*Frank A. Rhodes*

Mr. Rhodes, 46, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Rhodes meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

*James B. Roth*

Mr. Roth, 41, has had ITDM since 1980. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Roth meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

*Matthew T. Russell*

Mr. Russell, 28, has had ITDM since 1986. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Russell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Illinois.

*Tranquilino D. Sena*

Mr. Sena, 36, has had ITDM since 1990. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sena meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New Mexico.

*John A. Serth, Jr.*

Mr. Serth, 50, has had ITDM since 2001. His endocrinologist examined him in 2008 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Serth meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

*David H. Shipley*

Mr. Shipley, 53, has had ITDM since 2009. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Shipley meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Wyoming.

*Michael A. Taylor*

Mr. Taylor, 52, has had ITDM since 2007. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Taylor meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class O operator's license from Nebraska.

*Peter T. Tengbeh*

Mr. Tengbeh, 55, has had ITDM since 2008. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Tengbeh meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2009 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Rhode Island.

*John A. Yarde*

Mr. Yarde, 67, has had ITDM since 2004. His endocrinologist examined him in 2009 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Yarde meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2008 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

**Request for Comments**

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the Notice.

FMCSA notes that Section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1]

[1] Section 4129(a) refers to the 2003 Notice as a ''final rule.'' However, the 2003 Notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) the elimination of the requirement for three years of experience operating CMVs while being treated with insulin; and (2) the establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 Notice (68 FR 52441). FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary. FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 Notice (68 FR 52441), except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 Notice (68 FR 52441), except as modified by the Notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: July 21, 2009.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E9–17968 Filed 7–27–09; 8:45 am]

**BILLING CODE P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[FMCSA Docket No. FMCSA–2009–0122]**

### Qualification of Drivers; Exemption Applications; Diabetes

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA announces its decision to exempt thirty-five individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

**DATES:** The exemptions are effective July 28, 2009. The exemptions expire on July 28, 2011.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov*.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477, Apr. 11, 2000). This statement is also available at *http://www.regulations.gov*.

#### Background

On June 2, 2009, FMCSA published a notice of receipt of Federal diabetes exemption applications from thirty-five individuals, and requested comments from the public (74 FR 26467). The public comment period closed on July 2, 2009, and no comments were received.

FMCSA has evaluated the eligibility of the thirty-five applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

#### Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current standard for diabetes in 1970 because several risk studies indicated that diabetic drivers had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 **Federal Register** Notice (68 FR 52441) in conjunction with the November 8, 2005, **Federal Register** Notice (70 FR 67777) provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These thirty-five applicants have had ITDM over a range of 1 to 31 years. These applicants report no hypoglycemic reaction that resulted in loss of consciousness or seizure, that required the assistance of another person, or resulted in impaired cognitive function without warning symptoms in the past 5 years (with one year of stability following any such episode). In each case, an endocrinologist has verified that the driver has demonstrated willingness to properly monitor and manage their diabetes, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision standard at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the June 2, 2009, **Federal Register** Notice (74 FR 26471). Therefore, they will not be repeated in this notice.

#### Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes standard in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA

considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologist's medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that exempting these applicants from the diabetes standard in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

**Conditions and Requirements**

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not they are related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

**Discussion of Comments**

FMCSA received no comments in this proceeding.

**Conclusion**

Based upon its evaluation of the thirty-five exemption applications, FMCSA exempts, Abdelhadi A. Abdelnabi, Dennis W. Athey, II., Barry A. Barber, Jeromy B. Birchard, Kevin J. Blue, Lester B. Brazfield, Bradley M. Brown, Gary L. Brown, Robert F. Browne, III., Robert F. Carter, Howard L. Cooksey, William D. Cornwell, III., Brian P. Dionne, Richard C. Dunn, Donald K. Ennis, Dennis Graves, Michael T. Harris, Daniel H. Henson, J. Theoginis Kehaias, Harold M. Koski, Richard B. Lorimer, Lester J. Manis, Trena L. Marshall, Troy A. Martinson, Ronald R. McDougle, Richard L. Miller, Jerome A. Mjolsness, David K. Mopps, George E. Patton, Jack E. Rensing, Clayton M. Reynolds, Jeffrey S. Saint-Vincent, Richard Scott, Gary A. Sweeney, and David L. Wilhelm from the ITDM standard in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: July 21, 2009.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E9–17969 Filed 7–27–09; 8:45 am]

**BILLING CODE 4910–EX–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2007–26653]**

### Qualification of Drivers; Exemption Renewals; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 18 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*

**Background**

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on July 2, 2009.

**Discussion of Comments**

FMCSA received no comments in this proceeding.

**Conclusion**

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 18 renewal applications, FMCSA renews the Federal vision exemptions for Michael W. Anderson, Michael R. Bradford, John J. Caricola, Jr., William P. Caulfield, Denise M. Engle, Wade M. Hillmer, Michael W. Jensen, Jorge Lopez, Albert E. Marbut, Michael J. McGregan, Willie E. Nichols, John P. Perez, Jeffrey W. Pike, Jr., Scott K. Richardson, Kyle C. Shover, Charles H. Smith, Robert G. Springer, and Scott A. Taylor.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: July 21, 2009.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E9–17971 Filed 7–27–09; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket ID FMCSA–2009–0154]**

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of applications for exemptions; request for comments.

**SUMMARY:** FMCSA announces receipt of applications from 40 individuals for exemption from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the Federal vision standard.

**DATES:** Comments must be received on or before August 27, 2009.

**ADDRESSES:** You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2009–0154 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov*, including any personal information included in a comment. Please see the Privacy Act heading below.

*Docket:* For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

*Privacy Act:* Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19476). This information is also available at *http://Docketsinfo.dot.gov*.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

### Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' FMCSA can renew exemptions at the end of each 2-year period. The 40 individuals listed in this notice each have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by statute.

### Qualifications of Applicants

*Michael K. Adams*

Mr. Adams, age 48, has had a retinal detachment in his right eye since 1976. The best corrected visual acuity in his right eye is light perception and in his left eye, 20/20. Following an examination in 2009, his optometrist noted, ''In my medical opinion, Mr. Adams has sufficient vision to perform driving tasks required to operate a commercial vehicle.'' Mr. Adams reported that he has driven straight trucks for 28 years, accumulating 140,000 miles, and tractor-trailer combinations for 28 years, accumulating 420,000 miles. He holds a Class A Commercial Driver's License (CDL) from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Michael J. Amorese*

Mr. Amorese, 46, has macular scarring due to a traumatic injury since childhood. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/200. Following an examination in 2009, his ophthalmologist noted, ''In my opinion, Mr. Michael Amorese has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Amorese reported that he has driven straight trucks for 20 years, accumulating 150,000 miles. He holds a Class D operator's license from New York. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Mark R. Anderson*

Mr. Anderson, 56, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is light perception and in his left eye, 20/20. Following an examination in 2009, his optometrist noted, ''It is my opinion that Mark can perform all driving tasks required to operate a commercial vehicle.'' Mr. Anderson reported that he has driven straight trucks for 36 years, accumulating 216,000 miles. He holds a Class C operator's license from Michigan. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Darrell W. Bayless*

Mr. Bayless, 49, has had optic nerve defect from birth. The best corrected visual acuity in his right eye is 20/15 and in his left eye, 20/400. Following an examination in 2009, his optometrist noted, ''I certify that in my medical opinion, Mr. Bayless has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Bayless reported that he has driven tractor-trailer combinations for 4 years, accumulating 220,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 8 mph.

*Keith A. Bliss*

Mr. Bliss, 41, has had a prosthetic left eye since 1978. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2009, his optometrist noted, ''In my opinion, he has sufficient vision to drive a commercial vehicle.'' Mr. Bliss reported that he has driven straight trucks for 22

years, accumulating 1.1 million miles, and tractor-trailer combinations for 5 years, accumulating 325,000 miles. He holds a Class A CDL from New York. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Lloyd D. Burgess*

Mr. Burgess, 60, has loss of vision in his left eye due to retinal detachment sustained in 2004. The best corrected visual acuity in his right eye is 20/15 and in his left eye, 20/400. Following an examination in 2009, his optometrist noted, ''Based on the above findings, I certify that in my medical opinion, Mr. Burgess has sufficient vision to operate a commercial vehicle in a safe manner.'' Mr. Burgess reported that he has driven tractor-trailer combinations for 29 years, accumulating 3.5 million miles. He holds a Class A CDL from Ohio.

His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Gary R. Butler*

Mr. Butler, 57, has a prosthetic right eye due to a traumatic incident that occurred in 1999. The best corrected visual acuity in his left eye, 20/20. Following an examination in 2009, his optometrist noted, ''In my opinion and without hesitation, Mr. Butler's vision is sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Butler reported that he has driven straight trucks for 5 years, accumulating 250,000 miles, and tractor-trailer combinations for 13 years, accumulating 650,000 miles. He holds a Class A CDL from Oklahoma. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*David S. Clinger*

Mr. Clinger, 58, has loss of vision in his right eye due to maculopathy. The visual acuity in his right eye is 20/200 and in his left eye, 20/25. Following an examination in 2009, his ophthalmologist noted, ''In my medical opinion, David's vision is sufficient to perform driving tasks for commercial driving.'' Mr. Clinger reported that he has driven straight trucks for 42 years, accumulating 588,000 miles. He holds a Class A CDL from Idaho. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Ronald L. Cote*

Mr. Cote, 55, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/400 and in his left eye, 20/15. Following an examination in 2009, his ophthalmologist noted, ''My medical opinion is that Lance Ronald Cote is ok visually to drive and operate a commercial vehicle without glasses.'' Mr. Cote reported that he has driven straight trucks for 38 years, accumulating 760,000 miles. He holds a Class A CDL from Nevada. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*John C. Defoe*

Mr. Defoe, 44, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20 and in his left eye, 20/400. Following an examination in 2009, his ophthalmologist noted, ''In my opinion, Mr. Defoe has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Defoe reported that he has driven straight trucks for 25 years, accumulating 500,000 miles, and tractor-trailer combinations for 2 years, accumulating 12,000 miles. He holds a Class A CDL from Massachusetts. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Shennon E. Dorsey*

Mr. Dorsey, 36, has had a prosthetic left eye since 1996. The visual acuity in his right eye is 20/20. Following an examination in 2009, his optometrist noted, ''It is my medical opinion that Mr. Dorsey has the vision necessary to continue to operate a commercial vehicle.'' Mr. Dorsey reported that he has driven straight trucks for 13 years, accumulating 1.3 million miles, and tractor-trailer combinations for 13 years, accumulating 1.6 million miles. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Steve E. Duran*

Mr. Duran, 62, has loss of vision in his left eye due to retinal detachment sustained in 2003. The visual acuity in his right eye is 20/20 and in his left eye, light perception. Following an examination in 2009, his optometrist noted, ''In my opinion, Mr. Duran has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Duran reported that he has driven tractor-trailer combinations for 42 years, accumulating 4.6 million miles. He holds a Class A CDL from New Mexico. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Michael M. Edleston*

Mr. Edleston, 58, has loss of vision in his right eye due to a traumatic injury to his cornea sustained in 1969. The best corrected visual acuity in his right eye is 20/400 and in his left eye, 20/20. Following an examination in 2008, his optometrist noted, ''His vision is sufficient to drive a commercial vehicle.'' Mr. Edleston reported that he has driven straight trucks for 18 years, accumulating 259,200 miles, and tractor-trailer combinations for 21 years, accumulating 903,000 miles. He holds a Class A CDL from Massachusetts. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Cecil A. Evey*

Mr. Evey, 54 has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/200. Following an examination in 2008, his optometrist noted, ''In my opinion, Cecil Evey has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Evey reported that he has driven tractor-trailer combinations for 27 years, accumulating 1.6 million miles. He holds a Class A CDL from Idaho. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Kamal A. Gaddah*

Mr. Gaddah, 51, has had central retinal vein occlusion since 2000. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/300. Following an examination in 2009, his ophthalmologist noted, ''In my medical opinion, Mr. Gaddah has sufficient vision to perform his driving tasks required to operate a commercial vehicle.'' Mr. Gaddah reported that he has driven straight trucks for 17 years, accumulating 1.1 million miles. He holds a Class D operator's license from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Bradley O. Hart*

Mr. Hart, 42, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/200. Following an examination in 2009, his optometrist noted, ''I believe that Mr. Hart has sufficient visual function to operate a commercial vehicle safely.'' Mr. Hart reported that he has driven straight trucks for 15 years, accumulating 150,000 miles, and tractor-trailer combinations for 15 years,

accumulating 600,000 miles. He holds a Class A CDL from Utah. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*John M. Homchick*

Mr. Homchick, 62, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/15 and in his left eye, 20/80. Following an examination in 2009, his ophthalmologist noted, ''In my opinion, Mr. Homchick has sufficient vision to safely operate a commercial vehicle.'' Mr. Homchick reported that he has driven straight trucks for 13 years, accumulating 339,352 miles. He holds a Class A CDL from Washington. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Terry L. Hudgens*

Mr. Hudgens, 41, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/60. Following an examination in 2009, his optometrist noted, ''In my opinion, Mr. Hudgens has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Hudgens reported that he has driven straight trucks for 14 years, accumulating 1.5 million miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows one crash, for which he was not cited, and one conviction for speeding in a CMV. He exceeded the speed limit by 14 mph.

*Eric M. Kousgaard*

Mr. Kousgaard, 30, has had amblyopia in his left eye since birth. The visual acuity in his right eye is 20/20 and in his left eye, 20/400. Following an examination in 2009, his optometrist noted, ''Patient does have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Kousgaard reported that he has driven straight trucks for 13 years, accumulating 344,500 miles. He holds a Class O operator's license from Nevada, which allows him to drive any non-commercial vehicle except a motorcycle. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 10 mph.

*Larry L. Massey*

Mr. Massey, 60, has had loss of vision in his left eye due to a congenital birth defect. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/80. Following an examination in 2009, his optometrist noted, ''I certify in my medical opinion that Larry Massey does have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Massey reported that he has driven tractor-trailer combinations for 27 years, accumulating 2.7 million miles. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV, failure to obey a traffic sign.

*Joe A. McIntyre*

Mr. McIntyre, 51, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20 and in his left eye, 20/400. Following an examination in 2009, his optometrist noted, ''I feel he has sufficient vision to perform the driving tasks required to operate a commercial vehicle out of state.'' Mr. McIntyre reported that he has driven tractor-trailer combinations for 18 years, accumulating 342,000 miles. He holds a Class A CDL from Georgia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*James F. McMahon, Jr.*

Mr. McMahon, 54, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/80 and in his left eye, 20/20. Following an examination in 2008, his optometrist noted, ''I do wish to point out that James has been driving commercial vehicles for 24 years and it is my medical opinion that his vision is sufficient to allow him to continue to perform this function.'' Mr. McMahon reported that he has driven straight trucks for 34 years, accumulating 450,942 miles. He holds a Class B CDL from New Hampshire. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Samuel A. Miller*

Mr. Miller, 35, has had an optic nerve defect in his right eye since birth. The best corrected visual acuity in his right eye is 20/200 and in his left eye, 20/20. Following an examination in 2009, his optometrist noted, ''In my opinion, Mr. Miller's congenital optic nerve defect should not prohibit him from safely operating a commercial motor vehicle.'' Mr. Miller reported that he has driven straight trucks for 14 years, accumulating 218,400 miles. He holds a chauffeur's license from Indiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Marvin L. Motes*

Mr. Motes, 67, has a macular scar in his left eye due to a traumatic injury that occurred 15 years ago. The best corrected visual acuity in his right eye is 20/40 and in his left eye, 20/80. Following an examination in 2009, his optometrist noted, ''visual deficiency is stable, patient is able to drive, has sufficient vision to operate motor commercial vehicle.'' Mr. Motes reported that he has driven straight trucks for 37 years, accumulating 2 million miles, and tractor-trailer combinations for 28 years, accumulating 1.5 million miles. He holds a Class A CDL from Florida. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*John W. Myre*

Mr. Myre, 50, has a prosthetic left eye due to a traumatic injury since childhood. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2009, his ophthalmologist noted, ''Mr. Myre has excellent vision in his right eye and is visually competent to drive commercial vehicles.'' Mr. Myre reported that he has driven straight trucks for 31 years, accumulating 322,400, tractor trailer combinations for 18 years, accumulating 187,200 miles. He holds a Class A CDL from South Dakota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Noah I. Pennington*

Mr. Pennington, 67, has had a macular hole in his right eye since 1995. The visual acuity in his right eye is 20/50 and in his left eye, 20/30. Following an examination in 2009, his ophthalmologist noted, ''In my medical opinion, the patient does have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Pennington reported that he has driven tractor-trailer combinations for 30 years, accumulating 3 million miles. He holds a Class A CDL from Florida. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 10 mph.

*Ronald D. Peters*

Mr. Peters, 64, has loss of vision in his left eye due to subretinal bleeding stopped by a laser treatment in 2003. The best corrected visual acuity in his right eye is 20/30 and in his left eye, 20/250. Following an examination in 2009, his optometrist noted, ''Vision is adequate for commercial license.'' Mr. Peters reported that he has driven

straight trucks for 20 years, accumulating 800,000 miles, and tractor-trailer combinations for 35 years, accumulating 4.5 million miles. He holds a Class A CDL from South Dakota. His driving record for the last 3 years shows one crash, for which he was cited for following another vehicle too closely, and no other convictions for a moving violation in a CMV.

*Stephen Pozharsky*

Mr. Pozharsky, 62, has a prosthetic left eye due to a traumatic injury sustained in 1973. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2009, his optometrist noted, ''Has sufficient vision to operate motor commercial vehicle with present condition.'' Mr. Pozharsky reported that he has driven straight trucks for 36 years, accumulating 756,000 miles, and tractor-trailer combinations for 18 years, accumulating 252,000 miles. He holds a Class A CDL from New Jersey. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Angelo D. Rogers*

Mr. Rogers, 48, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20 and in his left eye, 20/80. Following an examination in 2009, his ophthalmologist noted, ''In my opinion, Angelo Rogers has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Rogers reported that he has driven straight trucks for 13 years, accumulating 221,000 miles, and tractor-trailer combinations for 13 years, accumulating 522,600 miles. He holds a Class A CDL from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Larry T. Rogers*

Mr. Rogers, 56, has had pappilodema in his right eye since 1999. The best corrected visual acuity in his right eye is 20/100 and in his left eye, 20/20. Following an examination in 2009, his optometrist noted, ''In my opinion, Todd shows sufficient vision (acuity and visual field) to operate a commercial vehicle.'' Mr. Rogers reported that he has driven tractor-trailer combinations for 25 years, accumulating 1 million miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Ricky J. Sanderson*

Mr. Sanderson, 38, has macular scarring in his left eye due to a traumatic injury sustained in 1999. The visual acuity in his right eye is 20/15 and in his left eye, 20/200. Following an examination in 2009, his optometrist noted, ''With binocular vision he appears to have adequate vision for commercial driving.'' Mr. Sanderson reported that he has driven straight trucks for 5 years, accumulating 7,500 miles, tractor-trailer combinations for 15 years, accumulating 600,000 miles, and buses for 11 years, accumulating 114,400 miles. He holds a Class A CDL from Utah. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*George V. Sorondo*

Mr. Sorondo, 59, has had amblyopia in his left eye since birth. The best corrected visual acuity in his right eye is 20/20 and in his left eye, 20/70. Following an examination in 2009, his optometrist noted, ''It is my professional medical opinion that Mr. Sorondo's vision, which has remained stable for decades, provides adequate, safe vision to maintain his commercial driver's license.'' Mr. Sorondo reported that he has driven straight trucks for 37 years, accumulating 669,330 miles. He holds a Class B CDL from California. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Marcial Soto-Rivas*

Mr. Soto-Rivas, 55, has loss of vision in his right eye due to a traumatic injury. The visual acuity in his right eye is light perception and in his left eye, 20/20. Following an examination in 2008, his optometrist noted, ''In my medical opinion, Mr. Soto-Rivas does have sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Soto-Rivas reported that he has driven straight trucks for 19 years, accumulating 380,000 miles, tractor-trailer combinations for 14 years, accumulating 840,000 miles, and buses for 10 years, accumulating 150,000 miles. He holds a Class A CDL from Oregon. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Marvin L. Stein*

Mr. Stein, 72, has loss of vision in his right eye due to macular degeneration. The best corrected visual acuity in his right eye is count-finger vision and in his left eye, 20/30. Following an examination in 2009, his ophthalmologist noted, ''It is my medical opinion that his vision would be sufficient to perform the driving tasks required to operate a commercial vehicle.'' Mr. Stein reported that he has driven straight trucks for 5 years, accumulating 375,000 miles, and tractor-trailer combinations for 49 years, accumulating 6.4 million miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*David C. Sybesma*

Mr. Sybesma, 52, has complete loss of vision in his right eye due to treatment for choroidal melanoma obtained in 1993. The visual acuity in his left eye is 20/20. Following an examination in 2009, his optometrist noted, ''At his time, he is well adapted to monocular vision, has 20/20 vision in his left eye and in my opinion has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Sybesma reported that he has driven straight trucks for 13 years, accumulating 69,350 miles, and tractor-trailer combinations for 13 years, accumulating 1.2 million miles. He holds a Class A CDL from Idaho. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Bruce E. Thulin*

Mr. Thulin, 58, has had a prosthetic right eye since childhood. The best corrected visual acuity in his left eye is 20/20. Following an examination in 2009, his optometrist noted, ''In my opinion, Mr. Thulin has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Thulin reported that he has driven straight trucks for 44 years, accumulating 4.4 million miles, and tractor-trailer combinations for 39 years, accumulating 3.9 million miles. He holds a Class A CDL from Nebraska. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 9 mph.

*Matthew K. Tucker*

Mr. Tucker, 38, has optic atrophy in his left eye since 1970. The best corrected visual acuity in his right eye is 20/80 and in his left eye, 20/20. Following an examination in 2009, his ophthalmologist noted, ''Thus, I believe that his vision is adequate for him to perform the driving tasks required to operate a commercial vehicle.'' Mr. Tucker reported that he has driven straight trucks for 10 years, accumulating 1 million miles, and

tractor-trailer combinations for 10 years, accumulating 1.2 million miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Stanley W. Tyler, Jr.*

Mr. Tyler, 41, has complete loss of vision in his left eye due to a traumatic injury sustained as a child. The visual acuity in his right eye is 20/20. Following an examination in 2009, his ophthalmologist noted, ''I believe that Mr. Tyler has perfectly adequate vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Tyler reported that he has driven straight trucks for 10 years, accumulating 275,000 miles. He holds a Class B CDL from Virginia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

*Victor H. Vera*

Mr. Vera, 35, has had retinal scarring in his right eye since 2002. The best corrected visual acuity in his right eye is 20/200 and in his left eye, 20/20. Following an examination in 2009, his optometrist noted, ''My opinion is that he has sufficient vision to safely operate a commercial vehicle.'' Mr. Vera reported that he has driven tractor-trailer combinations for 4 years, accumulating 729,600 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 7 mph.

*Charles A. Winchell*

Mr. Winchell, 54, has complete loss of vision in his left eye due to an infection that resulted in a failed corneal transplant in 1999. The best corrected visual acuity in his right eye is 20/25. Following an examination in 2009, his optometrist noted, ''I certify that in my opinion that Chuck has sufficient vision to perform the driving tasks required to operate a commercial vehicle as he has been doing this for many years with the same condition.'' Mr. Winchell reported that he has driven tractor-trailer combinations for 35 years, accumulating 1.7 million miles. He holds a Class D operator's license from Oklahoma. His driving record for the last 3 years shows no crashes and one conviction for speeding in a CMV. He exceeded the speed limit by 10 mph.

**Request for Comments**

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business August 27, 2009. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable.

In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: July 21, 2009.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E9–17966 Filed 7–27–09; 8:45 am]

**BILLING CODE 4910–EX–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–1999–5748; FMCSA–2000–8398; FMCSA–2001–9258; FMCSA–2003–14223; FMCSA–2005–20027; FMCSA–2005–20560]**

### Qualification of Drivers; Exemption Renewals; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of final disposition.

**SUMMARY:** FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 6 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*.

**Background**

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on July 2, 2009.

**Discussion of Comments**

FMCSA received no comments in this proceeding.

**Conclusion**

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 6 renewal applications, FMCSA renews the Federal vision exemptions for Edmund J. Barron, Thomas E. Howard, Roger K. Cox, Billy L. Johnson, Myron D. Dixon, and Clifford E. Masink.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: July 21, 2009.

**Larry W. Minor,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. E9–17972 Filed 7–27–09; 8:45 am]

**BILLING CODE 4910–EX–P**

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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[FHWA Docket No. FHWA–2009–0051]**

### Surface Transportation Project Delivery Pilot Program; Caltrans Audit Report

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

**ACTION:** Final report.

**SUMMARY:** Section 6005 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) established the Surface Transportation Project Delivery Pilot Program (pilot program), codified at 23 U.S.C. 327. To ensure compliance by each State participating in the pilot program, 23 U.S.C. 327(g) mandates semiannual audits during each of the first 2 years of State participation. This final report presents the findings from the third FHWA audit of the California Department of Transportation (Caltrans) under the pilot program.

**FOR FURTHER INFORMATION CONTACT:** Ms. Ruth Rentch, Office of Project Development and Environmental Review, (202) 366–2034, *Ruth.Rentch@dot.gov,* or Mr. Michael Harkins, Office of the Chief Counsel, (202) 366–4928, *Michael.Harkins@dot.gov,* Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., *e.t.,* Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

## Electronic Access

An electronic copy of this notice may be downloaded from the Office of the Federal Register's home page at *http://www.archives.gov* and the Government Printing Office's Web site at *http://www.access.gpo.gov.*

## Background

Section 6005 of SAFETEA–LU (codified at 23 U.S.C. 327) established a pilot program to allow up to five States to assume the Secretary of Transportation's responsibilities for environmental review, consultation, or other actions under any Federal environmental law pertaining to the review or approval of highway projects. In order to be selected for the pilot program, a State must submit an application to the Secretary.

On June 29, 2007, Caltrans and FHWA entered into a Memorandum of Understanding (MOU) that established the assignments to and assumptions of responsibility to Caltrans. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under the National Environmental Policy Act, as well as the FHWA's responsibilities under other Federal environmental laws for most highway projects in California.

To ensure compliance by each State participating in the pilot program, 23 U.S.C. 327(g) requires the Secretary to conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The results of each audit must be presented in the form of an audit report and be made available for public comment. The FHWA solicited comments on the third audit report in a **Federal Register** Notice published on May 20, 2009, at 74 FR 23777. The FHWA received no comments. This notice provides the final draft of the third FHWA audit report for Caltrans under the pilot program.

**Authority:** Section 6005 of Public Law 109–59; 23 U.S.C. 315 and 327; 49 CFR 1.48.

Issued on: July 17, 2009.

**Gregory G. Nadeau,**

*Acting Federal Highway Administrator.*

**Surface Transportation Project Delivery Pilot Program, Federal Highway Administration Audit of California Department of Transportation, January 26–30, 2009**

*Introduction*

Overall Audit Opinion

Based on the information reviewed, it is the Federal Highway Administration (FHWA) audit team's opinion that as of January 30, 2009, the California Department of Transportation (Caltrans) continued to work toward meeting all responsibilities assumed under the Surface Transportation Project Delivery Pilot Program (Pilot Program), as specified in the Memorandum of Understanding (MOU) [1] with FHWA and in the Caltrans Application for Assumption (Application).

With the completion of FHWA's third audit, the audit team has completed onsite audits of the majority of the Caltrans Districts. The audit team identified significant differences across the Districts in terms of the Pilot Program: resource availability and allocation, details of implementation, processes, and improvement and progress toward meeting all commitments. The highly decentralized nature of Caltrans operations is a major contributing factor to the variation observed. The decentralized nature of the organization necessitates clear, consistent and ongoing oversight by Caltrans Headquarters over District operations. A robust oversight program will help foster the exchange of information and the sharing of best practices and resources between Districts and will put the entire organization in a better position to more fully implement all assumed responsibilities and meeting all Pilot Program commitments.

Due to the multiyear timeframes associated with more complex and controversial projects, the full lifecycle of project development (beginning with environmental studies and concluding with the issuance of a record of decision) has yet to be fully realized by the Pilot Program. Caltrans continues to gain experience in understanding the resource requirements and processes necessary to administer its Pilot Program. It is the audit team's opinion that Caltrans needs to continue to refine its approaches and resources to meet all Pilot Program commitments, especially given the likelihood of increasing resource demands associated with exclusively managing more complex and controversial projects under the Pilot Program.

During the onsite audit, Caltrans staff and management continued to express ongoing interest in receiving feedback from the FHWA audit team related to program successes and areas in need of improvement. By addressing all findings in this report, Caltrans will continue to move its program toward full compliance with all assumed responsibilities and meeting all Pilot Program commitments.

## Background

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) section 6005(a) established the Pilot Program, codified at title 23, United States Code (U.S.C.), section 327. The Pilot Program allows the Secretary of Transportation (Secretary) to assign, and the State to assume, the Secretary's responsibilities under the National Environmental Policy Act (NEPA) for one or more highway projects. Upon assigning NEPA responsibilities, the Secretary may further assign to the State all or part of the Secretary's responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review of a specific highway project. When a State assumes the Secretary's responsibilities under this program, the State becomes solely responsible and liable for carrying out the responsibilities it has assumed, in lieu of the FHWA.

Caltrans published its Application under the Pilot Program on March 14, 2007, and made it available for public comment for 30 days. After considering public comments, Caltrans submitted its Application to FHWA on May 21, 2007, and FHWA, after soliciting the views of Federal agencies, reviewed and approved the Application. Then on June 29, 2007, Caltrans and FHWA entered into an MOU that established the assignments to and assumptions of responsibility to Caltrans, which became effective July 1, 2007. Under the MOU, Caltrans assumed the majority of FHWA's responsibilities under NEPA, as well as FHWA's responsibilities under other Federal environmental laws for most highway projects in California. Caltrans' participation in the Pilot Program will be effective through August 2011 (23 U.S.C. 327(i)(1)).

To ensure compliance by each State participating in the Pilot Program, 23 U.S.C. 327(g) mandates that FHWA, on behalf of the Secretary, conduct semiannual audits during each of the first 2 years of State participation; and annual audits during each subsequent year of State participation. The focus of the FHWA audit process is four fold: (1) To assess a Pilot State's compliance with the required MOU and applicable Federal laws and policies, (2) to collect information

[1] Caltrans MOU between FHWA and Caltrans available at: *http://environment.fhwa.dot.gov/strmlng/safe_cdot_pilot.asp.*

needed to evaluate the success of the Pilot Program, (3) to evaluate Pilot State progress in meeting its performance measures, and (4) to collect information for use in the Secretary's annual report to Congress on the administration of the Pilot Program. Additionally, 23 U.S.C. 327(g) requires FHWA to present the results of each audit in the form of an audit report that is published in the **Federal Register**. This audit report must be made available for public comment, and FHWA must respond to public comments received no later than 60 days after the date on which the period for public comment closes. The FHWA solicited comments on the third audit report in a **Federal Register** Notice published May 20, 2009, at 74 FR 23777. The FHWA received no comments during the comment period. This notice provides the final draft of the third FHWA audit report for Caltrans under the pilot program.

**Scope of the Audit**

This is the third FHWA audit of the Caltrans Pilot Program. The onsite portion of the audit was conducted in California from January 26 through January 30, 2009. As required in SAFETEA–LU, each FHWA audit must assess compliance with the roles and responsibilities assumed by the Pilot State in the MOU. The audit also includes recommendations to assist Caltrans in administering a successful Pilot Program.

The audit primarily focused on four key Pilot Program areas: (1) The Local Assistance (LA) program (Caltrans manages LA and Capital projects through independent organizational entities), (2) the role of the regional offices, (3) the effectiveness of and adherence to specified performance measures, and (4) the continued review of compliance with assumed responsibilities.

Prior to the onsite audit, FHWA conducted telephone interviews with Federal resource agency staff at the U.S. Army Corps of Engineers (USACE) and U.S. Fish and Wildlife Service (USFWS) regional offices in California. The onsite audit included visits to the Caltrans Headquarters Office (HQ) in Sacramento and to four Caltrans District/Regional Offices: District 3/North Region (Marysville), District 4 (Oakland), District 6/Central Region (Fresno), and District 10 (Stockton). The audit team also visited the USFWS and USACE offices in Sacramento.

This report documents findings within the scope of the audit as of the completion date of the onsite audit (*i.e.,* January 30, 2009).

**Audit Process and Implementation**

The intent of each FHWA audit completed under the Pilot Program is to ensure that each Pilot State complies with the commitments in its MOU with FHWA. The FHWA does not evaluate specific project-related decisions made by the State because these decisions are the sole responsibility of the Pilot State. However, the FHWA audit scope does include the review of the processes and procedures used by the Pilot State to reach project decisions in compliance with MOU section 3.2.

In addition, Caltrans committed in its Application (incorporated by reference in MOU section 1.1.2) to implement specific processes to strengthen its environmental procedures in order to assume the responsibilities assigned by FHWA under the Pilot Program. The FHWA audits review how Caltrans is meeting each commitment and assesses Pilot Program performance in the core areas specified in the *Scope of the Audit* section of this report.

*The Caltrans' Pilot Program commitments address:*

- Organization and Procedures under the Pilot Program;
- Expanded Quality Control Procedures;
- Independent Environmental Decisionmaking;
- Determining the NEPA Class of Action;
- Consultation and Coordination with Resource Agencies;
- Issue Identification and Conflict Resolution Procedures;
- Record Keeping and Retention;
- Expanded Internal Monitoring and Process Reviews;
- Performance Measures to Assess the Pilot Program;
- Training to Implement the Pilot Program;
- Legal Sufficiency Review.

*The FHWA team for the third audit included representatives from the following offices or agencies:*

- FHWA Office of Project Development and Environmental Review;
- FHWA Office of Chief Counsel;
- FHWA Alaska Division Office;
- FHWA Resource Center Environmental Team;
- Volpe National Transportation Systems Center;
- U.S. Fish and Wildlife Service;
- U.S.D.A. Forest Service.

During the onsite audit, FHWA interviewed more than 80 Caltrans staff (from both the Capital and LA programs) in four District/Region offices and Caltrans HQ. The audit team interviewed a cross-section of staff including top senior managers, senior environmental planners, generalists, associate planners, and technical experts. The audit team also reviewed project files and records for over 35 projects managed under the Pilot Program.

The FHWA acknowledges that Caltrans identified specific issues during its third self-assessment performed under the Pilot Program (required by MOU section 8.2.6), and has established processes to address each issue. Some issues described in the Caltrans self-assessment may overlap with FHWA findings identified in this audit report.

In accordance with MOU section 11.4.1, FHWA provided Caltrans with a 30-day comment period to review the draft audit report. FHWA reviewed comments received from Caltrans and revised sections of the draft report, where appropriate, prior to publishing it in the **Federal Register** for public comment.

**Status of Findings From the Last Audit**

As part of the third audit, FHWA evaluated the corrective actions implemented by Caltrans in response to the audit findings in the second audit report.

The FHWA observed that Caltrans continues to demonstrate compliance with two areas identified as ''Compliant'' in either the first audit (January 2008) or second audit (July 2008); the establishment of Pilot Program policies and procedures and interagency agreements that involve other agencies as signatories.

While previous audits also found Caltrans to be ''Compliant'' with its commitment to put in place a consistent process to conduct formal legal sufficiency reviews, limited information was available to support any finding determination during the third audit because only one formal finding of legal sufficiency had been completed.

The FHWA also reviewed the current status of ''Deficient'' and ''Needs Improvement'' audit findings identified during the second FHWA audit in July 2008.

*''Deficient'' audit findings:*

(1) *Performance Measure: ''Effectiveness of relationships with the general public''*—Caltrans reported progress in its third self-assessment on the performance measure ''effectiveness of relationships with agencies and the general public.'' Caltrans developed a method to evaluate its relationships with the general public by assigning a survey rating measuring the quality of public meeting materials. The survey was completed for 27 projects for which public meetings were held since the initiation of the Pilot Program. (See related findings N10 and D2 below.)

(2) *Quality Assurance/Quality Control (QA/QC) Certification Process*—Through project files reviews, the FHWA audit identified one instance where the environmental branch chief was not the final document reviewer (based on the signature dates included on the form). The audit team did verify that the External QC Certification form was correctly completed prior to proceeding with the Internal QC Certification form.

(3) *Environmental Document Process—Class of Action Determinations*—The audit team observed that the project files reviewed in this audit contained the required concurrence by the HQ Environmental Coordinator for Environmental Assessment (EA) and Environmental Impact Statement (EIS) class of action determinations. (See related finding D5 below.)

*''Needs Improvement'' audit findings:*

(1) *Commitment of Resources*—The audit team is aware that Caltrans has systems in place designed to capture time spent by staff on various tasks and activities required under the Pilot Program. However, interviews with Caltrans District staff working on LA projects revealed that work hours associated with the Pilot Program are not consistently entered into the Expenditure Authorization system using the Pilot Program-specific codes. Caltrans has not clearly identified how the information gathered by these time-recording systems helps Caltrans determine the sufficiency of staff resources needed under the Pilot Program.

Resource tracking is an ongoing area of concern for the audit team. As the complexity of projects increases with maturation of the Pilot Program, the variability in reporting and tracking resource expenditures may affect the timely delivery and quality of environmental documents. (See related finding N5 below.)

(2) *District Training Approaches and Implementation*—During the three FHWA audits, the audit team identified considerable variation in training needs assessments, approaches, and responsibilities across Districts and also within individual Districts. The observed variations in training approaches may result in potentially widely varying levels of competency among staff. In order to achieve a sufficient level of competency among all staff, Caltrans HQ environmental staff need to actively monitor each District's training methods and ensure that consistency is achieved in terms of training assessment and delivery. (See related findings N7 and N12 below.)

(3) *Pilot Program Performance Measures*—These two performance measures have been addressed by Caltrans in the following manner:

(a) Performance Measure: ''Timely Completion of NEPA Process''—Caltrans has expanded this performance measure to include tracking the time from initiating environmental studies to the approval date of the draft and final environmental documents. The performance measure also now differentiates the timeframes by EAs and EISs. Previously, project timeframes were reported in aggregate instead of by environmental document type.

(b) Performance Measure: ''Maintain documented compliance with requirements of all Federal laws and regulations being assumed.''—Caltrans reported in its third self-assessment that 100 percent of final environmental documents contained documentation of: Section 7 of the Endangered Species Act, as amended (section 7) biological opinions and letters of concurrence, State Historic Preservation Officer concurrences under section 106 of the National Historic Preservation Act (section 106), and section 4(f) of the U.S. Department of Transportation Act of 1966 (section 4(f)) findings and conclusions. (See related finding N8 below.)

(4) *Quarterly Reports*—The quarterly reports Caltrans provides to FHWA under section 8.2.7 of the MOU continue to include inaccurate/incomplete information on environmental document approvals and decisions under the Pilot Program. Each of the first five quarterly reports received by FHWA have been revised, some several times, to address data reporting errors including: Omitted categorical exclusions, EAs, findings of no significant impacts, re-evaluations, section 4(f) analyses, and section 7 and section 106 consultations, as well as numerous consultations and categorical exclusions (CEs) reported in error. The third self-assessment reported that a quarterly report protocol was developed and implemented prior to preparing the fifth quarterly report. However, the audit team determined that the fifth report also included errors and omissions (omitted EA, re-evaluation and notice of intent, and section 7 consultations reported in error) and a revised report was submitted. (See related finding D1 below.)

(5) *Varying Understanding of Section 6004/Section 6005 CEs*—The audit team did not observe any misunderstanding of section 6004 and section 6005 SAFETEA–LU CE determinations in the District Offices visited in the third audit.

(6) *Creating and Maintaining Project Protocols and Project Files*—The Caltrans' third self-assessment reported that corrective action discussions were completed with staff managing projects with incomplete project files and/or those not conforming to the Uniform Environmental File System (UFS) protocol. Additionally, it was reported that discussions of the retention of electronic communications were completed with District staff. (See related findings C1 and N4 below.)

(7) *QA/QC Process Implementation*—Caltrans' third self-assessment reported on the number of ways that Caltrans actively monitors conformance with the Pilot Program QC procedures. Methods include ongoing communication with senior environmental planners regarding the QC processes, discussions at staff meetings, review by senior environmental planners of environmental documents and HQ Environmental Coordinators actively monitoring conformance with the QC procedures. (See related finding C4 below.)

**Key Elements of Implementation**

One purpose of each FHWA audit of a State Pilot Program is to identify and collect information on Pilot Program implementation practices for consideration by potential future Pilot Program participants. Key programmatic elements used by Caltrans to administer its Pilot Program include documenting policies and procedures in Standard Environmental Reference (SER) Chapter 38, annotated outlines for environmental documents, QC certification forms, environmental document review checklists, and monthly NEPA delegation statewide teleconferences.

**Effective Practices**

The FHWA audit team observed during interviews and through project file reviews completed in Districts 3, 4, 6, 10 and the North and Central regions the following effective practices:

(1) Central Region practices:

(a) The environmental document template used for each project establishes the format and provides technical cues at locations where specific data should be entered by environmental document authors. The use of document templates helps to ensure compliance with environmental laws and to improve document consistency and quality.

(b) For large projects, once the Preliminary Environmental Study (PES) form has been completed by Caltrans staff, environmental staffers perform joint field reviews with the local agencies and their consultants. This affords Caltrans and local agency staff the opportunity to discuss the NEPA process requirements and the required technical studies needed to complete the process.

(c) Individual Development Programs (IDPs) are critical elements in the training process for Caltrans staff (in both the Capital and LA programs). Senior environmental planners regularly and consistently use IDPs to guide and track staff training.

(2) The LA staff in District 10 use a work plan and tracking sheet that serves as a work flow chart for LA projects in the District. This tool is useful because it helps Caltrans and local governments understand the requirements, sequencing, and timing of environmental compliance activities throughout the project development process.

**Findings Definitions**

The FHWA audit team carefully examined Pilot Program areas to assess compliance in accordance with established criteria (*i.e.,* MOU, Application). The time period covered by this third audit report is from the start of the Caltrans Pilot Program (July 1, 2007) through completion of the third onsite audit (January 30, 2009) with the focus of the audit on the most recent 6 month period. This report presents audit findings in three areas:

- *Compliant*—Audit verified that a process, procedure or other component of the Pilot Program meets a stated commitment in the Application and/or MOU.
- *Needs Improvement*—Audit determined that a process, procedure or other component of the Pilot Program as specified in the Application and/or MOU is not fully implemented to achieve the stated commitment or the process or procedure implemented is not functioning at a level necessary to ensure the stated commitment is satisfied. *Action is recommended to ensure success.*
- *Deficient*—Audit was unable to verify if a process, procedure or other component of the Pilot Program met the stated commitment in the Application and/or MOU. *Action is required to improve the process, procedure or other component prior to the next audit; or*

Audit determined that a process, procedure or other component of the Pilot Program did not meet the stated commitment in the Application and/or MOU. *Corrective action is required prior to the next audit.*

**Summary of Findings—January 2009**

*Compliant*

(C1) *Completion of the PES form*—As stated in Chapter 6 of the LA Procedures Manual, completing the PES form for each project is one of the roles and responsibilities of LA staff. The audit team learned through interviews with LA staff in the Central Region office that training had been provided on how to complete the PES form. The audit team also confirmed through file reviews that the PES forms in the Central Region were completed correctly.

(C2) *Tracking and Managing Projects*—The Central Region office developed a sophisticated data management and tracking system using the File Maker software application for tracking and managing Capital projects (*i.e.*, projects on the State Highway System (SHS)). The Central Region has standard practices to ensure that all projects are entered into the system and tracked appropriately. The system included data validation features such as color coded items to identify missed deadlines or inactive projects. The audit team found that all environmental staffers in the office appear to be able to input data into the system. The File Maker system is used to track, manage, and provide reports on the Capital projects in the Region. As a result, the audit team was able to determine that the Central Region

office is compliant with section 8.2.7 of the MOU, requiring Caltrans to report to FHWA any approvals and decisions Caltrans makes with respect to the responsibilities it has assumed under the Pilot Program.

(C3) *Project Files/UFS*—Section 8.2.4 of the MOU and procedures specified in SER Chapter 38 require that Caltrans staff maintain project files and general administrative files for all Capital and LA projects in accordance with the UFS.

The audit team found that the North and Central Regions have taken additional steps to ensure that project files are organized correctly and that the proper information can be located easily. Additional sub-tabs have been added to the UFS file tab system to improve the clarity and consistency across the Districts in these Regions. The new sub-tabs were added for topic areas likely to contain large amounts of information (*e.g.*, biology, special status species, coordination correspondence).

(C4) *QA/QC Process*—The Central Region has established a QA/QC unit. The audit team interviewed members of this unit during the onsite visit at the Regional office. To ensure compliance with section 8.2.5 of the MOU, the QA/QC unit implemented, for its Capital program staff, a QC process that involves an internal review and QA/QC branch chief signature that exceeds the requirements of the QC plan in the SER Chapter 38.

*Needs Improvement*

(N1) *QA/QC Certification Process*—Section 8.2.5 of the MOU and SER Chapter 38 require Caltrans staff to review each environmental document in accordance with the policy memorandum titled ''Environmental Document Quality Control Program under the NEPA Pilot Program'' (July 2, 2007). The audit team observed improvement since the previous audit (July 2008) in the completion of the QC certification forms. However, the audit team still identified incomplete and incorrectly completed QC certification forms. These inconsistencies were also identified in the third Caltrans self-assessment and corrective actions were discussed in that report.

(N2) *Self-Assessment and Process Reviews*—Section 8.2.6 of the MOU and SER Chapter 38 require Caltrans to regularly perform an internal formal process review for environmental compliance, referred to by Caltrans as a self-assessment. A summary report of the Caltrans self-assessment is provided to FHWA prior to each FHWA audit. The audit team has identified aspects of the self-assessment process that need improvement in order for this process to meet its stated intent. These areas include:

(a) Review of projects during the self-assessment. To fully assess compliance with the project development process and responsibilities assumed under the Pilot Program, Caltrans needs to evaluate projects at all phases of project development, as well as compliance with project filing procedures. A complete review should include not only projects that have reached decision points and have been reported in the quarterly reports to FHWA, but also projects yet to reach a decision point.

(b) More details on performance measures. As the self-assessment is the primary method of data collection and evaluation of success in meeting Pilot Program performance measures, more details and discussion regarding each performance measure should be included in the self-assessments. Examples of areas that need further explanation include: (1) The sampling procedures used for checking EA/EIS project files organized according to the established filing system and (2) the sampling procedures used for checking the completeness of the QC certification forms.

(c) Limited scope of the self-assessment review. A significant proportion of the third self-assessment focused on the effectiveness of corrective actions implemented by Caltrans to address deficiencies noted in its second self-assessment and actions taken to address FHWA Pilot Program audit findings. While an important component of the self-assessment process, review of improvement regarding noted deficiencies from prior internal and external audits is only one aspect of a successful self-assessment process. The bulk of the self-assessment process should be focused on confirmation that all Pilot Program requirements are being fully met, including pursuit of newly occurring areas of weakness/potential weakness.

(d) To ensure that Caltrans is effectively reviewing all elements of assumed responsibility as stated in the MOU and Application, it must present a systematic review of all Pilot Program processes and procedures. Caltrans has yet to establish a methodology/approach to specify how it will conduct its self-assessment process. In particular, the process it is using and intends to use to determine, for each audit, what Pilot Program elements warrant review, the level of review to be performed on each selected element, the depth of the review (*e.g.*, the sample size of documents reviewed, the number of districts contacted/staff interviewed, the frequency of reviews), and the coverage of each self-assessment (what parts of the Program have been/need to be reviewed/re-reviewed). The current self-assessment process has yet to demonstrate that Caltrans is evaluating its Program in a manner that will determine for all applicable components if ''its process is working as intended, to identify any areas needing improvements in the process'' (MOU Section 8.2.6). Evidence to suggest that the self-assessment process needs improvement is demonstrated by new Needs Improvement and Deficient audit findings identified by the FHWA audit team in this audit in areas recently reviewed (but not identified) under Caltrans self-assessment. In addition, the FHWA audit team identified new Deficient findings in Pilot Program areas not evaluated by the self-assessment process.

(N3) *Air Quality Conformity Determinations*—Section 8.5.1 of the MOU and SER Chapter 38 require Caltrans staff to document the air quality conformity analysis for each project by submitting a request to FHWA for a formal conformity determination. The request for the conformity determination should be submitted to FHWA as soon as possible after the preferred alternative is identified. The FHWA conformity determination must be received before the final NEPA action is completed.

Through interviews and project file reviews in the Districts visited, the audit team identified a misunderstanding by the Caltrans staff regarding the air quality conformity determination process. This misunderstanding and confusion was not observed in the first two audits. Several Caltrans staff interviewed in both the North and Central Regions were not aware of their responsibilities to request formal FHWA conformity determinations for projects processed through the LA program. Interviews identified a lack of communication and misunderstandings between Caltrans staff and local agencies regarding air quality conformity analysis and determinations. In two of seven project files reviewed for air quality conformity determinations, FHWA conformity determination letters were missing. For another file, the conformity letter was not included in the project file but was subsequently located by Caltrans staff and included in the file during the audit.

(N4) *Project Files/UFS*—Section 8.2.4 of the MOU and SER Chapter 38 require Caltrans to maintain project files and general administrative files. To support statewide consistency in file content and organization, the UFS has been developed for mandatory use for all Capital and LA projects.

Despite the ''Compliant'' finding regarding the North and Central regions described under item C3 above, the audit team identified that some project files were not established as soon as environmental studies had begun, as required by SER Chapter 38.

Additional inconsistencies identified included:

(a) Several instances where project files were missing UFS tabs and some sections contained no information or an explanation as to why the tabs were missing or tab sections were incomplete (*i.e.*, empty).

(b) Required project documentation was missing from several project files. Examples of missing documents include PES forms, QA/QC certification forms, air quality conformity determination letters, State Historic Preservation Office concurrence letters for section 106 determinations, ''Plans, Specifications and Estimates'' information, and various transmittal letters.

(c) Project file reviews identified unsigned/incomplete documentation including incomplete environmental document filing checklists, unsigned environmental document preparation and review tools, and unsigned LA EA document title pages.

(N5) *Commitment of Resources*—Section 4.2.2 of the MOU requires Caltrans to maintain adequate organizational and staff capability effectively to carry out the responsibilities it has assumed, including devoting adequate staff resources to the Pilot Program. In the Districts/Regions visited, interviews with the Caltrans staff working on LA projects revealed the following:

(a) Inconsistencies associated with charging time spent on Pilot Program activities to the official Work Breakdown Structure (WBS) code (6DELE). Staff

interviews identified two main reasons for incomplete adherence to use of the WBS code: Not having the time to determine the amount of time and enter it in the time sheet system; not tracking Pilot Program labor expenditures at all.

(b) LA staffers expressed frustration to the audit team regarding the amount of work to be accomplished by current LA staff in the Districts. Concerns were frequently expressed regarding inadequate staffing, lack of timeliness in filling vacant positions, and the difficulty coping with the pressure to advance projects in a timely manner and on schedule.

The audit team learned that Caltrans is considering updating and enhancing the LP 2000 system which should present an opportunity to improve resource tracking for LA staff, and projecting future staff needs.

(N6) *Adequate QA/QC Review of Technical Studies*—The second Caltrans self-assessment identified that the peer review of the biological resources technical studies was sometimes less thorough than the same reviews performed for SHS projects. The audit team confirmed this finding through interviews with LA staff in one District visited. Caltrans has committed to ensure that the appropriate level of environmental analysis is conducted for all NEPA documents for projects on both the SHS and also on local streets and roads.

A corrective measure was identified in the self-assessment to remind the staff biologists that the peer review of biological resource technical studies for the LA projects uses the same standard as for Capital projects. The audit team concurs in this corrective measure and also recommends that additional follow-up review occurs to ensure that it is being implemented.

(N7) *Training on Air Quality Conformity*—MOU section 12.1.1 requires Caltrans to provide training ''in all appropriate areas with respect to the environmental responsibilities that Caltrans has assumed.'' Three of four LA and Capital environmental planners interviewed in the Central Region office indicated an ongoing need for training in the area of air quality conformity, its role in the Statewide Transportation Improvement Program, the Transportation Improvement Plan, and emissions budgets. Interviewees indicated that additional training or primers by Caltrans' air quality specialists are needed for environmental planners due to this being such a dynamic area affecting many projects. Caltrans should assess if other environmental planners in other Districts/Region offices also find this area problematic and require additional training in this area. Air quality specialists should also work with environmental planners in their Districts to ensure that everyone understands their role and the required processes.

(N8) *Procedural and Substantive Requirements*—MOU section 5.1.1 requires Caltrans to be subject to the same procedural and substantive requirements that apply to FHWA in carrying out the responsibilities assumed. Through interviews with USACE and USFWS staff located in California, the audit team learned that there have been a few instances where environmental requirements were not completely and correctly implemented.

(a) In at least one instance, based on the biological assessment of the project, take of threatened or endangered species was anticipated and quantified. However, Caltrans made a request for informal, not formal consultation, to the USFWS. This process decision is contrary to the implementing regulations of section 7 of the ESA.

(b) In other instances, the USACE reported that environmental assessment documents prepared pursuant to NEPA and reviewed by the USACE under section 404 of the Clean Water Act, contained insufficient information to support decisionmaking and chosen alternatives. Further, as part of their Clean Water Act section 404 permit verification, the conclusions made by Caltrans in relation to ESA requirements were not supported. This noncompliance prevented the USACE from issuing its required permit without the proper consultation with the USFWS.

It is the opinion of the audit team, based on these observations, that Caltrans staff and/or the consultants hired by Caltrans to conduct biological assessments, submit permit applications, and perform NEPA analyses, could benefit from training in various environmental laws and regulations. It is also noted that the technical reviews and other QC reviews should have identified these errors. The MOU section 10.2.1.C performance measure to monitor relationships with Federal resource agencies needs to be implemented.

(N9) *Assignments Under the Pilot Program*—MOU section 3.2.2 requires Caltrans to comply with the requirements of all applicable environmental laws. Caltrans staff interviewed indicated a lack of understanding of the SAFETEA–LU section 6002 (§ 6002; 23 U.S.C. 139) environmental review process definition and role of participating agencies, particularly in comparison to that of cooperating agencies.

In a review by the audit team of four EIS project files, the audit team found that the cooperating and participating agency invitation letters sent by Caltrans were not totally accurate and were confusing. The letters were based on the template invitation letter provided in the SER, with links to the Local Assistance Manual. This template contains the following errors and confusing language:

(a) The subject line for the letter only mentions an invitation to become a participating agency, with no indication of an invitation to also be a cooperating agency, when both apply. Yet, in the body of the letter, there is a combined discussion of cooperating agency status and participating agency status.

(b) In the list of activities that will be occurring during the NEPA process, there are two instances listing *both* FHWA and Caltrans as providing various information. Under the Pilot Program, as stated in the first paragraph of the letter, FHWA is not involved in the project.

(c) The letter does not clarify the different roles and responsibilities of participating and cooperating agencies.

(d) The letter states that an agency will be a cooperating agency only if it has ''jurisdiction for permit.'' That is not in accordance with 40 CFR 1598.5 which defines cooperating agency as, ''any Federal agency other than the lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in the proposal.''

Caltrans needs to ensure that the SAFETEA–LU environmental review process (§ 6002; 23 U.S.C. 139) is fully and correctly implemented.

(N10) *Performance Measure—''Monitor Relationships With the General Public''*—MOU section 10.2.1.C requires Caltrans to monitor relationships with the general public. This is the first audit to evaluate this performance measure, as such a tool had not previously been developed for this performance measure. This measure is intended to assess the effectiveness of any changes in communication that could affect an existing relationship among Caltrans and the general public. The tool or indicator measure developed involves Caltrans staff and/or consultants performing self assessments to evaluate public meeting materials. To fully assess this relationship, however, the views of the other party must be considered as well. The current performance measure does not reflect the general public's views on communication with Caltrans regarding Federal-aid highway projects. More details need to be provided regarding the projects for which the public meeting materials are being evaluated. Different projects require different and appropriate materials depending on the scope and issues involved in the project. Using a generic rating for all projects, with no additional information or explanation, may not truly reflect the desired outcome.

(N11) *Documentation of Class of Action Determinations.*—Through project file reviews, the audit team found inconsistencies in the class of action determination documentation. The SER Chapter 38 ''Defining the Class of Action'' requires for EAs and EISs, that either a Deputy District Director for Environmental (or designee) or a District Local Area (DLA) Engineer and a District senior environmental planner make a determination with the concurrence of the Division of Environmental Analysis Environmental Coordinator.

Four of six EIS project files reviewed by the audit team did not include documentation on the class of action determination. For one project, the class of action was changed from an EIS to an EA, but no documentation was identified in the file to explain the change or to demonstrate concurrence on the decision to down scope the environmental document type. For another project, the project file did not contain an explanation for the change of action from an EA to an EIS.

(N12) *LA Training Plan*—Under section 12.1.1 of the MOU, Caltrans is responsible for ensuring that its staff is properly trained and that training will be provided ''in all appropriate areas with respect to the environmental responsibilities Caltrans has assumed.'' This section of the MOU also states that ''Caltrans agrees to have all appropriate employees (including consultants hired for the purpose of carrying

out the Secretary's responsibilities) attend such training.'' Additionally, the Application states that DLA environmental staffers ''will provide training to local agencies and their consultants to ensure that LA environmental documents follow statewide procedures and meet Federal requirements.''

Section 12.1.2 of the MOU requires that a training plan be updated annually during Caltrans' participation in the Pilot Program. This training plan is shared with FHWA on an annual basis. The training plans submitted for Fiscal Year (FY) 07–08 and FY 08–09 included information only on Capital program training and did not include information on training for DLA staff or how staff will provide training to local agencies and consultants. The information gaps in the FY08–09 Training Plan include:

(a) The lack of a formalized training plan for DLA staff on DLA-specific processes—Four interviewees and pre-audit information collection revealed no evidence of a formal training plan to carry out the LA responsibilities under the Pilot Program, including training for DLA staff and staff in local agencies and consultants. Interviews in all Districts/Regions visited indicated varying training activities have occurred; however, this information—or an explanation on the approach—is not included in the training plan.

(b) The lack of an ongoing training procedure for local agencies and consultants, including expected courses or outreach to be offered. Six interviewees stated that there is no formal approach being used by Caltrans Districts to ensure proper training or outreach is provided to local agencies and consultants. Given the very large number of LA projects in some Districts, and the typically high staff turnover within local agencies, Caltrans needs to formalize and implement an ongoing training plan to ensure that LA program staff can carry out the responsibilities under the Pilot Program and work with the local agencies and consultants to ensure compliance with statewide procedures and Federal requirements assumed by Caltrans.

*Deficient*

(D1) *Quarterly Reports*—The quarterly reports Caltrans provides to FHWA under section 8.2.7 of the MOU continue to consistently include an inaccurate listing of all approvals and decisions under the Pilot Program. The quarterly reports received by FHWA for the first five quarters have all contained substantial errors and have had to be revised and resubmitted to FHWA by Caltrans.

Discussions with Caltrans staff developing input for the quarterly reports identified inconsistent approaches and procedures in the processes leading to report production. Communication is not always timely between the project generalists and the staff responsible for project tracking and reporting. Additionally, two of the four Districts visited during the third audit were unable to readily produce a list of the projects within that District that fall under the Pilot Program. The audit team finds the quarterly reporting process and products deficient.

(D2) *Performance Measure—''Monitor Relationships With Federal and State Resource Agencies''*—MOU section 10.2.1.C requires Caltrans to ''assess change in communication among Caltrans, Federal and State resource agencies.'' In all three Caltrans self-assessments (December 2007, June 2008, and December 2008) under ''Progress in Meeting Pilot Program Performance Metrics'' Caltrans stated that this performance measure has not yet been implemented. The audit team understands that Caltrans has engaged a consultant to undertake a survey of Federal and State resource agencies to assess their relationships with Caltrans; however, the minimal degree of progress after 18 months of the Pilot Program renders Caltrans' performance on this requirement deficient at the time of the audit.

(D3) *Delegation of Signature Authority*—In six of the eight Caltrans District Offices reviewed in this audit, the audit team learned of the delegation of signature authority for EISs and individual Section 4(f) Evaluations that occurred in October 2007.

In September 2007, Caltrans asked for clarification of signature authority for EISs as stated in the Application and section 1.1.2 of the MOU. The FHWA responded with clarification of this signature authority through a letter from FHWA to Caltrans dated September 12, 2007. This letter stated that the Draft EIS can be signed by either the Deputy District Director for Environmental Planning or the District Director, at the Caltrans' District discretion. Final EISs are to be signed by District Directors, and not further delegated. There was no request for clarification for individual Section 4(f) Evaluations and therefore, that signature authority remains as agreed to with the Deputy District Director.

During the audit, the audit team learned of two memos, dated October 2007, that delegated, for six Districts, the signature of individual Section 4(f) Evaluations to the Environmental Office Chiefs and the signature of EISs to the Environmental Division Chief or the District Director.

This delegation is inconsistent with the FHWA clarification letter. Additionally, Chapter 38 of the SER is inconsistent regarding this delegation of signature authority for Draft EISs, indicating two different delegation signature authorities, one to the Deputy District Director and one to the Deputy District Director for Environmental Planning, in the sections ''Signature Authorities'' and ''Signature Protocols.''

(D4) *Assignment of Section 6002 Responsibility under the Pilot Program*—Under MOU section 3.2.2, Caltrans is responsible for complying with the requirements of any applicable environmental law. Therefore, Caltrans is responsible for complying with SAFETEA–LU section 6002 (23 U.S.C. 139) which defines provisions of the environmental review process. The SAFETEA–LU section 6002(d) (23 U.S.C. 139(d)) states that a Federal lead agency for a highway project conducting a NEPA process under section 6002, in this case Caltrans, ''shall identify, as early as practicable in the environmental review process for a project, any other Federal and non-Federal agencies that may have an interest in the project, and shall invite such agencies to become participating agencies in the environmental review process for the project.''

In three of the six EIS project files reviewed, there were participating agency invitations sent out to only 5 to 10 agencies per project. For those projects, the audit team, thorough interviews and review of project files, learned that more local, State, Federal, or tribal governmental agencies, either may have or already had, expressed an interest in the project and were therefore required to be an invited participating agency.

The Caltrans' third self-assessment included a section on ''Understanding of Section 6002 Requirements,'' and did not report any finding that requires a corrective action.

Based on its review of project files and interviews with Caltrans staff, the audit team finds Caltrans' compliance with its Pilot Program responsibilities to be deficient with regard to the intent and requirements of SAFETEA–LU section 6002 regarding inviting participating agencies.

(D5) *Corrective Action for Audit Deficiency*—In three of the project files reviewed by the audit team that contained a class of action determination documentation, the class of action determination concurrence was issued the day before the third audit began, or actually, in two instances, the concurrence was issued during the audit. This is a failure to fully address the deficiency, ''Environmental Document Process—Class of Action Determination,'' noted in the previous audit.

**Response to Comments and Finalization of Report**

The FHWA received no comments during the 30-day comment period for the draft audit report. Therefore, the FHWA feels that there is no need to revise the draft audit report findings and finalizes the audit report with this notice.

[FR Doc. E9–17896 Filed 7–27–09; 8:45 am]

BILLING CODE 4910–22–P

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

July 22, 2009.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750

Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before August 27, 2009 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–1545.
*Type of Review:* Extension.
*Title:* REG–107644–97 (Final) Permitted Elimination of Preretirement Optional Forms of Benefit (TD 8769).
*Description:* The regulation permits an amendment to a qualified plan that eliminates certain preretirement optional forms of benefit.
*Respondents:* Businesses or other for-profits.
*Estimated Total Burden Hours:* 48,800 hours.
*Clearance Officer:* R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.
*OMB Reviewer:* Shagufta Ahmed, (202) 395–7873, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Celina Elphage,**
*Treasury PRA Clearance Officer.*
[FR Doc. E9–17915 Filed 7–27–09; 8:45 am]
**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Submission for OMB Review; Comment Request

July 21, 2009.

The Department of Treasury will submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13 on or after the date of publication of this notice. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, and 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

**DATES:** Written comments should be received on or before August 27, 2009 to be assured of consideration.

**Internal Revenue Service (IRS)**

*OMB Number:* 1545–0432.
*Type of Review:* Extension.
*Form:* 5495.
*Title:* Request for Discharge from Personal Liability under Internal Revenue Code Section 2204 or 6905.
*Description:* Form 5495 provides guidance under sections 2204 and 6905 for executors of estates and fiduciaries of decedent's trusts. The form, filed after regular filing of an Estate, Gift, or Income tax return for a decedent, is used by the executor or fiduciary to request discharge from personal liability for any deficiency for the tax and periods shown on the form.
*Respondents:* Individuals or Households.
*Estimated Total Burden Hours:* 306,500 hours.

*OMB Number:* 1545–1841.
*Type of Review:* Extension.
*Title:* REG–157302–02 (Final), TD 9142 Deemed IRAs in Qualified Retirement Plans.
*Description:* Section 408(q), added to the Internal Revenue Code by section 602 of the Economic Growth and Tax Relief Reconciliation Act of 2001, provides that separate accounts and annuities may be added to qualified employer plans and deemed to be individual retirement accounts and individual retirement annuities if certain requirements are met. Section 1.408(q)–1(f)(2) provides that these deemed IRAs must be held in a trust or annuity contract separate from the trust or annuity contract of the qualified employer plan. This collection of information is required to ensure that the separate requirements of qualified employer plans are met.
*Respondents:* Businesses or other for-profits.
*Estimated Total Burden Hours:* 40,000 hours.

*OMB Number:* 1545–1828.
*Type of Review:* Extension.
*Title:* REG–131478–02 (Final) Guidance under Section 1502; Suspension of Losses on Certain Stock Disposition.
*Description:* The information in Sec. 1.1502–35T(c) is necessary to ensure that a consolidated group does not obtain more than one tax benefit from both the utilization of a loss from the disposition of stock and the utilization of a loss or deduction with respect to another asset that reflects the same economic loss; to allow the taxpayer to make an election under Sec. 1.1502–35T(c)(5) that would benefit the taxpayer, the election in Sec. 1.1502–35T(f) provides taxpayers the choice in the case of a worthless subsidiary to utilize a worthless stock deduction or absorb the subsidiary's losses; and Sec. 1.1502–35T(g)(3) applies to ensure that taxpayers do not circumvent the loss suspension rule of § 1.1502–35T(c) by deconsolidating a subsidiary and then re-importing to the group losses of such subsidiary.
*Respondents:* Businesses or other for-profits.
*Estimated Total Burden Hours:* 15,000 hours.

*OMB Number:* 1545–1969.
*Type of Review:* Extension.
*Form:* 13751.
*Title:* Waiver of Right to Consistent Agreement of Partnership Items and Partnership-Level Determinations as to Penalties, Additions to Tax, and Additional Amounts.
*Description:* The information requested on Form 13751 (as required under Announcement 2005–80) will be used to determine the eligibility for participation in the settlement initiative of taxpayers related through TEFRA partnerships to ineligible applicants. Such determinations will involve partnership items and partnership-level determinations, as well as the calculation of tax liabilities resolved under this initiative, including penalties and interest.
*Respondents:* Businesses or other for-profits.
*Estimated Total Burden Hours:* 100 hours.

*OMB Number:* 1545–1986.
*Type of Review:* Extension.
*Title:* Notice 2006–XX Elections Created or Effected by the American Jobs Creation Act of 2004.
*Description:* The collection of information will enable the Internal Revenue Service to ensure that the eligibility requirements for the various elections or revocations have been satisfied and the requisite sections have been complied with.
*Respondents:* Businesses or other for-profits.
*Estimated Total Burden Hours:* 3,034,765 hours.

*OMB Number:* 1545–1988.
*Type of Review:* Extension.
*Title:* Credit for New Qualified Alternative Motor Vehicles (Advanced Lean Burn Technology Motor Vehicles and Qualified Hybrid Motor Vehicles).
*Description:* This notice sets forth a process that allows taxpayers who purchase passenger automobiles or light trucks to rely on the domestic manufacturer's (or, in the case of a foreign manufacturer, its domestic distributor's) certification that both a particular make, model and year of vehicle qualifies as an advanced lean burn technology motor vehicle under Section 30B(a) (2) and (c) of the Internal Revenue Code or a qualified hybrid motor vehicle under Section 30B(a)(3) and (d), and the amount of the credit allowable with respect to the vehicle.
*Respondents:* Individuals or Households.

*Estimated Total Burden Hours:* 280 hours.

*OMB Number:* 1545–1991.

*Type of Review:* Revision.

*Form:* 8804–W.

*Title:* Installment Payments of Section 1446 Tax for Partnerships.

*Description:* Regulations for section 1446 require a worksheet for installment payments of section 1446 tax. Partnerships generally must make installment payments of estimated section 1446 tax if they expect the aggregate tax on the effectively connected taxable income (ECTI) that is allocable to all foreign partners to be $500 or more.

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 31,600 hours.

*OMB Number:* 1545–1996.

*Type of Review:* Extension.

*Title:* Notice 2006–05, Waiver for Reasonable Cause for Failure to Report Loan Origination Fees and Capitalized Interest.

*Description:* This Notice provides information to payees who receive payment of interest on qualified education loans who are unable to comply with the information reporting requirements under section 6050S of the Internal Revenue Code.

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 5,000 hours.

*OMB Number:* 1545–2134.

*Type of Review:* Extension.

*Title:* Notice 2009–41—Credit for Residential energy efficient property.

*Description:* This notice provides guidance about the procedures by which a manufacturer can certify that residential energy efficient property qualifies for the § 25D credit. This notice is intended to provide (1) guidance concerning the methods by which manufacturers can provide such certifications to taxpayers, and (2) guidance concerning the methods by which taxpayers can claim such credits.

*Respondents:* Individuals or Households.

*Estimated Total Burden Hours:* 350 hours.

*OMB Number:* 1545–1990.

*Type of Review:* Extension.

*Title:* Application of section 338 to Insurance Companies (TD 9377, final).

*Description:* Final regulations under section 197 of the Internal Revenue Code (Code) that apply to a section 197 intangible resulting from an assumption reinsurance transaction, and under section 338 that apply to reserve increases after a deemed asset sale. The final regulations also provide guidance with respect to existing section 846(e) elections to use historical loss payment patterns. The final regulations apply to insurance companies.

*Respondents:* Businesses or other for-profits.

*Estimated Total Burden Hours:* 12 hours.

*Clearance Officer:* R. Joseph Durbala, (202) 622–3634, Internal Revenue Service, Room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224.

*OMB Reviewer:* Shagufta Ahmed, (202) 395–7873, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

**Celina Elphage,**

*Treasury PRA Clearance Officer.*

[FR Doc. E9–17914 Filed 7–27–09; 8:45 am]

BILLING CODE 4830–01–P

## DEPARTMENT OF THE TREASURY

### Report on Section 529 College Savings Plans

**AGENCY:** Departmental Offices, Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury invites the general public to submit information pertinent to a report it will issue on Section 529 college savings plans. Such information could include data, research studies, opinions citing hard data, or references thereof. The report is an initiative of the Middle Class Task Force chaired by Vice President Joe Biden and was announced in an April 17th press release that can be found at *http://www.whitehouse.gov/the_press_office/Middle-Class-Task-Force-Holds-Meeting-on-College-Affordability/.* The report will examine how people save using 529 plans and whether they are taking appropriate steps to manage risk. In addition, the report will identify options and best practices for making the 529 plans more effective.

**DATES:** Written comments must be received on or before August 14, 2009, to be assured of consideration.

*Submission of Comments:* Please submit comments electronically through the Federal eRulemaking Portal—''Regulations.gov.'' Go to *http://regulations.gov,* select ''Department of the Treasury'' from the agency menu to submit or view public comments. The ''How to Use This Site'' and ''User Tips'' links on the Regulations.gov home page provide information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

Please include your name, affiliation, address, e-mail address, and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** *529ReportInput@do.treas.gov.*

**SUPPLEMENTARY INFORMATION:** The Treasury Department is particularly interested in data, research studies, opinions citing hard data, or references thereof, relating to the specific questions set forth below.

1. To what extent are Section 529 savings plan investment options prudent and to what extent do they accommodate reasonable attitudes toward risk?

2. To what extent are Section 529 savings plans invested wisely?

a. Is there a tendency for accounts to be too heavily invested in equities?

b. To what extent do account owners sell equities when prices are falling and buy equities when prices are rising?

c. Should plans take steps to better assist account owners in making prudent investment choices? If so, what steps would be appropriate?

3. To what extent are Section 529 savings plan account fees reasonable?

a. How do fees compare with similar retail mutual funds, and what factors might explain any differences?

b. How much variance is there in fees across plans for a similar investment option, and what factors might explain any such variance?

4. To what extent do low- and middle-income families benefit from Section 529 savings plans and Section 529 prepaid tuition plans?

a. How do the financial incentives for participation vary with family income?

b. How does financial aid eligibility affect the financial incentives for participation?

c. How are contributions, account balances, and tax benefits distributed across income groups?

d. Controlling for initial family attitudes toward education, does having a Section 529 savings account increase the beneficiary's likelihood of attending college?

e. Are state matching grants an effective means of encouraging Section 529 contributions from low- and moderate-income families?

f. Are tax subsidies for saving the most cost effective way to make college

affordable for low- and middle- income families?

5. Do prepaid tuition plans assess a reasonable premium in exchange for reducing participant risks with respect to investment returns and increases in the cost of attending college?

**Alan B. Krueger,**

*Assistant Secretary for Economic Policy.*

[FR Doc. E9–17916 Filed 7–27–09; 8:45 am]

**BILLING CODE 4810–25–P**

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### Suspicious Activity Report

**AGENCY:** Office of Thrift Supervision (OTS), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The proposed information collection request (ICR) described below has been submitted to the Office of Management and Budget (OMB) for review and approval, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

**DATES:** Submit written comments on or before August 27, 2009. A copy of this ICR, with applicable supporting documentation, can be obtained from RegInfo.gov at *http://www.reginfo.gov/public/do/PRAMain.*

**ADDRESSES:** Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Office of Information and Regulatory Affairs, Attention: Desk Officer for OTS, U.S. Office of Management and Budget, 725 17th Street, NW., Room 10235, Washington, DC 20503, or by fax to (202) 395–6974; and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, by fax to (202) 906–6518, or by e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

**FOR FURTHER INFORMATION CONTACT:** For further information or to obtain a copy of the submission to OMB, please contact Ira L. Mills at, *ira.mills@ots.treas.gov* (202) 906–6531, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

*Title of Proposal:* Suspicious Activity Report.

*OMB Number:* 1550–0003.

*Form Number:* 1601.

*Description:* OTS and the bank regulators, including the Board, adopted the Suspicious Activity Report (SAR) in 1996 to simplify the process through which depository institutions (''banks'') inform their regulators and law enforcement about suspected criminal activity. The SAR was updated in 1999 and again in 2003.

In 1992, the Treasury Department was granted broad authority to require suspicious transaction reporting under the Bank Secrecy Act. *See* 31 U.S.C. 5318(g). The Department of the Treasury's Financial Crimes Enforcement Network, which has been delegated authority to administer the Bank Secrecy Act, joined with the bank regulators in 1996 in requiring, on a consolidated form (the SAR form), reports of suspicious transactions. *See* 31 CFR 103.18(a).

The filing of SARs is necessary to prevent and detect the laundering of money and other funds at banks.

Banks are required to retain a copy of any SAR filed and supporting documentation for the filing of the SAR for five years. *See* 31 CFR 103.18(d), 31 CFR 103.38 and 12 CFR 563.180(d)(6).

These documents are necessary for criminal investigations and prosecutions.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit.

*Estimated Number of Respondents:* 804.

*Estimated Number of Responses:* 58,821.

*Estimated Burden Hours per Response:* 1 hour for the report; 1.8 hours for retention.

*Estimated Frequency of Response:* On occasion.

*Estimated Total Burden:* 164,698 hours.

*Clearance Officer:* Ira L. Mills, (202) 906–6531, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Dated: July 21, 2009.

**Deborah Dakin,**

*Acting Chief Counsel, Office of Thrift Supervision.*

[FR Doc. E9–17846 Filed 7–27–09; 8:45 am]

**BILLING CODE 6720–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Disability Compensation; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Disability Compensation will meet on August 10–11, 2009, in the Carlton Ballroom at the St. Regis Washington DC, 923 16th and K Streets, NW., from 8:30 a.m. to 5 p.m. each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising from service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule and give advice on the most appropriate means of responding to the needs of veterans relating to disability compensation.

On August 10 and the morning of August 11, the Committee will receive briefings about studies on compensation for Veterans with service-connected disabilities and other Veteran benefits programs. On the afternoon of August 11, the Committee will break into subcommittees to prepare recommendations. Time will also be allocated during the afternoon of August 11 for receiving public comments. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Ms. Ersie Farber, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration (211A), 810 Vermont Avenue, NW., Washington, DC 20420. Any member of the public wishing to attend the meeting

or seeking additional information should contact Ms. Farber at (202) 461–9728 or *Ersie.farber@va.gov*.

Dated: July 22, 2009.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. E9–17907 Filed 7–27–09; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF VETERANS AFFAIRS

### Privacy Act; Systems of Records

**AGENCY:** Department of Veteran Affairs (VA).

**ACTION:** Notice of establishment of new system of records.

**SUMMARY:** The Privacy Act of 1974 (5 U.S.C. 552a (e) (4)) requires that all agencies publish in the **Federal Register** a notice of the existence and character of their system of records. Notice is hereby given that the Department of Veterans Affairs (VA) is establishing a new system of records entitled ''Veterans Information Solution (VIS)—VA'' (137VA005Q).

**DATES:** Comments on this new system of records must be received no later than August 27, 2009. If no public comment is received, the new system will become effective August 27, 2009.

**ADDRESSES:** Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS).

**FOR FURTHER INFORMATION CONTACT:** David Lindsey, Program Manager, VADIR, Registration and Eligibility (005Q3), 810 Vermont Avenue, NW., Washington, DC 20420; telephone (202) 245–1679.

**SUPPLEMENTARY INFORMATION:**

a. Description of Proposed System of Records

VIS is an Intranet-based application that provides a consolidated view of information gathered from the Beneficiary Identification and Record Locator Subsystem (BIRLS), the Veterans Affairs/Department of Defense Identity Repository (VADIR), the Benefits Delivery Network (BDN), and the Rating Board Automation (RBA2000) corporate database for determination of eligibility for veteran's benefits. VIS provides a read only view of a subset of the data contained within these databases listed; VIS does not provide updates to any of these systems, nor does it retain any of the data gathered from these systems. Once the user request has been fulfilled, the data is expunged from the system.

b. Proposed Routine Use Disclosures of Data in the System

*VA is proposing to establish the following Routine Use disclosures of data accessed by the VIS application from the identified data sources:*

1. The record of an individual included in this system may be provided to Department of Defense (DoD) systems or offices for use in connection with matters relating to one of DoD's programs to enable delivery of healthcare or other DoD benefit to eligible beneficiaries.

2. The name, address, VA file number, effective date of compensation or pension, current and historical benefit pay amounts for compensation or pension, service information, date of birth, competency payment status, incarceration status, and social security number of veterans and their surviving spouses may be disclosed to the Department of Defense Manpower Data Center (DMDC) to reconcile the amount and/or waiver of service, department and retired pay. These records may also be disclosed as part of a computer matching program to accomplish these purposes.

3. The name, address, VA file number, date of birth, date of death, social security number, and service information may be disclosed to DoD's DMDC. DoD will use this information to identify retired veterans and dependent members of their families who have entitlement to Department of Defense benefits but who are not identified in the Department of Defense Enrollment Eligibility Reporting System (DEERS) program and to assist in determining eligibility for Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) benefits. This purpose is consistent with 38 U.S.C. 5701.

4. VA may disclose on its own initiative any information in this system, except the names and addresses of veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule, or order issued pursuant thereto.

5. VA may disclose any information or records to appropriate agencies, entities, and persons when (1) it is suspected or confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) VA has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputations of the records subjects, harm to economic or property interest, identity theft or fraud, or harm to the security, confidentiality or integrity of this system or other systems or programs (whether maintained by VA or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is made to such agencies, entities, and persons whom VA determines are reasonably necessary to assist or carry out VA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by VA to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision or credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the member, when the member or staff person requests the record on behalf of and at the written request of the individual.

8. The name(s) and address(es) of a veteran may be disclosed to another Federal agency or to a contractor of that agency, at the written request of the

head of that agency or designee of the head of that agency for the purpose of conducting government research necessary to accomplish a statutory purpose of that agency.

9. VA may disclose information in the system of records to the Department of Justice (DOJ), either on VA's initiative or in response to DOJ's request for the information, after either VA or DOJ determines that such information is relevant to DOJ's representation of the United States or any of its components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that release of records to the DOJ is a use of information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

10. Where VA determines that there is good cause to question the legality or ethical propriety of the conduct of a person or organization representing a person in a matter before VA, a record from this system may be disclosed, on VA's initiative, to any or all of the following: (1) Applicable civil or criminal law enforcement authorities and (2) a person or entity responsible for the licensing, supervision, or professional discipline of the person or organization acting as representative. Name and home addresses of veterans and their dependents will be released on VA's initiative under this routine use only to Federal entities when VA believes that the names and addresses are required by the Federal department or agency.

11. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor, subcontractor or entity or individual with whom VA has an agreement or contract to perform the services of the contract or agreement.

12. Disclosure may be made to the National Archives and Records Administration or the General Services Administration in records management inspections conducted under authority of Title 44 U.S.C.

c. Search Capability—Users may only gain access to the VIS application if they provide a valid user ID, password, and station number. Upon successful login and authentication to the VIS application, users are provided a search screen. Search criteria may include either name or one of the following numeric entries: SSN, File Number, and Service Number.

d. Sensitive Records—The VIS application notifies users when an attempt is made in violation of sensitivity levels. These notifications occur when an authorized user attempts to view the veteran information that has a higher sensitivity level ranking than he or she has been granted.

e. Design Constraints—The VIS system sits within the Austin Automation Center in Austin, Texas; therefore it must conform to the requirements and standards established for those environments. This includes requirements such as access control to the systems, revision/patch levels for hardware operating systems and database management systems, and use of security tools such as antivirus software, intrusion detection software and spyware.

f. Certification & Accreditation—The VIS system has gone through the Certification & Accreditation (C&A) process. During this process, the system underwent a series of risk and security assessments and had extensive documentation developed to support the integrity of the system. The VA C&A process is used to certify that the VIS system has adequate logical, management and technical security controls in place that minimize the system's risk to unauthorized access and disclosure.

g. Privacy Impact Assessment—The VIS system has had a comprehensive Privacy Impact Assessment conducted on it to ensure that the privacy of the information contained within the system is adequately protected according to VA and Office of Management and Budget (OMB) privacy and security standards.

h. Internal Communications Architecture—Information is requested by VIS from the VADIR, BIRLS, BDN and RBA2000 systems and displayed for the requestor. All data transmissions associated with these data requests are over the internal VA network using approved security protocols to protect the data.

i. Compatibility of the Proposed Routine Uses—The Privacy Act permits the VA to disclose information about the individuals contained in a system of records without their consent for a routine use, when the information will be used for a purpose that is compatible with the purpose for which the information was collected. In all of the routine use disclosures described above, either the recipient of the information will use the information in connection with a matter relating to one of VA's programs, to provide a benefit to the veteran, or disclosure is required by law. The notice of intent to publish an advance copy of the system notice has been sent to the appropriate Congressional committees and to the Director of OMB as required by 5 U.S.C. 552a(r) (Privacy Act) and guidelines issued by OMB (65 FR 77677), December 12, 2000.

Approved: July 10, 2009.

**John R. Gingrich,**

*Chief of Staff, Department of Veterans Affairs.*

**137VA005Q**

**SYSTEM NAME:**

''Veterans Information Solution (VIS)—VA'' (137VA005Q).

**SYSTEM LOCATION:**

The VIS application is located in the Austin Automation Center (AAC), 1615 East Woodward Street, Austin, Texas 78772. A second VIS disaster recovery site is planned to be stood up in FY09 at the Veterans Affairs (VA) data center in Hines, Illinois.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

The category of the individuals covered by the VIS application include Veterans and their dependents whose information is provided to VIS via the Beneficiary Identification and Record Locator Subsystem (BIRLS), the Veterans Affairs/Department of Defense Identity Repository (VADIR), the Benefits Delivery Network (BDN), and the Rating Board Automation (RBA2000) corporate database.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

The record, or information contained in the record, may include identifying information (*e.g.,* name, address, social security number); military service and active duty separation information (*e.g.,* name, service number, date of birth, rank, sex, total amount of active service, branch of service, character of service, pay grade, assigned separation reason, whether Veteran was discharged with a disability, types of disabilities, served in Vietnam Conflict, reenlisted, received a Purple Heart or other military decoration); personal information (*e.g.,* marital status, name and address of dependents, occupation, amount of education of a Veteran or a dependent, dependent's relationship to Veteran).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Title 38, United States Code, Part II, Chapters 11, 13, 15, 17, 18, 19 and 23.

**PURPOSE:**

VIS is an Intranet-based application that provides a consolidated view of information gathered from the BIRLS, VADIR, BDN, and RBA2000 systems for determination of eligibility for Veteran's benefits. VIS provides a read only view of a subset of the data contained within these databases listed; VIS does not provide updates to any of these systems, nor does it retain any of the data gathered from these systems. Once the user request has been fulfilled, the data is expunged from the system.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

1. The record of an individual included in this system may be provided to Department of Defense (DoD) systems or offices for use in connection with matters relating to one of DoD's programs to enable delivery of healthcare or other DoD benefit to eligible beneficiaries.

2. The name, address, VA file number, effective date of compensation or pension, current and historical benefit pay amounts for compensation or pension, service information, date of birth, competency payment status, incarceration status, and social security number of Veterans and their surviving spouses may be disclosed to the Department of Defense Manpower Data Center (DMDC) to reconcile the amount and/or waiver of service, department and retired pay. These records may also be disclosed as part of a computer matching program to accomplish these purposes.

3. The name, address, VA file number, date of birth, date of death, social security number, and service information may be disclosed to DoD's DMDC. DoD will use this information to identify retired Veterans and dependent members of their families who have entitlement to Department of Defense benefits but who are not identified in the Department of Defense Enrollment Eligibility Reporting System (DEERS) program and to assist in determining eligibility for Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) benefits. This purpose is consistent with 38 U.S.C. 5701.

4. VA may disclose on its own initiative any information in this system, except the names and addresses of Veterans and their dependents, that is relevant to a suspected or reasonably imminent violation of law, whether civil, criminal, or regulatory in nature and whether arising by general or program statute or by regulation, rule, or order issued pursuant thereto, a Federal, State, local, tribal, or foreign agency charged with the responsibility of investigating or prosecuting such violation, or charged with enforcing or implementing the statute, regulation, rule, or order. VA may also disclose on its own initiative the names and addresses of veterans and their dependents to a Federal agency charged with the responsibility of investigating or prosecuting civil, criminal, or regulatory violations of law, or charged with enforcing or implementing the statute, regulation, rule, or order issued pursuant thereto.

5. VA may disclose any information or records to appropriate agencies, entities, and persons when (1) it is suspected or confirmed that the integrity or confidentiality of information in the system of records has been compromised; (2) VA has determined that as a result of the suspected or confirmed compromise there is a risk of embarrassment or harm to the reputations of the records subjects, harm to economic or property interest, identity theft or fraud, or harm to the security, confidentiality or integrity of this system or other systems or programs (whether maintained by VA or another agency or entity) that rely upon the potentially compromised information; and (3) the disclosure is made to such agencies, entities, and persons whom VA determines are reasonably necessary to assist or carry out VA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. This routine use permits disclosures by VA to respond to a suspected or confirmed data breach, including the conduct of any risk analysis or provision or credit protection services as provided in 38 U.S.C. 5724, as the terms are defined in 38 U.S.C. 5727.

6. Disclosure to other Federal agencies may be made to assist such agencies in preventing and detecting possible fraud or abuse by individuals in their operations and programs.

7. The record of an individual who is covered by a system of records may be disclosed to a Member of Congress, or a staff person acting for the member, when the member or staff person requests the record on behalf of and at the written request of the individual.

8. The name(s) and address (es) of a veteran may be disclosed to another Federal agency or to a contractor of that agency, at the written request of the head of that agency or designee of the head of that agency for the purpose of conducting government research necessary to accomplish a statutory purpose of that agency.

9. VA may disclose information in the system of records to the Department of Justice (DOJ), either on VA's initiative or in response to DOJ's request for information, after either VA or DOJ determines that such information is relevant to DOJ's representation of the United States or any of its components in legal, or in a proceedings before a court or adjudicative body provided that, in each case, the agency also determines prior to disclosure that release of records to the DOJ is a use of information contained in the records that is compatible with the purpose for which VA collected the records. VA, on its own initiative, may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which VA collected the records.

10. Where VA determines that there is good cause to question the legality or ethical propriety of the conduct of a person or organization representing a person in a matter before VA, a record from this system may be disclosed, on VA's initiative, to any or all of the following: (1) Applicable civil or criminal law enforcement authorities and (2) a person or entity responsible for the licensing, supervision, or professional discipline of the person or organization acting as representative. Name and home addresses of Veterans and their dependents will be released on VA's initiative under this routine use only to Federal entities when VA believes that the names and addresses are required by the Federal department or agency.

11. Disclosure of relevant information may be made to individuals, organizations, private or public agencies, or other entities or individuals with whom VA has a contract or agreement to perform such services as VA may deem practicable for the purposes of laws administered by VA, in order for the contractor, subcontractor or entity or individual with whom VA has an agreement or contract to perform the services of the contract or agreement.

12. Disclosure may be made to the National Archives and Records Administration or the General Services Administration in records management inspections conducted under authority of Title 44 U.S.C.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The VIS application electronically stores personal information on veterans only long enough to fulfill a user's request for information; once the user's request is fulfilled, the data is expunged from the system.

**RETRIEVABILITY:**

The VIS application queries the BIRLS, the VADIR, the BDN, and the RBA2000 corporate database to populate user requests for data. The data is retrieved using name, social security number, and/or other unique personal identifier.

**SAFEGUARDS:**

1. Physical Security: The VIS system is located in the AAC in Texas; a backup disaster recovery system will be installed at the Hines Data Processing Center in Illinois. Access to data processing centers is generally restricted to center employees, custodial personnel, Federal Protective Service and other security personnel. Access to computer rooms is restricted to authorized operational personnel through electronic locking devices. All other persons needing access to computer rooms are escorted.

2. System Security: Access to the VA network is protected by the usage of ''logon'' identifications and passwords. Once on the VA network, separate ID and password credentials are required to gain access to the VIS server and/or database. Access to the server and/or database is granted to a limited number of users, system administrators and database administrators. In addition VIS has undergone certification and accreditation. Based on a risk assessment that followed National Institute of Standards and Technology Vulnerability and Threat Guidelines, the system is considered stable and operational and an Authority to Operate has been granted. The system was found to be operationally secure, with very few exceptions or recommendations for change.

**RETENTION AND DISPOSAL:**

The VIS Application does not retain veteran's personal data in the application system. VIS queries four data systems (BIRLS, VADIR, BDN and RBA2000) to meet user requests for data; once the user request has been satisfied, the data is expunged from the system.

**SYSTEM MANAGER(S) AND ADDRESSES:**

The official responsible for maintaining the VADIR repository: Program Manager, Registration and Eligibility, Office of Enterprise Development, Interagency Program Executive Office (005Q3), ATTN: VIS System of Records, 810 Vermont Avenue, NW., Washington, DC 20420.

**NOTIFICATION PROCEDURES:**

Individuals seeking information on the existence and content of a record pertaining to them should contact the system manager, in writing, at the above address. Requests should contain the full name, address and telephone number of the individual making the inquiry.

**RECORD ACCESS PROCEDURE:**

See Notification Procedure above.

**CONTESTING RECORD PROCEDURES:**

See Notification Procedure above.

**RECORD SOURCE CATEGORIES:**

The VIS data sources are: VADIR, the BIRLS, the BDN, and the RBA2000 corporate database.

[FR Doc. E9–17910 Filed 7–27–09; 8:45 am]

**BILLING CODE 8320–01–P**

Federal Register

Tuesday,
July 28, 2009

# Part II

# Department of the Interior

## Fish and Wildlife Service

## 50 CFR Part 17

## Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* (Large-Flowered Woolly Meadowfoam) and *Lomatium cookii* (Cook's Lomatium); Proposed Rule

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018–AW21**

**[Docket No. FWS–R1–ES–2009–0046]**
**[92210 1117–0000–B4]**

# Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* (Large-Flowered Woolly Meadowfoam) and *Lomatium cookii* (Cook's Lomatium)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for two plants, *Limnanthes floccosa* ssp. *grandiflora* (large-flowered woolly meadowfoam) and *Lomatium cookii* (Cook's lomatium) under the Endangered Species Act of 1973, as amended (Act). We are proposing to designate 2,561 hectares (ha) (6,327 acres (ac)) as critical habitat for *Limnanthes floccosa* ssp. *grandiflora* in Jackson County, Oregon, and 2,875 ha (7,104 ac) as critical habitat for *Lomatium cookii* in Jackson and Josephine Counties, Oregon. The total critical habitat area proposed in this rule, including critical habitat units that overlap for the two species, is 4,467 ha (11,038 ac).

**DATES:** To provide us with adequate time to consider your comments, please ensure that we receive them on or before September 28, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by September 11, 2009.

**ADDRESSES:** You may submit comments and materials concerning this proposal by one of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No. FWS–R1–ES–2009–0046.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: Docket No. FWS–R1–ES–2009–0046; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Paul Henson, State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Avenue, Suite 100, Portland, OR 97266 (telephone 503–231–6179; facsimile 503–231–6195). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. We particularly seek comments concerning:

(1) The reasons why we should or should not designate areas as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of habitat for the species included in this proposed rule;
- What areas occupied at the time of listing, and that contain physical and biological features essential for the conservation of the species, we should include and why;
- What areas not occupied at the time of listing that are essential to the conservation of the species we should include and why; and
- Special management considerations or protection that the proposed critical habitat may require.

(3) Specific information on *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* and the habitat components (physical and biological features) essential to the conservation of these species, such as soil moisture gradient, microsite preferences, and light requirements.

(4) Any information on the biological or ecological requirements of these species.

(5) Land-use designations and current or planned activities in areas occupied by the species, and their possible impacts on the species and the proposed critical habitat.

(6) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities and the benefits of including or excluding areas that are subject to these impacts.

(7) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act, after considering the potential impacts and benefits of the proposed critical habitat designation.

(8) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the proposed rule by mail from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**) or by visiting the *Federal eRulemaking Portal* at *http://www.regulations.gov*.

## *Background*

### Species Information

*Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* were listed as endangered species under the Act in 2002 (67 FR 68004; November 7, 2002). In this proposed rule, we intend to discuss only those topics directly relevant to the designation of critical habitat for these two species. For detailed information on the taxonomy and biology of *L. f.* ssp. *grandiflora* and *L. cookii*, please refer to the final listing rule published in the **Federal Register**

on November 7, 2002 (67 FR 68004) and the Draft Recovery Plan for Listed Species of the Rogue Valley Vernal Pool and Illinois Valley Wet Meadow Ecosystems (USFWS 2006, pp. II-1 to II-17).

*Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are endemic to seasonal wetland habitats of southwestern Oregon. *L. F.* ssp. *grandiflora* is restricted to Jackson County in the Rogue River Valley, where it co-occurs with *Lomatium cookii* in several areas near White City in an area known as the Agate Desert (ONHP 1997, p. 3; Huddleston 2001, p. 11). *Lomatium cookii* occurs in two disjunct locations: (1) in the Rogue River Valley, near the towns of Medford, White City, and Eagle Point; and (2) in the Illinois River Valley of Josephine County near the towns of Selma, Cave Junction, and O'Brien (ONHDB 1994, p. 5). The two locations are separated by approximately 48 kilometers (km) (30 miles (mi)).

*Limnanthes floccosa* ssp. *grandiflora*, commonly known as large-flowered woolly meadowfoam, is a small, annual forb (broad-leaved herb) in the false mermaid family (Limnanthaceae). The subspecies produces yellowish-white flowers that bloom in April and May and reaches a height of 15 centimeters (cm) (6 inches (in)) (Meinke 1982, p. 202). *L. f.* ssp. *grandiflora* is distinguished from the more common *L. f.* ssp. *floccosa* (common woolly meadowfoam) by its larger, sparser-haired calyxes (outer flower bracts), which typically produce a single flower per pedicel (flower stalk) (Kalin-Arroyo 1973, p. 188; USFWS 2006, pp. II-1–II-3). In contrast, *L. f.* ssp. *floccosa* typically produces smaller flowers with densely whitish and woolly haired calyxes; the flowers are formed in clusters. *L. f.* ssp. *grandiflora* occurs on the floor of the Middle Rogue River Basin in Jackson County in vernal pool–mounded prairie habitat (rain-fed seasonal wetlands in prairie characterized by gentle mound-swale topography) (Kalin-Arroyo 1973, p. 188; ONHP 1997, p. 4; USFWS 2006, pp. II-1–II-3).

*Lomatium cookii*, commonly known as Cook's lomatium or Cook's desert parsley, is a perennial, tap-rooted forb in the parsley family (Apiaceae) that produces light-yellow flowers from late March to May and reaches a height of 50 cm (20 in). This species is distinguished from the more common *Lomatium utriculatum* (foothill desert parsley) by having narrow bracts under the flower umbels (flower clusters), producing paler yellow flowers, and by typically lacking leaves on the flowering stems (Kagan 1986, pp. 73-74; USFWS 2006, pp. II-15–II-17). *Lomatium cookii* is associated with vernal pool–mounded prairie habitat, but also occurs in seasonally wet meadow habitat in forest openings (ONHDB 1994, pp. 9–10).

*Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are both associated with the remaining relatively undisturbed vernal pool–mounded prairie habitat in the Middle Rogue River Basin's Agate Desert (Environmental Science Associates (ESA) 2007, p. 2-1; ONHP 1997, p. 3). Relative to the pools, the plants often occur in pool margins, or less often on both mound tops and depression bottoms of less intact vernal pools.

The substrate underlying the vernal pool topography in the Middle Rogue River Valley is primarily basalt within a matrix of thick clay soil, which creates a hardpan or duripan layer (mineral soil horizons relatively impervious to water). During fall and winter rains, water collects in shallow depressions of the vernal pool–mounded prairie habitat. Downward percolation of water is prevented by the presence of the duripan layer located from 0.18 to 0.75 meters (m) (0.6 to 2.5 feet (ft)) below the soil surface (Keeley and Zedler 1998, p. 2; Huddleston 2001, pp. 14–15). In areas north and northwest of Medford, the vicinity of White City, and north along low-elevation plains, *L. f.* ssp. *grandiflora* and *Lomatium cookii* occur on alluvial soils, primarily mapped as Agate-Winlo complex soils, but also occasionally on mapped Coker clay and Provig-Agate complex soils with 0 to 3 percent slopes. *L. f.* ssp. *grandiflora* also occasionally occurs on soils mapped as Carney clay and Winlo very gravelly loam in vernal pool habitat north of White City (USDA 2006b).

In the Agate Desert, the two plants are associated with microhabitats occupied by mostly annual native forbs and graminoids (grass-like plants), including *Alopecurus geniculatus* (water foxtail), *Deschampsia danthonioides* (slender hairgrass), *Eryngium petiolatum* (Oregon coyote thistle), *Trifolium depauperatum* (poverty clover), *Myosurus minimus* (tiny mouse-tail), *Navarretia leucocephala* ssp. *leucocephala* (white-head navarretia), *Lasthenia californica* (California goldfields), *Phlox gracilis* (slender phlox), *Plagiobothrys bracteatus* (bracted popcornflower), and *Triteleia hyacinthina* (white brodiaea) (OSU 2007); USFWS 2006, p. II-6). The vernal pool habitat occupied by *Limnanthes floccosa* ssp. *grandiflora* in the Agate Desert ranges from 372 to 469 m (1,220 to 1540 ft) in elevation (Huddleston 2001, p. 11; USGS 2002). The vernal pool habitat occupied by *Lomatium cookii* in the same basin area ranges from 372 to 411 m (1,220 to 1,350 ft) in elevation (Huddleston 2001, p. 11; USGS 2009).

The habitats occupied by *Lomatium cookii* in the Illinois River Valley are more complex than the Rogue River Valley in both soil composition and soil depth. *Lomatium cookii* occurs on 17 mapped soil types in the Illinois River Valley. The majority of *Lomatium cookii* occurrences in the Illinois River Valley are found on Brockman clay loam, Josephine gravelly loam, and Pollard loam (USDA 2008). Unlike the Middle Rogue River Basin soils, many of the *Lomatium cookii*-occupied soil types originate from stream-fed alluvium covering sedimentary or ultramafic rocks (ONHDB 1994, pp. 9–10). Ultramafic rock is a class of rock that is low in calcium and high in iron and magnesium and is often toxic to plants (Brady *et al.* 2005, p. 246). Pollard loam and Speaker-Josephine gravelly loam soils originate from non-ultramafic sources, while Brockman soil and most others types originate from ultramafic parent material (Silvernail and Meinke 2008, pp. 9–10).

*Lomatium cookii* plants exhibit a slightly different morphology in the Illinois River Valley than in the Rogue River Basin. Compared with Agate Desert plants, Illinois River Valley *Lomatium cookii* plants are less robust, have smaller plant dimensions, and have fewer numbers of floral units. Plants in the two areas also exhibit differences in floral and fruit morphology, seed length, the number of umbels (flower groups), length of peduncle (flower stalk), number of central umbellets (sub-flower groups) per umbel, and number of staminate flowers (male flowers) per peripheral and central umbellet (Silvernail and Meinke 2008, pp. 30–31).

In the Illinois River Valley, *Lomatium cookii* is known from six general areas along a 29-km (18-mi) stretch of the Illinois River within the large serpentine sheet composed of ultramafic rock that covers the central and southwestern portion of Josephine County. Within this landform, *Lomatium cookii* occurs only in areas with alluvial silts or clays that have been deposited over the ultramafic bedrock (ONHDB 1994, p. 9). In the Illinois River Valley, *Lomatium cookii* occurs in elevations that range from 383 to 488 m (1,256 to 1,600 ft) (USGS 2009).

Habitat occupied by *Lomatium cookii* in the Illinois Valley is primarily seasonally wet grassland meadows, on flats and slopes in mixed oak-conifer forested meadows, streambanks, or

forest openings, dominated by native grasses, including: *Danthonia californica* (California oatgrass), *Poa secunda* (rough bluegrass), *Deschampsia cespitosa* (tufted hairgrass), *Festuca roemeri* var. *klamathensis* (Klamath Roemer's fescue), *Achnatherum lemmonii* (Lemmon's needlegrass) and *Deschampsia danthonioides*. Native forbs include *Camassia* spp. (camas), *Ranunculus occidentalis* (western buttercup), and *Limnanthes gracilis* var. *gracilis* (slender meadowfoam) (ONHDB 1994, p. 9). The seasonally wet meadows occupied by *Lomatium cookii* in the Illinois River Valley usually occur as part of bottomland *Quercus garryana–Quercus kelloggii–Pinus ponderosa* (Oregon white oak–California black oak–ponderosa pine) savannas. Widely spaced, large pine trees are characteristic of the open meadow habitat with mixed pine and oak woodlands occurring along seasonal creeks.

At the time of listing in 2002, *Limnanthes floccosa* ssp. *grandiflora* was known from 15 distinct occurrences and *Lomatium cookii* was known from 36 occurrences throughout their ranges (67 FR 68004; November 7, 2002). Currently *L. f.* ssp. *grandiflora* has 22 documented occurrences and *Lomatium cookii* has 37 documented occurrences. *L. f.* ssp. *grandiflora* is found only in Jackson County, and is known from Shady Cove, Hammel Road, two areas northeast of Upper Table Rock, several areas north of Eagle Point, the Agate Reservoir, and at several vicinities in and around White City including: the Jackson County Sports Park (Hoover Ponds), the Hall and Military Slough tracks of the Denman Wildlife Area, on City of Medford property, several areas west of Whetstone Creek, and on several private properties (OHNIC 2008; Service database 2008). The four largest population centers of *L. f.* ssp. *grandiflora* include two areas in White City, Whetstone Creek, and an area northeast of Upper Table Rock. The smallest *L. f.* ssp. *grandiflora* population is known from an area just outside the Rogue Valley International–Medford Airport (Meyers 2008, p. 48).

*Lomatium cookii* occurs in both Jackson County and Josephine County. In Josephine County, where it is found in seasonal wet meadow habitats, *Lomatium cookii* has been reported from six general areas: (1) the vicinity of Selma; (2) the east base of Woodcock Mountain; (3) Rough and Ready Creek; (4) Illinois River Forks State Park; (5) French Flat; and (6) Laurel Road (ONHIC 2008; USFWS 2008). The six largest population centers of *Lomatium cookii* include two areas in French Flat, Laurel Road, and near the east base of Woodcock Mountain in Josephine County; and at the Rogue Valley International–Medford Airport and an area in east White City in Jackson County.

The two species co-occur in three general areas in Jackson County: (1) the vicinity of the Rogue International–Medford Airport in Medford; (2) in and around White City; and (3) areas west of Whetstone Creek. Specific locations where *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are found together have been reported in the Rogue River Valley at the Rogue Valley International–Medford Airport and various locations in and around White City including: the Jackson County Sports Park, the Hall Track of the Denman Wildlife Area, on City of Medford property, several areas west of Whetstone Creek, and on several private properties in and around White City (ONHIC 2008; USFWS 2008).

*Lomatium cookii* populations are generally found in habitats not subject to mining, agricultural development, residential or commercial development, and grazing (Oregon Natural Heritage Information Center (ONHIC) database 2008). Although, historically, many of these activities were thought to have negative impacts on the species, there are some notable exceptions, such as grazing, which can be beneficial if properly managed. At a few sites in Jackson County, for example, annual mowing, periodic burning, and grazing are practiced and appear to be compatible with survival and even proliferation of *Lomatium cookii* (Borgias 2004, p. 34). In fact, the largest and most prolific *Lomatium cookii* populations occur where compatible grazing or mowing practices occur repeatedly (Borgias 2004, p. 34). Although intensive cattle grazing has a significant negative impact, especially combined with the effects of competition with nonnative annual grasses, evidence suggests that *Lomatium cookii* is capable of persisting under moderate grazing pressure (Brock 1987, pp. 23, 30). Timing of grazing is also important, as grazing in the fall and winter growing season would reduce seed production by the plants (Brock 1987, p. 23). Sites occupied by *Lomatium cookii* that receive no management continue to support plant populations, but monitoring suggests that some of those populations are declining (Kaye and Thorpe 2008, pp. 16–25). Borgias (2004, p. 34) observed that, after several years without grazing or a fire at The Nature Conservancy's Agate Desert Preserve, thatch accumulated and recruitment of young *Lomatium cookii* declined due to the increases of nonnative annual grasses. Other reports indicate that vegetative succession, herbivory by voles (*Microtus* spp.), or both, may be the cause of declining populations (Kaye and Thorpe 2008, pp. 16–25).

Land uses associated with the largest, more intact populations of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are vernal pool habitats managed using compatible agricultural practices. Actions conducive to large population sizes of either of the two species may include prescribed burns, controlled grazing practices, or regular mowing. The Rogue Valley International–Medford Airport is an example of an area that is mowed regularly to meet Federal Aviation Authority (FAA) safety requirements and that supports a large and prolific *Lomatium cookii* population that extends over 28 ha (70 ac) (R. Russell, pers. comm. 2004; S. Friedman, pers. obs. 2009). Within grazed properties, small isolated patches of *L. f.* ssp. *grandiflora* often continue to persist, perhaps due to suppression of invasive nonnative grasses (Meyers 2008, pp. 1–48; Wildlands, Inc. 2008, p. 1; Borgias 2004, p. 42).

Threats

Threats to *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* in the Rogue River Valley include: residential, urban, and commercial development; agricultural development (including leveling, ditching, tilling, and stock pond construction or water impoundments); road construction and maintenance; aggregate mining; incompatible grazing practices; off-road vehicle (ORV) use that affects surface hydrology; vandalism (related to ORV use); encroachment by nonnative plants; and herbivory by gophers (family Geomyidae) and voles (67 FR 68004; Kaye and Thorpe, pp. 11–12).

- Residential, urban, agricultural, mining, and commercial development has resulted in an approximately 60 percent loss of the vernal pool landscape in the Rogue River Valley due to building construction, removal of habitat, altered hydrology, or altered topography (ONHP 1997, pp. 14–15; Wille and Petersen 2006, p. 1993).
- Ground-disturbing activities, such as road construction and maintenance or ORV use, can damage the clay pan layer and allow soil moisture to drain from the vernal pools or wet meadow habitats that the plants depend upon for reproduction and survival. Incompatible agricultural practices, including some timber management and crop management, can alter hydrology,

directly affect plants with equipment, or indirectly affect plants as a result of road construction. Road construction can result in population fragmentation, alteration of hydrology, or the covering of plants by fill material, resulting in degradation of habitat and direct loss of plants.

• Vandalism refers to the intentional disregard or dismantling of signing or fencing intended to protect certain wetland areas from unauthorized ORV use, which may then result in negative effects on the hydrology of the habitat.

• The removal of surface material in conjunction with mining activities results in the direct loss of habitats.

• Heavy grazing, especially from October through April, would be an example of incompatible grazing. The majority of seasonal growth for these two plants occurs during the winter, and if plants are grazed during the fall and winter months, they are less likely to produce seed in the spring or early summer (Brock 1987, p. 23). Vernal pool hydrology may also be altered by the compression and compaction disturbance caused by grazing livestock. Nonnative plants can outcompete and displace native plant species and may also inhibit successful germination of seeds. Herbivory by gophers and voles results in direct mortality of individual plants, as well as an indirect decrease in reproduction.

*Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are also threatened by encroachment of nonnative annual herbs, including *Centaurea solstitialis* (yellow starthistle) and *Cardaria draba* (hoary cress), which may competitively exclude the two native species, as well as nonnative annual grasses, namely *Hordeum marinum* ssp. *gussoneanum* (Mediterranean barley) and *Taeniantherum caput-medusae* (medusahead). *Hordeum marinum* ssp. *gussoneanum* encroaches on microhabitats occupied by both species, but *T. caput-medusae* occurs on adjacent upland mound habitats, occasionally interfering with *Lomatium cookii* germination and growth, or stifling native plant growth in general. Reproduction of both *Lomatium cookii* and *L. f.* spp. *grandiflora* is impaired by the presence of introduced annual grasses, as seeds of both native species are not able to germinate under the dense thatch produced by nonnative annual grasses. Recently introduced nonnative invasive plants that are particularly threatening to *Lomatium cookii* in the Illinois Valley are *Alyssum murale* (yellowtuft) and *A. corsicum* (alisso di Corsica). These two plants were recently introduced to serpentine meadow habitat as part of an experiment to test their ability to accumulate nickel. Unfortunately the plants have now begun to spread rapidly across wide areas of serpentine meadow in particularly dense concentrations and threaten to encroach upon and displace *Lomatium cookii* populations in the Illinois Valley (ODA and USFS 2008, pp. 1–3).

Threats to *Lomatium cookii* in the Illinois Valley include aggregate and mineral mining, residential and urban development, impacts associated with timber harvesting practices, road construction and maintenance, ground disturbance by ORV use that affects surface hydrology, garbage dumping, succession of native woody vegetation due to fire suppression, incompatible grazing practices, and herbivory by gophers and voles; the effects of most of these threats are described above. The dumping of garbage, especially such large items as old appliances, can directly affect populations by crushing or smothering them. Succession of native woody vegetation, although a natural process, is normally held in check by fire. In the Illinois Valley, the longer fire return intervals due to fire suppression has led to the encroachment of native woody vegetation (trees and shrubs) into the wet meadow habitats occupied by *Lomatium cookii*. Such native woody plants include: *Ceanothus cuneatus* (buckbrush), *Pinus ponderosa* (Ponderosa pine), *Pinus jeffreyi* (Jeffrey pine), *Pseudotsuga menziesii* (Douglas-fir), and *Toxicodendron diversiloba* (poison oak). The succession of these species in *Lomatium cookii* habitat can isolate the species into small refuge pockets or cause widespread reduction of habitat suitability by reducing light availability (over-shading), limiting water and nutrient availability, fragmenting populations, and limiting space to grow. Individuals of *Lomatium cookii* growing in more shaded conditions, as when surrounded by shrubs, tend to be smaller and less robust than plants growing in more open areas in association with lower growing grasses and forbs (ONHIC 2008).

Several long-term monitoring efforts indicate that, at four protected locations in the Rogue and Illinois River Valleys, *Lomatium cookii* populations have experienced declines (D. Borgias, pers. comm. 2006; Kaye and Thorpe 2008, pp. 16–25). The causes are not specifically known but appear to be due to encroachment and over-shading from the succession of natural vegetation or increases in gopher and vole activity. At two of the declining *Lomatium cookii* populations, located at the French Flat Area of Critical Environmental Concern (ACEC), the Medford District of the Bureau of Land Management (BLM) is currently planning to arrest this decline by reducing shrub and tree encroachment (S. Fritts, pers. comm. 2009). At two *Lomatium cookii* populations located on The Nature Conservancy's Agate Desert Preserve and Whetstone Savanna Preserve, planting of native bunchgrass, mowing, and grazing are being considered to address declining plant numbers (D. Borgias, pers. comm. 2009).

*Previous Federal Actions*

For more information on Federal actions concerning *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* prior to their listing, please refer to the final listing rule for the two plants published in the **Federal Register** on November 7, 2002 (67 FR 68004). At the time of listing, critical habitat was not designated for the two species due to higher priorities at that time.

On December 19, 2007, the Center for Biological Diversity filed a complaint against the Service (*Center for Biological Diversity* v. *Kempthorne, et al., 07-CV-2378 IEG, (S.D. CA*)) for failure to designate critical habitat for four plant species, including *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* (the other two species occur in different regions). In a settlement agreement reached on April 11, 2008, we agreed to complete a critical habitat determination for *L. f.* ssp. *grandiflora* and *Lomatium cookii* in a single rulemaking because they share similar habitats. We agreed to submit a proposed critical habitat rule for both *L. f.* ssp. *grandiflora* and *Lomatium cookii* to the **Federal Register** by July 15, 2009, and a final rule by July 15, 2010.

In 2003, critical habitat was designated for the threatened vernal pool fairy shrimp (*Branchinecta lynchi*) in California and the Rogue River Valley of Oregon (68 FR 46683; August 6, 2003). The designated vernal pool fairy shrimp critical habitat in Oregon overlaps with approximately 2,101 ha (5,192 ac) of suitable habitat for *Limnanthes floccosa* ssp. *grandiflora* and 799 ha (1,974 ac) of suitable habitat for *Lomatium cookii* (68 FR 46683). The vernal pool fairy shrimp critical habitat designation resulted in additional regulatory review for habitats occupied by both *L. f.* ssp. *grandiflora* and *Lomatium cookii* in most of Jackson County due to the similarity and location of the vernal pool–mounded prairie habitat shared by these species. In this proposed rule, we will note where designated critical habitat for the

vernal pool fairy shrimp overlaps with that proposed for *L. f.* ssp. *grandiflora* and *Lomatium cookii.*

*Prudency Determination*

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)) further state that the designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or (2) such designation of critical habitat would not be beneficial to the species.

There is no documentation that *Limnanthes floccosa* ssp. *grandiflora* or *Lomatium cookii* are threatened by taking or targeted human activities such as collection. Since the publication of the Draft Recovery Plan for Listed Species of the Rogue Valley Vernal Pool and Illinois Valley Wet Meadow Ecosystems (draft recovery plan) (USFWS 2006, pp. IV-13–IV-14) in 2006, maps identifying core recovery areas for *L. f.* ssp. *grandiflora* and *Lomatium cookii* have been available to the public. The core recovery areas included focal areas where we anticipated conservation and protection could result in recovery of the two species. Most landowners and collectors have been aware of the location of general *L. f.* ssp. *grandiflora* and *Lomatium cookii* occurrence locations since publication of the draft recovery plan in 2006. We do not have any documentation that threats have increased since these species were listed and since the draft recovery plan was published.

In the absence of evidence that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits of a critical habitat designation include: (1) Federal agency compliance with the consultation requirements to avoid destruction or adverse modification of critical habitat; (2) focusing conservation activities on the most essential features and areas; (3) providing educational benefits to State or county governments or private entities; and (4) preventing people from causing inadvertent harm to the species. The primary regulatory effect of critical habitat is the requirement under section 7(a)(2) of the Act that Federal agencies refrain from taking any action that destroys or adversely affects critical habitat. The proposed critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* is composed of lands under Federal, State, county, municipal, and private ownership. Some of the lands designated as critical habitat may be subject to Federal actions that trigger the section 7 consultation requirement, such as the granting of Federal monies for conservation projects or the need for Federal permits for projects (for example, the filling of wetlands subject to section 404 of the Clean Water Act (33 U.S.C. 1344, *et seq.*)). There may also be some educational or informational benefits to the designation of critical habitat. Educational benefits include the notification of landowners, land managers, and the general public of the importance of protecting the habitat of these species. In the case of *L. f.* ssp. *grandiflora* and *Lomatium cookii*, these aspects of critical habitat designation would potentially benefit the conservation of these species.

Although these species are limited in their ecological and geographical ranges, we have no information indicating that a critical habitat designation would not be prudent due to the threat of overcollection or vandalism. Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to these species and may provide some measure of benefit, we find that designation of critical habitat is prudent for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*: thus, we are proposing to designate critical habitat in accordance with section 4(b)(2) of the Act.

**Critical Habitat**

Critical habitat is defined in section 3 of the Act as:

1. The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

2. Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to discretionary actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on discretionary Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the geographic area occupied by the species at the time it was listed must first have the physical and biological features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life-cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)). Occupied habitat that contains features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection. Under the Act, we can designate areas that were unoccupied at the time of listing only when we determine that the best available scientific data demonstrate that the designation of the area is essential to the conservation of the species. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but not occupied at the time of listing may, however, be determined to be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our ''Policy on Information Standards Under the Endangered Species Act,'' published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554; H.R. 5658) and the

associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service make use of the best scientific and commercial data available.

When we are determining which areas should be proposed as critical habitat, a primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species, based on the scientific data currently before the Service, as new information may become available that indicates otherwise. In addition, habitat is often dynamic, and species may shift from one area to another over time. For these reasons, a critical habitat designation should not be interpreted as meaning that habitat outside the designation is unimportant or may not be required for the recovery of the species in question.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy prohibition, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings under certain circumstances.

*Methods*

As required by section 4(b)(2)of the Act, we used the best scientific data available in determining areas occupied at the time of listing that contain the features essential to the conservation of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii,* considered individually. We also determined whether those features may require special management considerations or protection. We reviewed available information that pertains to the habitat requirements of these species; these sources of information included, but were not limited to, the proposed (65 FR 30941; May 15, 2000) and final (67 FR 68004; November 7, 2002) rules to list these species; the draft recovery plan (USFWS 2006); data contained in reports prepared for or by the U.S. Bureau of Land Management (BLM) (1999 through 2008), the Oregon Department of Agriculture's (ODA) Native Plant Conservation Program (2007-2008), and The Nature Conservancy (TNC) (1998 through 2008); discussions with species experts including ODA, BLM, ONHIC, and TNC staff; data and information presented in academic research theses; data provided by ONHIC; Oregon State University herbarium records; and data submitted during section 7 consultations. Additionally, we utilized regional Geographic Information System (GIS) shape files for area calculations and mapping, such as United States Department of Agriculture (USDA) National Agriculture Imagery Program aerial imagery, USDA soil maps, and United States Geological Survey (USGS) contour maps (USDA 2006a, 2006b, 2008; USGS 2002, 2009). We are not currently proposing as critical habitat any areas outside the geographical area presently occupied by either *L. f.* ssp. *grandiflora* or *Lomatium cookii*, because the draft recovery plan indicates that recovery can be attained within the present range of each species (USFWS 2006). Our regulations stipulate that critical habitat shall be designated outside the areas presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)).

*Primary Constituent Elements*

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas occupied at the time of listing to propose as critical habitat, we consider the physical and biological features essential to the conservation of the species and whether those features may require special management considerations or protection. These features may include, but are not limited to, the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing (or development) of offspring, germination, or seed dispersal; and generally

(5) Habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species.

The appropriate quantity and spatial arrangement of the principal biological or physical features within the defined area essential to the conservation of the species comprise the ''primary constituent elements'' (PCEs) of critical habitat. As defined by our implementing regulations at 50 CFR 424.12(b)), these primary constituent elements may include, but are not limited to, features such as roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetlands or drylands, water quality and quantity, host species or plant pollinators, geological formations, vegetation types, tides, and specific soil types.

The specific PCEs required for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are derived from the biological needs of the species as described in the **Background** section of this proposed rule and the information presented below.

*Space for Individual and Population Growth, Germination, and Seed Dispersal*

*Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* both occur on vernal pool–mounded prairie and other ephemeral wetland habitats underlain by relatively undisturbed subsoils subject to periodic inundation (Borgias 2004, pp. 17–20; ONHDB 1994, pp. 9–10). In the Agate Desert, both species occur in low-gradient mounded habitat that supports a mosaic of low-growing native grasses and forbs and an absence of dense canopy vegetation. The pools typically fill during the winter rains and retain a wetted perimeter until late April. In years with higher than average winter rainfall, more depressions fill, and individual pools that are separate in dry years may merge together (Borgias 2004, p. 32). The dominant native grasses and forbs associated with vernal pool–mounded prairie habitat occupied by *L. f.* ssp. *grandiflora* and *Lomatium cookii* include: *Alopecurus geniculatus, Deschampsia danthonioides*, *Eryngium petiolatum, Lasthenia californica, Myosurus minimus, Navarretia leucocephala* ssp. *leucocephala, Phlox gracilis*, *Plagiobothrys bracteatus*, *Trifolium depauperatum*, and *Triteleia hyacinthina*. In the Agate Desert, vernal pool–mounded prairie habitats occupied by *Lomatium cookii*, range from 372 to 411 m (1,220 to 1,350 ft) in elevation. In the same habitat, *L. f.* ssp. *grandiflora* occurrences range from 372 to 469 m (1,220 to 1,540 ft) in elevation (USGS 2002).

In the Illinois River Valley, *Lomatium cookii* occurs primarily in alluvial

meadows underlain by relatively undisturbed ultramafic soils subject to winter inundation from rainfall, seasonal flooding, and overland drainage (ONHDB 1994, pp. 9–10). These seasonally wet meadows, occurring within *Quercus garryana-Quercus kelloggii-Pinus ponderosa* forest openings, are dominated by native grasses and forbs including: *Achnatherum lemmonii, Camassia* spp., *Danthonia californica, Deschampsia cespitosa*, *Festuca roemeri, Poa secunda*, *Ranunculus occidentalis*, and *Limnanthes gracilis* var. *gracilis* (ONHDB 1994, p. 9). Widely spaced, large pine trees are characteristic of the open meadow habitat with some mixed pine and oak woodlands occurring along seasonal creeks. In the Illinois River Valley area, *Lomatium cookii* ranges from 383 to 488 m (1,256 to 1,600 ft) in elevation (USGS 2009).

These specific habitats and hydrological regimes provide the conditions essential for the growth and survival of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* and for the successful production, germination, and dispersal of seeds.

Slope

In the Agate Desert, *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* occur almost exclusively on low-gradient and flat terrains, not typically exceeding 3 percent slope (USDA 2006b). In the Agate Desert, *L. f.* ssp. *grandiflora* and *Lomatium cookii* occur predominately in Agate-Winlo complex soils mapped at 0 to 3 percent slope.

Most Illinois River Valley *Lomatium cookii* occurrences are found on a variety of soils that range from 0 to 8 percent slope (ONHIC 2008; USDA 2008). However, a few of the *Lomatium cookii* sites in the Illinois River Valley are on terrains with soils mapped up to 30 percent slope (ONHIC 2008).

*Water and Nutritional or Physiological Requirements*

Vernal pools typically become inundated or saturated during winter rains and hold water for sufficient lengths of time for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* to germinate, grow, and reproduce. Periodically, this geographic area may experience drought, and rainfall may be insufficient to fill pools. The composition of the plant community can vary from year to year depending on the timing and amount of annual rainfall and the type of land management on the site (Borgias 2004, p. 16). The vernal pools and wet meadow soils where the two plants occur are dry during the summer but become saturated with water nearly every year. The water regime is important for the sustenance of the two plants and for their ability to germinate, persist, and grow in wet conditions during the winter months.

Vernal pool habitats, ephemeral swales, seasonally wet meadows, and streamside habitats occupied by *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* in the Rogue River and Illinois River valleys can be characterized as seasonal wetlands. The habitats are dominated by mostly obligate or facultative wetland vegetation. The *Lomatium cookii* occurrences at Rough and Ready Creek, the Rogue Valley International–Medford Airport, and a potentially introduced population at Woodcock Creek are clearly not wetlands but appear to have high clay content in the soil (Kagan 1994, p. 10; Silvernail and Meinke 2008, p. 31). The meadows at these sites may have enough of a clay component so that they would be seasonally wet (ONHDB 1994, p. 10).

The moisture and other nutritional or physiological requirements afforded by these sites provide the essential requirements for the growth, germination, reproduction, and successful seed dispersal of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii.*

Soil

For *Lomatium cookii*, which occurs in both the Agate Desert and the Illinois River Valley, the habitat soil types between the two plant population centers are vastly different in a variety of chemical and physical characteristics. In particular, the soil types in the Agate Desert typically occupied by both *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* are Agate–Winlo or Provig–Agate soils. Soils in the Illinois River Valley occupied by *Lomatium cookii* may be Abegg gravelly loam, Brockman clay loam, Copsey clay, Cornutt–Dubakel complex, Dumps, Eightlar extremely stony clay, Evans loam, Foehlin gravelly loam, Josephine gravelly loam, Kerby loam, Newberg fine sandy loam, Pearsoll–Rock outcrop complex, Pollard loam, Riverwash, Speaker–Josephine gravelly loam, Takilma cobbly loam, or Takilma Variant extremely cobbly loam. The majority of *Lomatium cookii* occurrences in the Illinois River Valley are found on Brockman clay loam, Josephine gravelly loam and Pollard loam (USDA 2008). In a soil analysis conduced by Silvernail and Meinke (2008, p. 30), samples from ultramafic *Lomatium cookii* habitat in the Illinois River Valley had higher concentrations of magnesium, nickel, chromium, cobalt, zinc, and copper and higher percent magnesium saturation. Soils from *Lomatium cookii* habitat in the Rogue River Valley had higher concentrations of calcium, nitrogen, phosphorus, potassium, manganese, iron, and boron. Soils from the two population centers had similar pH, cation exchange capacity, and percent sand, silt, or clay content (Silvernail and Meinke 2008, p. 30).

*Habitats Protected from Disturbance*

Development

Disturbance in the form of development is a major factor in the loss or degradation of habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. Residential or commercial development can directly eliminate or fragment essential habitat for both of the two species, causing declines in distribution and numbers. Agricultural development, such as ripping (a form of deep tilling that potentially undermines the hardpan layer of the soil), water diversion, and water impoundment can also eliminate habitat for the two plant species. Development can indirectly cause increases in nonnative plants in the habitat, in turn decreasing pollinators, habitat for pollinator species, and seed production of many native vernal pool plants (Thorp and Leong 1998, pp. 169–179). *L. f.* ssp. *grandiflora* and *Lomatium cookii* face immediate threats from urban and commercial development in the rapidly expanding Medford and White City metropolitan areas in the Rogue River Valley. Protected habitat is therefore of crucial importance for the growth and dispersal of these two species.

Based on aerial imagery, habitat areas that appear to provide sufficient buffer protection and continuous non-fragmented *Limnanthes floccosa* ssp. *grandiflora* habitat were typically greater than 8 ha (20 ac). Habitat areas of this size provide protection from adjacent development and weed sources and contained intact hydrology (USDA 2006a). This is the size of the smallest vernal pool–mounded prairie area that is known to support *L. f.* ssp. *grandiflora* (ONHIC 2008). Based on aerial imagery and ONHIC information, habitat areas that appeared to provide a sufficient buffer protection and continuous non-fragmented *Lomatium cookii* habitat covered at least 12 ha (30 ac). Habitat areas of this minimum size provide protection from adjacent development and weed sources and contained intact hydrology. The 12-ha (30-ac) habitat area is equivalent to the smallest wet meadow area in the Illinois River Valley

that supports *Lomatium cookii* (USDA 2006a, ONHIC 2008).

Invasive Nonnative Plants

Invasive nonnative species may outcompete *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* for open, bare ground and reduce space available for the listed plants' growth (Borgias 2004, p. 45); therefore, the listed plants require microhabitats free of exotic or native invasive competitors. In the Agate Desert, invasive nonnative plants that compete with the two listed species include: *Centaurea solstitialis, Cardaria draba, Hordeum marinum* ssp. *gussoneanum*, and *Taeniantherum caput-medusae* (medusahead).

In the Illinois Valley, common introduced grasses in the grazed pastures in and around *Lomatium cookii* habitat include: *Festuca arundinacea* (tall fescue), *Dactylis glomerata* (orchard grass), and *Poa pratensis* (Kentucky bluegrass). In addition, the recently introduced nonnative invasive species *Alyssum murale* and *A. corsicum* threaten *Lomatium cookii* in this area.

*Primary Constituent Elements for Limnanthes floccosa ssp. grandiflora and Lomatium cookii*

Under our regulations, we are required to identify the known physical and biological features or PCEs essential to the conservation of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*, which may require special management considerations or protection. All areas proposed as critical habitat for *L. f.* ssp. *grandiflora* and *Lomatium cookii* were occupied at the time of listing, are within the species' historical geographic range, and provide sufficient PCEs to support at least one life-history function.

Based on our current knowledge of the life history, biology, and ecology of the species and the characteristics of the habitat necessary to sustain the essential life history functions of the species, we have determined that the PCEs for *Limnanthes floccosa* ssp. *grandiflora* critical habitat are:

(1) Vernal pools or ephemeral wetlands and the adjacent upland margins of these depressions that hold water for a sufficient length of time to sustain *Limnanthes floccosa* ssp. *grandiflora* germination, growth, and reproduction, occurring in the Agate Desert vernal pool landscape (ONHP 1997, p. 3). These vernal pools or ephemeral wetlands are seasonally inundated during wet years but do not necessarily fill with water every year due to natural variability in rainfall, and support native plant populations. Areas of sufficient size and quality are likely to have the following characteristics:

- Elevations from 372 to 469 m (1,220 to 1,540 ft);
- Associated dominant native plants including, not limited to: *Alopecurus geniculatus, Deschampsia danthonioides*, *Eryngium petiolatum, Lasthenia californica, Myosurus minimus*, *Navarretia leucocephala* ssp. *leucocephala, Phlox gracilis, Plagiobothrys bracteatus*, *Trifolium depauperatum*, and *Triteleia hyacinthina.*
- A minimum area of 8 ha (20 ac) to provide intact hydrology and protection from development and weed sources.

(2) The hydrologically and ecologically functional system of interconnected pools, ephemeral wetlands, or depressions within a matrix of surrounding uplands that together form vernal pool complexes within the greater watershed. The associated features may include the pool basin or depressions; an intact hardpan subsoil underlying the surface soils up to 0.75 m (2.5 ft) in depth; and surrounding uplands, including mound topography and other geographic and edaphic features, that support these systems of hydrologically interconnected pools and other ephemeral wetlands (which may vary in extent depending on site-specific characteristics of pool size and depth, soil type, and hardpan depth).

(3) Silt, loam, and clay soils that are of alluvial origin, with a 0 to 3 percent slope, primarily classified as Agate–Winlo complex soils, but also including Coker clay, Carney clay, Provig–Agate complex soils, and Winlo very gravelly loam soils.

(4) No or negligible presence of competitive nonnative invasive plant species. Negligible is defined for the purpose of this rulemaking as a minimal level of nonnative plant species that will still allow *Limnanthes floccosa* ssp. *grandiflora* to continue to survive and recover.

The need for space for individual and population growth, germination, seed dispersal, and reproduction is provided by PCEs 1 and 4; the need for soil moisture for growth, germination, reproduction, and seed dispersal is provided by PCE 2 (but not necessarily every year); the need for other nutritional or physiological requirements for the species is met by PCE 3; habitat free from disturbance that allows for sufficient reproduction and survival opportunities is provided by PCEs 1 and 4. All of the above described PCEs do not have to occur simultaneously within a unit for the unit to constitute critical habitat for *Limnanthes floccosa* ssp. *grandiflora.*

Based on our current knowledge of the life history, biology, and ecology of *Lomatium cookii* and the characteristics of the habitat necessary to sustain the essential life history functions of the species, we have determined that the PCEs for the species' critical habitat are:

(1) (A) In the Agate Desert, vernal pools and ephemeral wetlands and the adjacent upland margins of these depressions that hold water for a sufficient length of time to sustain *Lomatium cookii* germination, growth, and reproduction. These vernal pools or ephemeral wetlands support native plant populations and are seasonally inundated during wet years but do not necessarily fill with water every year due to natural variability in rainfall. Areas of sufficient size and quality are likely to have the following characteristics:

- Elevations from 372 to 411 m (1,220 to 1,350 ft);
- Associated dominant native plants including, not limited to: *Alopecurus geniculatus, Deschampsia danthonioides*, *Eryngium petiolatum, Lasthenia californica, Myosurus minimus, Navarretia leucocephala* ssp. *leucocephala, Phlox gracilis, Plagiobothrys bracteatus*, *Trifolium depauperatum*, and *Triteleia hyacinthina*; and
- A minimum area of 8 ha (20 ac) to provide intact hydrology and protection from development and weed sources.

(1) (B) In the Illinois River Valley, wet meadows in oak and pine forests that are seasonally inundated and support native plant populations. Areas of sufficient size and quality are likely to have the following characteristics:

- Elevations from 383 to 488 m (1,256 to 1,600 ft);
- Associated dominant native plants including, not limited to *Achnatherum lemmonii, Camassia* spp., *Danthonia californica*, *Deschampsia cespitosa, Festuca roemeri*, *Poa secunda, Ranunculus occidentalis*, and *Limnanthes gracilis* var. *gracilis*;
- Occur primarily in bottomland *Quercus garryana–Quercus kelloggii–Pinus ponderosa* (Oregon white oak–California black oak–ponderosa pine) forest openings along seasonal creeks; and
- A minimum area of 12 ha (30 ac) to provide intact hydrology and protection from development and weed sources.

(2) (A) In the Agate Desert, the hydrologically and ecologically functional system of interconnected pools or ephemeral wetlands or depressions within a matrix of surrounding uplands that together form

vernal pool complexes within the greater watershed. The associated features may include the pool basin and ephemeral wetlands; an intact hardpan subsoil underlying the surface soils up to 0.75 m (2.5 ft) in depth; and surrounding uplands, including mound topography and other geographic and edaphic features that support systems of hydrologically interconnected pools and other ephemeral wetlands (which may vary in extent depending on site-specific characteristics of pool size and depth, soil type, and hardpan depth).

(2) (B) In the Illinois Valley, the hydrologically and ecologically functional system of streams, slopes and wooded systems that surround and maintain seasonally wet alluvial meadows underlain by relatively undisturbed ultramafic soils within the greater watershed.

(3) (A) In the Agate Desert, silt, loam, and clay soils that are of ultramafic and nonultramafic alluvial origin, with a 0 to 3 percent slope, classified as Agate–Winlo or Provig–Agate soils.

(3) (B) In the Illinois Valley, silt, loam, and clay soils that are of ultramafic and nonultramafic alluvial origin, with a 0 to 30 percent slope, classified as Abegg gravelly loam, Brockman clay loam, Copsey clay, Cornutt–Dubakel complex, Dumps, Eightlar extremely stony clay, Evans loam, Foehlin gravelly loam, Josephine gravelly loam, Kerby loam, Newberg fine sandy loam, Pearsoll–Rock outcrop complex, Pollard loam, Riverwash, Speaker–Josephine gravelly loam, Takilma cobbly loam, or Takilma Variant extremely cobbly loam.

(4) No or negligible presence of competitive nonnative invasive plant species. Negligible is defined for the purpose of this rulemaking as a minimal level of nonnative plant species that will still allow *Lomatium cookii* to continue to survive and recover.

The need for space for individual and population growth, germination, seed dispersal, and reproduction is provided by PCEs 1 and 4; the need for soil moisture for growth, germination, reproduction, and seed dispersal is provided by PCE 2 (but not necessarily every year); the need for other nutritional or physiological requirements for the species is met by PCE 3; habitat free from disturbance that allows for sufficient reproduction and survival opportunities is provided by PCEs 1 and 4. All of the above described PCEs do not have to occur simultaneously within a unit for the unit to constitute critical habitat for *Lomatium cookii*.

This proposed designation includes the PCEs in the appropriate quantity and spatial arrangement necessary to support the life history functions of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* and are essential to the conservation of these species. Each of the areas proposed in this rule has been determined to contain sufficient PCEs to provide for one or more of the life history functions of *L. f.* ssp. *grandiflora* and *Lomatium cookii*. All of the above described PCEs do not have to occur simultaneously within a unit for the unit to constitute critical habitat.

*Criteria Used To Identify Critical Habitat Boundaries*

As required by section 4(b)(1)(A) of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. The steps we used in identifying critical habitat are as follows:

(1) Our initial step was to determine, in accordance with section 3(5)(A)(i) of the Act and regulations in 50 CFR 424.12, the physical and biological habitat features (the, PCEs) essential to the conservation of the species as explained in the previous section.

(2) We identified areas occupied by *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* at the time of listing. Occupancy status was determined using occurrence data from the ONHIC database (ONHIC 2008), Medford BLM records (BLM 2005), a recent *L. f.* ssp. *grandiflora* status report (Meyers 2008, pp. 1–65), Service staff reports, data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits, research published in peer-reviewed articles, research presented in academic theses and agency reports, regional GIS coverages, and the OSU herbarium record database (OSU 2007). We determined occupancy at the time of listing by comparing survey and collection information and descriptions of occupied areas in the final listing rule published in the **Federal Register** on November 7, 2002 (67 FR 68004). At the time of the 2002 listing, 15 occurrences (sites) were known for *L. f.* ssp. *grandiflora* and 36 occurrences (sites) were known for *Lomatium cookii* (67 FR 68004).

Since the final listing rule was published, we have become aware of additional areas that we have determined were occupied at the time of listing. Two such areas were known at the time of listing, but at that time the species were thought to have been extirpated from those sites. First identified in 1937, the two areas had no exact location information (OSU 2007). Attempts were made to relocate the occurrences, but these attempts were unsuccessful. However, in 2005, the two areas were again found and each was occupied by a large number of *Lomatium cookii* plants. In addition, one other site occupied by *Lomatium cookii* was first identified in 2005, 3 years after the listing. Although we were not aware of this occupied area at the time of listing, it contained a large number of individual *Lomatium cookii* plants, relative to other occupied locations.

We conclude that for all such areas observed within 3 years of listing, it is highly unlikely that such large populations would have only just become established subsequent to the listing of the species. Based on long-term monitoring data, populations of such large size are generally reflective of robust populations that have persisted over the long term. Therefore, if a site was recorded within 3 years after the listing of the species (between 2002 and 2005), and the population at that site was so large that it must have been well-established and occupied for many years, we considered that area to have been occupied at the time of listing, because the evidence supports the site having been occupied but simply not yet recorded at the time of listing, or we had not been successful in relocating those sites that had been documented earlier.

Although various new occurrences have been identified since the time of listing in 2002, only three occurrences of *Lomatium cookii* correspond to new areas identified between the time of listing in 2002 and the year 2005 that we consider to have been occupied at the time of listing. Currently, we know of 22 documented occurrences of *Limnanthes floccosa* ssp. *grandiflora* and 37 documented occurrences of *Lomatium cookii* that correspond to a total of 25 areas we consider to have been occupied at the time of listing. Note that multiple occurrences may comprise a single occupied area; hence, there will be a greater number of occurrences than of occupied areas.

(3) We then considered areas identified as priority 1 and 2 recovery core areas in the draft recovery plan for the two species (USFWS 2006) to determine which areas contain the PCEs in the amount and spatial configuration essential to the conservation of the species. Most areas identified as priority 1 and 2 recovery areas in the draft recovery plan were incorporated into the proposed designation. The one exception is a site at the Medford Airport that was identified as a recovery area for *Limnanthes floccosa* ssp.

*grandiflora* in the draft recovery plan, but that site did not meet the size and quality criteria for critical habitat, as described below, and thus was not included in the proposed designation.

(4) We removed any nonfunctional vernal pool–mounded prairie or meadow habitat that was developed or degraded (not likely to contain PCEs) to ensure proposed critical habitat contains features essential to the conservation of each of the species (USDA 2006; ESA 2007, pp. 3-2 to 3-11). We also did not consider any areas of vernal pool–mounded prairie or meadows containing 10 or fewer reported individuals, as populations of this size could by chance, become extirpated due to:

(i) random natural events,

(ii) year-to-year variability in climate patterns, and

(iii) accidental human-influenced causes.

Furthermore, populations with 10 individuals or fewer could harbor detrimental genes caused by inbreeding depression. We considered populations of such small size as not likely to occur in habitats that provide the physical or biological features necessary to support populations capable of persisting for the long term, thus such areas would not be essential to the conservation of the two species.

(5) As a final step, we considered whether each of the areas identified may need special management considerations or protections. Our consideration of this factor is presented below.

Based on this analysis, we are proposing to designate 25 units as critical habitat for the two species: 8 for *Limnanthes floccosa* ssp. *grandiflora* and 17 for *Lomatium cookii*. Two of the 25 units are shared by both species. After applying the above criteria, we mapped the critical habitat unit boundaries at each of these 25 areas. We created maps using aerial imagery, 7.5 minute topographic maps, and GIS contour data. We used publicly available satellite imagery, for example, from the National Agriculture Imagery Program (USDA 2006) to assist in identifying areas that would provide the essential physical and biological features for the species, using digital habitat signatures.

In addition, based on aerial imagery, we made every effort to avoid including such developed areas as buildings, paved areas, and other structures that lack the PCEs for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* within the mapped boundaries of the proposed critical habitat. We combined the polygon data with information from aerial photos to determine the proposed critical habitat unit boundaries of each site. The scale of the maps prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions limited to these areas would not trigger section 7 consultation, unless they affect the species, or primary constituent elements, or both, in adjacent critical habitat.

*Special Management Considerations or Protections*

The term critical habitat is defined in section 3(5)(A) of the Act, in part, as geographic areas on which are found those physical or biological features essential to the conservation of the species and ''which may require special management considerations or protection.'' Accordingly, in identifying critical habitat in occupied areas, we assess whether the PCEs within the areas determined to be occupied at the time of listing may require any special management considerations or protection. All areas being proposed as critical habitat require some level of management to address current and future threats to *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*, to maintain or enhance the physical and biological features essential to their conservation, and to ensure the recovery and survival of these species.

The major threats to the PCEs in the areas identified as proposed critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* include: development on private lands; incompatible agricultural and grazing practices; ground disturbance that affects surface hydrology, including ORV use and road construction or maintenance activities; mining activities; garbage dumping; the succession of meadow habitat to forested habitat due to fire suppression; and encroachment and displacement by nonnative plants. Herbivory by voles and gophers may also affect these species. In all of the proposed units in Jackson County, special management is needed to reduce or eradicate the threats posed by development, habitat fragmentation, ground disturbance that affects surface hydrology, and incompatible grazing practices. In all of the proposed units in Josephine County, special management is needed to reduce or eradicate the threats posed by development, ORV, mining activities, garbage dumping, and woody vegetative succession. Please refer to the unit descriptions in the **Proposed Critical Habitat Designation** section for further discussion of special management considerations or protection of the PCEs related to geographically specific threats to *L. f.* ssp. *grandiflora* and *Lomatium cookii*.

In addition, for all units, special management is needed to control and monitor the encroachment of nonnative, invasive plant species to maintain intact vernal pool–mounded prairies and wet meadow ecosystems such that they can continue to support populations of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*.

Special management considerations or protection of the vernal pool–mounded prairies and wet meadow habitats that may be needed to support reproduction and growth of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* include: controlled burning and vegetation clearing to maintain early seral stages; nonnative invasive plant species control; grazing management; the re-establishment of hydrology; re-seeding with native plants; monitoring; and protection from development (Borgias 2004, pp. 47–53; ONHDB 1994, pp. 13–20).

*Proposed Critical Habitat Designation*

The areas we are proposing as critical habitat currently provide the habitat components necessary to meet the primary biological needs of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*, as defined by the PCEs. The areas proposed for designation are those areas that we have determined are most likely to substantially contribute to conservation of *L. f.* ssp. *grandiflora* and *Lomatium cookii* and to contribute to the long-term survival and recovery of the species.

We have determined that 25 units totaling approximately 4,467 ha (11,038 ac) meet our definition of critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*, including land under Federal, State, county, municipal, and private ownership. We are proposing 8 units of critical habitat for *L. f.* ssp. *grandiflora* and 17 units for *Lomatium cookii*; two of these units, White City and Whetstone Creek in Jackson County, contain habitat for both species (see Tables 1, 2, 3, and unit descriptions below). The critical habitat areas described below constitute our best current assessment of areas that meet the definition of critical habitat for *L. f.* ssp. *grandiflora* and *Lomatium cookii*. We have determined that all

areas proposed as critical habitat for *L. f.* ssp. *grandiflora* and *Lomatium cookii* were occupied at the time of listing and most are, we believe, currently occupied as well (recent survey information was not available for all sites).

The areas proposed as critical habitat for *Limnanthes floccosa* ssp. *grandiflora* are: (1) Unit RV1—Shady Cove; (2) Unit RV2—Hammel Road; (3) Unit RV3A, B, C, and D—North Eagle Point; (4) Unit RV4—Rogue Plains; (5) Unit RV5—Table Rock Terrace; (6) Unit RV6A, B, C, D, E, F, G, and H—White City; (7) Unit RV7— Agate Lake; and (8) Unit RV8—Whetstone Creek. Units coded with ''RV'' are in the Rogue Valley (Agate Desert), Jackson County.

The areas proposed as critical habitat for *Lomatium cookii* are: (1) Unit RV6A, F, G, and H—White City; (2) Unit RV8—Whetstone Creek; (3) Unit RV9A and B—Medford Airport; (4) Unit IV1—Anderson Creek; (5) Unit IV2—Draper Creek; (6) Unit IV3—Reeves Creek North; (7) Unit IV4—Reeves Creek East; (8); Unit IV5—Reeves Creek South; (9); Unit IV6A and B—Laurel Road; (10) Unit IV7—Illinois River Forks State Park; (11) Unit IV8—Woodcock Mountain; (12) Unit IV9—Riverwash; (13) Unit IV10—French Flat North; (14) Unit IV11—Rough and Ready Creek; (15) Unit IV12—French Flat Middle; (16) Unit IV13—Indian Hill; and (17) Unit IV14—Waldo. Units coded with ''IV'' are in the Illinois River Valley, Josephine County.

The approximate area and land ownership of each proposed critical habitat unit is shown in Tables 1, 2, and 3. Portions of units or entire units roughly correspond to the recovery core areas for each species as identified in the 2006 draft recovery plan (USFWS 2006). The recovery core areas were selected based on occurrence records and habitat identified through ground surveys, aerial imagery, topography features, and soil layers. As described above, we assessed all areas proposed as critical habitat to ensure that they provide the requisite PCEs for the species as defined in this proposed rule.

We conducted a regional review across the range of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* to evaluate and select vernal pool–mounded prairie and seasonally wet meadow habitats that provide the physical and biological features essential to the conservation of the species and that may require special management considerations or protection. Important factors we considered were the known presence of *L. f.* ssp. *grandiflora* and *Lomatium cookii* (populations greater than 10 individuals) and the presence of intact vernal pools, vernal pool complexes, open meadows, and meadow complexes supporting the hydrological characteristics necessary to provide the PCEs essential to the conservation of the two species. We identified vernal pool–mounded prairie and wet meadow complexes throughout the range of these species, which support high numbers of *L. f.* ssp. *grandiflora* and *Lomatium cookii* occurrences from the ONHIC database (2008) and reports (Meyers 2008, pp. 1–65; Kaye and Thorpe 2008, pp.16–25; ONHIC 2008; Service database 2008). However, as is the case with all critical habitat designations, areas outside of this designation may still prove to be necessary to the recovery of this species. A description of each area is outlined below.

Area 1: Jackson County, Oregon

In Jackson County, we are proposing eight critical habitat units for *Limnanthes floccosa* ssp. *grandiflora* and three critical habitat units for *Lomatium cookii*. The Jackson County units occur approximately 58 km (30 mi) east of the nearest unit proposed for *Lomatium cookii* species in Josephine County. All proposed critical habitat units in Jackson County are located within the Middle Rogue River Basin or ''Agate Desert.'' Two units, White City and Whetstone Creek, are occupied by both species.

*Unit RV1: Shady Cove*

We are proposing to designate Unit RV1 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora*. Unit RV1 consists of approximately 8 ha (20 ac) of intact vernal pool–mounded prairie and was occupied by the species at the time of listing (ONHIC 2008). We have no current information regarding the status of this population but consider the plant to be extant within the unit, as we have no information indicating any activities have occurred that likely would have resulted in extirpation. Unit RV1 contains all of the PCEs for *L. f.* ssp. *grandiflora* and was identified in the draft recovery plan as the Shady Cove recovery core area (USFWS 2006, pp. IV-12–IV-13). This unit was not designated as vernal pool fairy shrimp critical habitat. It parallels a 430 m (ft) stretch of Highway 62 and is located 460 m (1,500 ft) west of Highway 62. The unit is 0.8 km (0.5 mi) south of Shady Cove, 1.3 km (0.8 mi) northeast of Takelma Park, and is 122 m (400 ft) east of the Rogue River. The unit is occurs on privately owned land. Aerial imagery indicates that the unit is composed of intact vernal pool–mounded prairie habitat (USDA 2006).

ONHIC database records make no mention of any ongoing threats to the *Limnanthes floccosa* ssp. *grandiflora* population within the unit; however, the occurrence information mentions that the adjacent habitat to the south had been leveled, indicating that agricultural development is occurring in the area (ONHIC 2008). The unit occurs in an area of predominant agricultural and grazing use (Borgias 2004, p. 8). Practices that could occur on the property that might negatively affect *L. f.* ssp. *grandiflora* habitat, if not properly managed, include water impoundment, tilling, and grazing. We are not aware of any conservation agreements or management plans to conserve *L. f.* ssp. *grandiflora* habitat within this unit. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit RV1 due to threats from agricultural development, potential incompatible grazing practices, and the encroachment of invasive, nonnative, annual plant species.

*Unit RV2: Hammel Road*

We are proposing to designate Unit RV2 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora*. Unit RV2 consists of approximately 84 ha (207 ac) of intact vernal pool–mounded prairie. The unit is currently occupied by *L. f.* ssp. *grandiflora* and was occupied at the time of listing (ONHIC 2008). This critical habitat unit contains all of the PCEs for *L. f.* ssp. *grandiflora* and was identified as the Staley Road recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). This unit is also designated as vernal pool fairy shrimp critical habitat and corresponds to vernal pool fairy shrimp critical habitat subunit 1A (North Agate Desert Unit) (71 FR 7117). It is located on privately owned land, 1.2 km (0.75 mi) northeast of the confluence of Reese Creek and the Rogue River, 1.3 km (0.8 mi) west of Highway 62, and 430 m (1,400 ft) east of the Rogue River.

A recent observation indicates that approximately 1,500 *L. f.* ssp. *grandiflora* are present on the unit (Meyers 2008, p. 6). Aerial imagery and field observations indicate that the unit is comprised of intact vernal pool–mounded prairie habitat (USDA 2006a; Meyers 2008, p. 6).

ONHIC database (2008) records indicate that light grazing occurs within this unit, and the grazing practices appear to have been compatible with the survival of *Limnanthes floccosa* ssp. *grandiflora* over the past 13 years. We are not aware of any conservation agreements or plans to protect *L. f.* ssp.

*grandiflora* habitat within this unit. Practices that could occur on the property that might negatively affect *L. f.* ssp. *grandiflora* habitat if not properly managed include water impoundment, tilling, and grazing. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit RV2 due to threats from agricultural development, potential incompatible grazing practices, and the encroachment of invasive, nonnative, annual plant species.

*Unit RV3A, B, C, and D: North Eagle Point*

We are proposing to designate Unit RV3 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora*. The unit consists of four subunits totaling 539 ha (1,331 ac) of intact vernal pool habitat that is currently occupied by the species and was occupied at the time of listing (ONHIC 2008). This critical habitat unit contains all of the PCEs for *L. f.* ssp. *grandiflora* and was identified as the North Eagle Point recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). Unit RV3 is also designated as vernal pool fairy shrimp critical habitat and corresponds to vernal pool fairy shrimp critical habitat subunits 1B, D, and G (North Agate Desert Unit) (71 FR 7117). The unit is located on privately owned land southwest of Mosser Mountain and northeast of Long Mountain. The four subunits loosely follow a 6.9 km (4.3 mi) stretch of Hog Creek beginning at its origin. Originating 3.8 km (2.4 mi) east of Highway 62 in subunit RV3D, Hog Creek runs through RV3C, crosses Highway 62, flows between RV3B (located 100 m (328 ft) west of Highway 62) and RV3A (located 600 m (1,970 ft) west of Highway 62), before emptying into the Rogue River after 2.4 km (1.5 mi). Subunit RV3A is located 560 m (1,837 ft) southeast of the confluence of Reese Creek and the Rogue River. Subunit RV3B is located 100 m (328 ft) west of Highway 62 at the intersection of Ball Road and extends along an 835 m (2,740 ft) stretch of Hog Creek. Subunit RV3C is located 2 km (1.2 mi) north of Eagle Point (see Index map) and extends 2.6 km (1.6 mi) south of the junction of Ball Road and Reese Creek Road. Subunit RV3D is located 3.2 km (2 mi) east of Long Mountain and is 2.4 km (1.5 mi) southeast of the junction of Highway 62 and Ball Road. It extends along a 1.8 km (1.1 mi) stretch of Hog Creek.

ONHIC Element Occurrence data accounts for two 1,000-plant *Limnanthes floccosa* ssp. *grandiflora* populations within this unit, one growing in an area of intact vernal pool–mounded prairie habitat and one in an atypical swale habitat alongside a fence. An additional 500 *L. f.* ssp. *grandiflora* plants growing in intact vernal pool–mounded prairie habitat on a separate property within the unit was reported by Wildlands, Inc. (Wildlands, Inc. 2008, p. 3). Aerial imagery indicates that the unit contains a significant amount of intact vernal pool–mounded prairie habitat (USDA 2006a).

Some habitat in this unit has been degraded by cattle grazing practices and agricultural development (Wildlands, Inc. 2008, p. 1). The entire unit occurs in an area of predominant agricultural and grazing use (Borgias 2004, p. 8). Livestock have caused significant damage to large vernal pools within the unit by soil compaction and mound and pool topography alteration (Oregon Natural Heritage Program (ONHP) 1997, p. 16). In addition, vernal pool hydrology has been compromised in some portions of the unit by water impoundment, causing water to permanently fill some vernal pools in several areas (Southern Oregon Land Conservancy 2008, p. 3). In addition, nonnative invasive annual grasses have colonized large portions of the unit and threaten to encroach on *Limnanthes floccosa* ssp. *grandiflora* populations (Southern Oregon Land Conservancy 2008, p. 4).

There are established protective measures to conserve *Limnanthes floccosa* ssp. *grandiflora* and the habitat of the threatened vernal pool fairy shrimp on two private properties within this unit. Long-term management plans are in development for both of the properties to protect and restore vernal pool–mounded prairie function; these plans will cover approximately 20 percent of the land in the unit. Monitoring and improved grazing management are currently taking place on the two properties to further conserve *L. f.* ssp. *grandiflora* habitat (M. Young, pers. comm. 2009; Southern Oregon Land Conservancy 2008, p. 6). Other special management considerations or protection on other properties within the unit may be required to restore, protect, and maintain the PCEs supported by Unit RV3 due to threats from agricultural development, potential incompatible grazing practices, and the encroachment of invasive, nonnative, annual grasses.

*Unit RV4: Rogue Plains*

We are proposing to designate Unit RV4 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora*. This unit consists of 245 ha (605 ac) of intact vernal pool–mounded prairie habitat that is currently occupied by the species and was occupied at the time of listing (ONHIC 2008; Meyers 2008, p. 10). This critical habitat unit contains all of the PCEs for *L. f. ssp. grandiflora* and was identified as the Rogue Plains recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). Unit RV4 has been designated as critical habitat for vernal pool fairy shrimp and corresponds to vernal pool fairy shrimp critical habitat subunits 1C, E, and F (North Agate Desert Unit) (71 FR 7117). The unit occurs on privately owned land located 122 m (400 ft) southeast of the junction of Highway 234 and Modoc Road. It extends 2 km (1.2 mi) south along Modoc Road from the intersection, is located 1.4 km (0.87 mi) southwest of Dodge Bridge, and 1.0 km (0.6 mi) northwest of Rattlesnake Rapids on the Rogue River.

A recent *Limnanthes floccosa* ssp. *grandiflora* survey report within Unit RV4 describes a robust 5,000-plant population occurring at the privately owned ''Rogue River Plains Preserve.'' The report also describes a *L. f.* ssp. *grandiflora* occurrence from which the species appears to have been extirpated (Meyers 2008, pp. 10, 55). For the most part, aerial imagery and field observations indicate that the unit is composed of intact vernal pool–mounded prairie habitat (USDA 2006a; Meyers 2008, p. 6).

Some habitat within this unit appears to have been degraded (Meyers 2008, p. 55), however, the winter and spring grazing presently occurring at the Rogue River Plains Preserve property appears to be compatible with the survival of *Limnanthes floccosa* ssp. *grandiflora* (Borgias 2004, p. 42). A photograph attached to a recent survey report depicts weakly developed vernal-pool mounded prairie topography at the property. At the site of the extirpated *L. f.* ssp. *grandiflora* location within the unit, incompatible grazing practices may have contributed to the local extirpation of the species.

Threats facing vernal-pool mounded prairie habitat in this unit are agricultural development, incompatible grazing practices, and the encroachment of invasive, nonnative, annual grasses. A conservation easement, held by TNC and placed on the privately owned Rogue River Plains Preserve property, permits the landowners to continue restricted grazing on their property, while development and agricultural development rights are withdrawn. Other special management considerations or protection on other properties within the unit may be needed to restore, protect, and maintain

the PCEs supported by Unit RV4 due to threats from agricultural development, potential incompatible grazing practices, and the encroachment of invasive, nonnative, annual grasses.

*Unit RV5: Table Rock Terrace*

We are proposing to designate Unit RV5 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora*. The unit includes 49 ha (122 ac) of intact vernal pool–mounded prairie habitat that has been occupied by the species since the time of listing (ONHIC 2008, USDA 2006a). Although a survey conducted on a portion of the unit in 2008 did not confirm presence of *L. f.* ssp. *grandiflora* plants (Meyers 2008, p. 59), a more recent partial survey verified the continued occupation of the unit by *L. f.* ssp. *grandiflora* (S. Friedman 2009, pers. obs.). This critical habitat unit contains all of the PCEs for *L. f.* ssp. *grandiflora* and was identified as the Table Rock Terrace recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). This unit is not designated as vernal pool fairy shrimp critical habitat. Unit RV5 is located on privately owned land 670 m (2,200 ft) north of the junction of Modoc and Antioc Roads, is 1.4 km (0.9 mi) east of Upper Table Rock, and 650 m (2,300 ft) west of the Rogue River. This unit follows along an 800 m (2,600 ft) stretch of Modoc Road to the east of the unit and a 700 m (2,300 ft) stretch of Antioc Road west of the unit.

Threats facing vernal-pool mounded prairie habitat in this unit may include agricultural development, incompatible grazing practices, and the encroachment of invasive, nonnative, annual grasses. Other special management considerations or protection within the unit may be needed to restore, protect, and maintain the PCEs supported by Unit RV5 due to these threats.

*Unit RV6, Subunits A, B, C, D, E, F, G, and H: White City*

This unit consists of eight subunits that generally encompass the perimeter of White City. We are proposing to designate all subunits in this unit as critical habitat for *Limnanthes floccosa* ssp. *grandiflora.* In addition, we are proposing to designate subunits RV6 A, F, G, and H as critical habitat for *Lomatium cookii*. This 848-ha (2,095-ac) unit includes intact vernal pool–mounded prairie and swale habitats that were occupied by the two species at the time of listing; both species presently occur within some or all of the subunits. This critical habitat unit contains all of the PCEs for *L. f.* ssp. *grandiflora* and *Lomatium cookii* and was identified as the Agate Desert recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). Unit RV6 is also designated as vernal pool fairy shrimp critical habitat and corresponds to vernal pool fairy shrimp critical habitat subunits 2A, B, C, D, and E and 3A and B (White City East and West Units) (71 FR 7117; February 10, 2006). The unit occurs on State, county, municipal and privately owned lands. It is located around White City, is 1.6 km (1.0 mi) southwest of Eagle Point, and is 440 m (1,444 ft) southeast of the confluence of the Rogue River and Little Butte Creek. Subunit RV6A is located north of Whetstone Creek and is 500 m (1,200 ft) west of the junction of Highway 62 and Antelope Road. Subunits RV6B, RV6C, RV6D and RV6E are located north of Avenue G in White City, south of Little Butte Creek, and 670 m (2,200 ft) southwest of Antelope Creek. Subunits RV6F and RV6G are located approximately 500 feet west of Dry Creek and are east of Highway 62 in White City. Subunit RV6H is located north of Whetstone Creek and south of Antelope Road. Subunit RV6H roughly encircles the Hoover Ponds, east of Highway 62, and is 850 m (2790 ft) east of subunit RV6A. The land in this unit is 29 percent State-owned, 6 percent county-owned, 10 percent municipally owned, and 55 percent privately owned.

This unit includes highly intact vernal pool–mounded prairie habitat. The Nature Conservancy manages a 22-ha (54-ac) parcel within this unit to conserve vernal pool–mounded prairie habitat and has recently developed a management plan to restore and enhance vernal pool function across 86 ha (213 ac) of habitat owned by the Oregon Department of Fish and Wildlife's (ODFW) Denman Wildlife Area. A mitigation site owned by Jackson County School District Number 9 protects 9.5 ha (24 ac) of intact vernal pool–mounded prairie habitat with one of the largest known populations of *Limnanthes floccosa* ssp. *grandiflora*. The City of Medford also leases 88 ha (217 ac) of vernal pool–mounded prairie for cattle grazing on some less intact vernal-pool mounded prairie habitat. In addition, the Oregon Department of Transportation (ODOT) manages two locations as roadside special management areas for the protection of *L. f.* ssp. *grandiflora* and *Lomatium cookii*.

Threats facing vernal pool–mounded prairie habitat in this unit include urban and commercial development, agricultural development, incompatible grazing practices, and the encroachment of invasive, nonnative annual grasses. The Nature Conservancy and Jackson County School District Number 9 have conducted prescribed burns, seeded with native plants, and erected signs and fences to control encroachment of nonnative invasive plants, discourage recreational ORV use, and restore native plant communities (Borgias 2004, p. 22; USFWS 2006, pp. I-18–I-21). ODFW has plans to restore vernal pool–mounded prairie habitat across the Denman Management Area by removing nonnative bunch grasses and restoring hydrologic flow by eliminating old road beds (Borgias *et al.* 2009, pp. 16-22). Other special management considerations or protection within the unit may be needed to restore, protect, and maintain the PCEs supported by Unit RV6 due to the described threats within the units.

*Unit RV7: Agate Lake*

We are proposing to designate Unit RV7 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora*. This unit consists of 426 ha (1,053 ac) of intact vernal pool–mounded prairie and swale habitat; the unit is currently occupied by the species and was occupied at the time of listing (Meyers 2008, p. 45). This critical habitat unit contains all of the PCEs for *L. f.* ssp. *grandiflora* and was identified as the Agate Lake recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). Unit RV7 has been designated as critical habitat for vernal pool fairy shrimp and corresponds to vernal pool fairy shrimp critical habitat subunit 2B (White City East Unit) (71 FR 7117; February 10, 2006). The unit occurs on federally and privately owned land located 500 m (1,640 ft) east of the Agate Reservoir, along a 5.4-km (3.4-mi) stretch roughly parallel and between Dry Creek and Antelope Creek, is 330 m (1,080 ft) north of Tater Hill, and is 1.4 km (0.9 mi) southeast of the confluence of Dry Creek and Antelope Creek. The land in this unit is approximately 9 percent federally owned and 89 percent privately owned.

The U.S. Bureau of Reclamation (BOR) has completed a management plan for 38 ha (94 ac) of slightly degraded vernal pool–mounded prairie habitat within this unit. BOR has established protective measures to conserve vernal pool–mounded prairie habitat. A long-term management plan has been finalized to protect and restore vernal pool–mounded prairie function (BOR 2006, p. 1-1). Previous to 2008, *Limnanthes floccosa* ssp. *grandiflora* had not been reported in the unit since 1965. In 2008, a 300-plant population of *L. f.* ssp. *grandiflora* was observed in recently restored vernal pool–mounded prairie habitat on Federal land within the unit (p. Meyers 2008, p. 45).

The PCEs in this unit are threatened by invasion of nonnative herbaceous annuals, trash dumping, activities associated with fire management (fire-line construction), vandalism, unauthorized ORV use, and incompatible grazing practices (BOR 2006, p. 1-8; Borgias 2004, p. 12). Therefore, special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit RV7 due to these threats.

*Unit RV8: Whetstone Creek*

We are proposing to designate Unit RV8 as critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. Unit RV8 consists of 362 ha (896 ac) of intact vernal pool–mounded prairie and swale habitat that was occupied by both species at the time of listing; both species continue to occur within the unit (ONHIC 2008; Meyers 2008, p. 20). This critical habitat unit contains all of the PCEs for *L. f.* ssp. *grandiflora* and *Lomatium cookii* and was identified as the Whetstone Creek recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). Unit RV8 has been designated as critical habitat for vernal pool fairy shrimp and corresponds to vernal pool fairy shrimp critical habitat subunit 3C (White City West Unit) (71 FR 7117; February 10, 2006). The unit occurs on State, municipal, and privately owned land located just west of White City. The unit is located approximately 1.4 km (0.9 mi) southeast of the confluence of the Rogue River and Whetstone Creek, 2.2 km (1.4 mi) southwest of Tou Velle State Park, and 2.9 km southeast of the confluence of Bear Creek and the Rogue River. The unit roughly parallels a 2.6 km (1.6 mi) stretch of Whetstone Creek to the south. The land in this unit is 9 percent State-owned, 10 percent municipally owned, and 81 percent privately owned.

This unit includes highly intact vernal-pool mounded prairie habitat with partial protection by city regulation and private conservation easements. This is the only unit that includes a shrub and tree component within vernal pool–mounded prairie habitat. The Nature Conservancy manages a 58-ha (144-ac) parcel within this unit occupied by both *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. One of the primary purposes of the preserve is to conserve vernal pool–mounded prairie habitat. The Nature Conservancy has recently developed a management plan to restore and enhance vernal pool function across a 32-ha (80-ac), neighboring property owned by ODOT that also occurs within the unit. The City of Medford leases 36 ha (96 ac) of vernal pool–mounded prairie habitat within the unit for grazing.

The PCEs in this unit are threatened by invasion of nonnative herbaceous annuals, incompatible agricultural development, aggregate mining, unauthorized ORV use, and incompatible grazing practices (BOR 2006, pp. 1-8; Borgias 2004, p. 12). Therefore, special management considerations or protection on other properties within the unit may be required to restore, protect, and maintain the PCEs supported by Unit RV8 due to the threats mentioned above.

*Unit RV9A and B: Medford Airport*

We are proposing to designate Unit RV9 as critical habitat for *Lomatium cookii*. This unit consists of the subunits RV9A and RV9B. *Lomatium cookii* has been known from this unit since before the time it was listed (ONHIC 2008). Unit RV9 includes 76 ha (190 ac) of slightly degraded vernal pool–mounded prairie habitat. No areas within this unit were designated as vernal pool fairy shrimp critical habitat. A report on *Limnanthes floccosa* ssp. *grandiflora* within the unit indicates that the population has fewer than 10 individuals (Meyers 2008, p 48); therefore, we are not proposing to designate this unit as critical habitat for this species, as explained above in our criteria to identify critical habitat boundaries. This critical habitat unit contains all of the PCEs for *Lomatium cookii* and was identified as the Rogue Airfield recovery core area in the draft recovery plan (USFWS 2006, pp. IV-12–IV-13). The two subunits are located mostly within the Rogue Valley International – Medford Airport, approximately 2 km (1.2 mi) west of Coker Butte and 1.5 km (0.9 mi) northeast of Bear Creek. Subunit RV9A is located 1.4 km (0.9 mi) north of the Rogue Valley International – Medford Airport and is 300 m (980 ft) east of the junction of Vilas Road and Table Rock Road. Subunit RV9B is between Upton Slough and Bear Creek and 1.7 km northeast of the junction of Interstate 5 and Highway 62. The land in this unit is 93 percent county-owned and 7 percent privately owned.

This unit includes one of the most extensive and densest populations of *Lomatium cookii* within its range. The Rogue Valley International – Medford Airport is managed to meet FAA safety requirements. The property is completely fenced-in to exclude people and large animals and is periodically mowed to keep vegetation low and reduce use by large birds and other wildlife. The security fencing and regular mowing is compatible with *Lomatium cookii* growth, reproduction, and germination and has enabled a robust population to become established. Other properties not included in the airport security zone are properties within the City of Medford urban growth boundary likely to become commercially developed.

Threats facing the vernal pool–mounded prairie habitat in this unit are potential airport and commercial development. The development of a new runway that could be placed across the densest population of *Lomatium cookii* has been suggested in the long-term plan for the airport (Rogue Valley International–Medford Airport 2001, pp. 5-2–5-4; 6-4–6-6). Special management considerations or protection within the unit may be needed to conserve and maintain the PCEs supported by Unit RV9 due to this threat.

Area 2: Josephine County, Oregon

In Josephine County, we are proposing 14 critical habitat units for *Lomatium cookii*. The Josephine County units occur approximately 58 km (30 mi) west of the nearest unit proposed for this species in Jackson County. None of the Josephine County units were designated as critical habitat for the vernal pool fairy shrimp in Oregon.

*Unit IV1: Anderson Creek*

We are proposing to designate Unit IV1 as critical habitat for *Lomatium cookii*. Unit IV1 consists of 53 ha (132 ac) of intact wet meadow habitat that is currently occupied and was occupied by the species at the time of listing (ONHDB 1994, pp. 9–10; OSU 2008). Unit IV1 contains all the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the Anderson Creek recovery core area (USFWS 2006, pp. IV-11, IV-14). It is located on privately owned land, 3.5 km (2.2 mi) north of Selma, 14 km (8.8 mi) north of Cave Junction, along a 1.0 km (0.6 mi) stretch of Anderson Creek and Highway 199, 2.0 km (1.2 mi) southwest of Hays Hill Summit, and is 1.7 km (1.0 mi) northwest of the junction of Draper Valley Road and Indian Creek Road.

The two occurrences in this unit are the most northern known occurrences of *Lomatium cookii* in the Illinois Valley. Recent surveys located two populations in this unit, one with 135 plants and one with 1,000 plants. The two populations were reported as growing in open, grassy meadows (C. Shohet, pers. comm. 2005). Aerial imagery suggests the habitat in this unit is relatively intact wet meadow (USDA 2006a).

Potential threats to the *Lomatium cookii* habitat in this unit include

incompatible grazing practices, agricultural development, alterations in hydrology due to timber production, native and noxious weed encroachment, and woody vegetation succession as the result of fire suppression (J. Kagan, pers. comm. 2008; C. Shohet, pers. comm. 2005). Grazing is a common agricultural practice in the area (J. Kagan, pers. comm. 2008), but depending on management within this unit, it may be incompatible with growth, reproduction, and germination of the species. We are not aware of any conservation agreements or management plans to conserve critical habitat within this unit. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV1 due to threats from agricultural development, potential incompatible grazing practices, and woody vegetative succession due to decreased fire return intervals.

*Unit IV2: Draper Creek*

We are proposing to designate Unit IV2 as critical habitat for *Lomatium cookii*. This unit consists of 39 ha (97 ac) of intact wet meadow habitat, was occupied by *Lomatium cookii* at the time of listing (ONHDB 1994, p. 5; OSU 2008), and continues to be occupied by the species. Unit IV2 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the Draper Creek recovery core area (USFWS 2006, pp. IV-11, IV-14). It is located on privately owned land 2.7 km (1.7 mi) northeast of Selma, 13.5 km (8.4 mi) north of Cave Junction, along a 900 m (2,900 ft) stretch of Draper Creek, located 800 m (2,600 ft) east of Anderson Creek. The unit is 800 m (2,600 ft) north-northwest of the confluence of Draper Creek and Davis Creek and is 200 m (650 ft) southeast of the junction of Draper Valley Road and Indian Creek Road.

According to a recent survey report, this unit includes relatively intact wet meadow habitat associated with Draper Creek. A recent survey located a 400-plant *Lomatium cookii* population here, reported as growing in an open, grassy meadow (C. Shohet, pers. comm. 2005). The *Lomatium cookii* occurrence in this unit is among the most northern known occurrences for this species in the Illinois Valley. Aerial imagery suggests the habitat in this unit may be reverting to oak and conifer succession in some areas (USDA 2006a).

Potential threats to the *Lomatium cookii* habitat in this unit include incompatible grazing practices, agricultural development, alterations in hydrology due to timber production, native and noxious weed encroachment, and woody vegetation succession (C. Shohet, pers. comm. 2005). Grazing is a common agricultural practice in the area (J. Kagan, pers. comm. 2009), but depending on management within the unit, it may be incompatible with growth, reproduction, and germination of the species. No conservation agreements or protections have been established within this unit, and we are not aware of any conservation plans to conserve critical habitat within this unit. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV2 due to threats from agricultural development, incompatible grazing practices, and woody vegetative succession due to increased fire return intervals.

*Unit IV3: Reeves Creek North*

We are proposing to designate Unit IV3 as critical habitat for *Lomatium cookii*. This unit consists of 105 ha (260 ac) of wet meadow habitat. *Lomatium cookii* occupied this unit at the time of listing and continues to be found here (ONHIC 2008). Unit IV3 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the Reeves Creek West recovery core area (USFWS 2006, pp. IV-11, IV-14). This unit is located on Federal and privately owned land, 4.5 km (2.8 mi) south of Selma, 6.0 km (3.75 mi) north of Cave Junction, and 1.1 km (0.7 mi) northeast of Sauers Flat. The unit is located 1.4 km (0.9 mi) east of the confluence between Reeves Creek and the Illinois River and extends along a 2.0 km (1.2 mi) stretch of Reeves Creek, beginning 800 m (2,600 ft) northeast of the junction of Highway 199 and Reeves Creek Road. The land in this unit is 58 percent federally owned and 42 percent privately owned.

The wet meadow habitat in this unit is primarily threatened by natural vegetative succession, but there is potential for road maintenance to become a threat. Road maintenance often fragments populations and can directly affect plants. Woody vegetative succession can impact *Lomatium cookii* populations in this unit by over-shading. Due to this threat, the plants observed in this unit occur in smaller numbers and grow in more limited areas compared to other Illinois Valley populations and appear to be more fragmented (ONHIC 2008). Timber harvesting occurs in this unit periodically and could affect *Lomatium cookii* populations in the next few years. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV3 due to threats from woody vegetation succession, impacts associated with timber harvesting activities, and road maintenance.

*Unit IV4: Reeves Creek East*

We are proposing to designate Unit IV4 as critical habitat for *Lomatium cookii*. This unit consists of 69 ha (170 ac) of intact wet meadow habitat and has been occupied by *Lomatium cookii* since the time of listing (ONHIC 2008). Unit IV4 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the Reeves Creek East recovery core area (USFWS 2006, pp. IV-11, IV-14). This unit is located on Federal and privately owned land, 6.2 km (3.9 mi) south of Selma, and 5.3 km (3.3 mi) northwest of Cave Junction. It occurs along a 500 m (1,640 ft) stretch of Reeves Creek located 700 m (2,300 ft) southeast of Unit IV3. The land in this unit is 52 percent federally owned and 48 percent privately owned.

The wet meadow habitat in this unit is primarily threatened by woody vegetative succession, activities associated with timber harvesting practices, road maintenance, and ORV use. The single *Lomatium cookii* population known from this unit is described as fragmented by a road cut. Portions of the habitat in this unit are also threatened by early seral forest succession (ONHIC 2008). As with the previous unit, plants observed in this unit occur in smaller numbers and grow in more limited areas compared to other Illinois Valley populations, and the populations appear to be more fragmented. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV4 due to threats from road construction, impacts associated with timber harvesting, woody vegetative succession, and ORV use.

*Unit IV5: Reeves Creek South*

We are proposing to designate Unit IV5 as critical habitat for *Lomatium cookii*. This unit consists of 158 ha (391 ac) of intact wet meadow habitat. This unit was occupied by *Lomatium cookii* at the time of listing and the species continues to be found there (ONHIC 2008). Unit IV5 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the Reeves Creek West recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located on both Federal and private land roughly parallel to Highway 199 for 2.5 km (1.6 mi), which is 500 m (1,640 ft) west of the unit. The unit is located 1.6

km (1.0 mi) north of Cave Junction, 1 km (0.6 mi) southeast of Sauers Flat, 800 m (2,600 ft) east of Kerby, and 1.2 km (0.7 mi) east of the confluence between Holton Creek and the Illinois River. The land in this unit is 65 percent federally owned and 35 percent privately owned.

The wet meadow habitat in this unit is primarily threatened by vegetative succession. Impacts associated with timber harvesting, road maintenance, and ORV use are threats that could affect the habitat within this unit within the next few years. The *Lomatium cookii* described in this unit is described as a fairly modest-sized population, with numbers up to 300 plants. The population in this unit is threatened by fragmentation due to woody vegetation succession. The population is somewhat scattered around open wet meadow patches dispersed within a young woody overstory (ONHIC 2008). Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV5 due to threats from road construction, impacts associated with timber harvesting, woody vegetative succession, and ORV use.

*Unit IV6A and B: Laurel Road*

We are proposing to designate Unit IV6 as critical habitat for *Lomatium cookii*. This unit consists of two subunits totaling 209 ha (516 ac) of intact wet meadow habitat that was occupied by *Lomatium cookii* at the time of listing (ONHIC 2008); the species continues to be found there. Unit IV6 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the Laurel Road recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located west and alongside of the base of Lime Rock, 1.2 km (0.7 mi) east of the city of Cave Junction, and follows along Highway 46 for 1.5 km (0.9 mi). Subunit IV6A is located 1.3 km (0.8 mi) west of Lime Rock summit, 1.0 km east of the junction of Laurel Road and Highway 199, and is roughly parallel to Highway 199 for 1.3 km (0.8 mi), which lies approximately 1.0 km (0.6 mi) west of the subunit. Subunit IV6B is 2.7 km (1.7 mi) east of the confluence of the east and west forks of the Illinois River and from the intersection of Holland Loop Road and Highway 46; it extends approximately 1.8 km (1.1 mi) to the northeast and 2.7 km (1.7 mi) to the north. The land in this unit is 6 percent federally owned, less than 1 percent State, and 93 percent privately owned.

Unit IV6 is open meadow and roadside habitat at the base of Lime Rock. Highway 46 crosses the population and gravel was spread on the population at a pull-out. The population continues to thrive and even grows up through the gravel. J. Kagan described the population as occurring at the bottom of a small hill derived of ultramafic alluvium (ONHDB 1994, p. 9). The two populations in the unit are some of the most robust populations in the Illinois Valley. However, the *Lomatium cookii* population has been monitored since April 2003, and after several years of population size increases, the population has recently declined. The specific cause of the decline is not known.

The primary threats to the habitat in this unit are periodic roadside maintenance, occasional roadside disturbance, woody vegetative succession, nonnative invasive plants, and rural development. There are relatively few nonnative invasive plants that threaten *Lomatium cookii* at this site, perhaps due to the ultramafic-derived soils, but roadside maintenance is expected to occur often along this stretch of road and could increase the presence of invasive plants. Several inadvertent impacts have been caused to the population by construction equipment and vehicle traffic and periodic maintenance to the road. ODOT manages the population closely and has been able to ensure that their road repairs do not affect the population.

Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV6 due to threats from rural development, roadside maintenance, woody vegetative succession, and invasive, nonnative plant species.

*Unit IV7: Illinois River Forks State Park*

We are proposing to designate Unit IV7 as critical habitat for *Lomatium cookii*. This unit consists of 55 ha (136 ac) of intact wet meadow habitat. *Lomatium cookii* has been known from this unit since the time of listing (ONHIC 2008). Unit IV7 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the River Forks State Park recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located 500 m (1640 ft) west of the city of Cave Junction, 600 m (1,970 ft) southeast of Pomeroy Dam, and is 230 m (750 ft) east of the confluence of the east and west forks of the Illinois River. The unit occurs along a 2.8 km (1.7 mi) stretch of the West Fork Illinois River. The unit occurs on 25 percent Federal, 44 percent State, and 31 percent privately owned land.

This unit is partially managed by the Oregon Parks and Recreation Department (OPRD). The OPRD manages both the Federal and State property and a management plan is currently in development to protect and conserve the habitat that support *Lomatium cookii*. Recent monitoring by Service staff (2008) observed a relatively robust population spread out alongside streamside meadow habitat (Service database 2008).

The primary threats to the habitat in this unit are natural woody vegetative succession and rural development. Agricultural development, incompatible grazing practices, and invasive, nonnative, annual plant species are also potential threats. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV7 due to the threats described above.

*Unit IV8: Woodcock Mountain*

We are proposing to designate Unit IV8 as critical habitat for *Lomatium cookii*. This unit consists of 348 ha (859 ac) of intact wet meadow habitat. *Lomatium cookii* was known from this unit at the time of listing and continues to occur there (ONHIC 2008). Unit IV8 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as part of the Rough and Ready Creek recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located on Federal and privately owned land, 2.4 km (1.5 mi) southwest of the city of Cave Junction, 5.3 km (3.3 mi) north of O'Brien, is 140 m (ft) west of the confluence of Woodcock Creek and the West Fork Illinois River, and occurs along a 3.3 km (2.0 mi) stretch of West Side Road. Unit IV7 is 400 m (ft) west of Highway 199 and roughly parallels the highway for 5.0 km (3.1 mi). This unit occurs on 3 percent Federal, 1 percent State, and 96 percent privately owned land.

This unit contains abundant intact wet meadow habitat and includes several populations of *Lomatium cookii*, one of which may include more than 5,000 plants. The habitat occupied by the species is typical moist grassland dominated by the native bunch grasses *Danthonia californica* and *Deschampsia cespitosa*. A 39-ha (97-ac) private property that occurs within the unit is under a conservation easement. Threats that face the PCEs in this unit include woody vegetative succession, rural development, and incompatible agricultural development. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV8 due to these

threats and potentially from incompatible grazing practices and invasive, nonnative, annual plant species.

*Unit IV9: Riverwash*

We are proposing to designate Unit IV9 as critical habitat for *Lomatium cookii*. This unit consists of 12 ha (30 ac) of intact wet meadow and streambank habitat. *Lomatium cookii* has been known from this unit since the time of listing (ONHIC 2008). Unit IV9 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as part of the Rough and Ready Creek recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located 4.2 km (2.6 mi) south of Cave Junction, 6.1 km (3.8 mi) north-northeast of O'Brien, and is located along the east bend of the West Fork Illinois River, 700 m (2,300 ft) south (upstream) of the confluence between Woodcock Creek and the West Fork Illinois River. The land in the unit is 34 percent federally owned, 5 percent State-owned, and 61 percent privately owned.

This unit includes the Danna Lytjen Special Management Area, a property of ODOT. It has been monitored by ODOT periodically since the time it was discovered (D. Sharp, pers. comm. 2009). The population within this unit is smaller (fewer than 50 plants) and occurs in wet meadow habitat alongside a ditch. The primary threats to habitat in this unit are periodic roadside maintenance, vegetative succession, occasional roadside disturbance, and rural development. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV9 due to threats from agricultural development, incompatible grazing practices, occasional roadside activities, vegetative succession, and rural development.

*Unit IV10: French Flat North*

We are proposing to designate Unit IV10 as critical habitat for *Lomatium cookii*. This unit consists of 45 ha (110 ac) of intact wet meadow habitat. *Lomatium cookii* has been known from this unit since the time of listing (ONHIC 2008). Unit IV10 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as part of the Rough and Ready Creek recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located 3.7 km (2.3 mi) south of Cave Junction, 900 m (2,950 ft) north of the intersection of Sherrier Drive and Raintree Drive, 1.7 km (1.1 mi) southwest of the confluence of Althouse Creek and the East Fork Illinois River, and parallels a 300 m (980 ft) stretch of Rockydale Road. The land in this unit is under 22 percent Federal ownership and 78 percent private ownership. A portion of this unit occurs on BLM-managed land (Kaye and Thorpe 2008, p. 1).

The two *Lomatium cookii* populations in this unit occur in open mixed oak–conifer habitat. Aerial imagery suggests that the wet meadow habitat is fragmented, may be slowly degrading, and may require some management to maintain early seral stage vegetation (USDA 2006a). The primary threats to the PCEs in this unit are rural development and vegetative succession.

Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV10 due to threats from rural development and woody vegetative succession.

*Unit IV11: Rough and Ready Creek*

We are proposing to designate Unit IV11 as critical habitat for *Lomatium cookii*. This unit consists of 61 ha (152 ac) of intact wet meadow habitat. *Lomatium cookii* has been known from this unit since the time of listing (ONHIC 2008). Unit IV11 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as part of the Rough and Ready Creek recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit roughly follows along and is adjacent to a 1.9 km (1.2 mi) stretch of Airport Drive, is located 3 km (1.9 mi) north of O'Brien, 900 m (2,950 ft) west of the Rough and Ready Forest Wayside State Park, and is 122 m (400 ft) east of the confluence with the Illinois River and Rough and Ready Creek. The land in this unit is 48 percent federally owned and 52 percent privately owned.

A grouping of *Lomatium cookii* patches has been monitored within this unit for over 10 years (Kaye and Thorpe 2008, p. 26). Although the population is stable and not considered a large population, it appears to be resilient to various ORV threats and alterations in hydrology.

Threats present at this unit are in the form of ORVs, nonnative invasive forbs, alteration in hydrology caused by roadside maintenance, and natural succession. Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV11 due to these threats.

*Unit IV12: French Flat Middle*

We are proposing to designate Unit IV12 as critical habitat for *Lomatium cookii*. This unit consists of 617 ha (1,524 ac) of intact wet meadow habitat. The unit has been occupied by *Lomatium cookii* since the time of listing. Unit IV12 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the French Flat recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located 4.5 km (2.8 mi) east of Cave Junction, 3.7 km (2.3 mi) northeast of O'Brien, 140 m (460 ft) north of Esterly Lakes, 1.4 km (0.9 mi) northeast of Indian Hill, 300 m (960 ft) east of the confluence of Rough and Ready Creek and the West Fork Illinois River, and follows along a 5.0 km (3.1 mi) stretch of Rockydale Road. Land within the unit is under 45 percent Federal ownership and 55 percent private ownership.

This unit contains some of the largest areas of intact wet meadow habitat within the Illinois Valley. Several *Lomatium cookii* populations occur within this unit. Two of the *Lomatium cookii* populations in the unit, each in excess of 40,000 individuals, have been closely monitored on BLM land for over 10 years (Kaye and Thorpe 2008, pp. 16–25). Although the populations are robust and dense compared to other locations, the rate of growth has been declining and plants may be slowly succumbing to various naturally caused threats, including woody vegetative succession and vole herbivory (Kaye and Thorpe 2008, pp. 16–25).

Threats commonly observed within this unit are: illegal ORV use; vandalism (related to ORV use); garbage dumping; mining; woody vegetative succession; substantial rodent herbivory on *Lomatium cookii* plants (voles); and competition with invasive, nonnative annual plant species. Several other *Lomatium cookii* populations that occur within this unit are not closely monitored. Therefore, special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV12 due to the threats described above.

*Unit IV13: Indian Hill*

We are proposing to designate Unit IV13 as critical habitat for *Lomatium cookii*. This unit consists of 18 ha (45 ac) of intact wet meadow habitat. It has been occupied by *Lomatium cookii* since the time of listing. Unit IV13 contains all of the PCEs for *Lomatium cookii*, and was identified in the draft recovery plan as the Indian Hill recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is adjacent to and lies east of a 900 m (2,950 ft) stretch of the West Fork Illinois River, located approximately 300 m south (upstream) of the confluence of Rough and Ready

Creek and the West Fork Illinois River. The unit is 1.8 km (1.1 mi) northeast of O'Brien and is 350 m (1,150 ft) northwest of Indian Hill. The land within this unit is 83 percent federally owned and 17 percent privately owned.

This unit contains a comma-shaped wet meadow supporting one *Lomatium cookii* population in excess of 9,000 plants. *Lomatium cookii* has been closely monitored in this unit for over 10 years (Kaye and Thorpe 2008, p 28). Although this population appears to be threatened by succession of woody vegetation and herbivory by voles, population monitoring indicates the population is stable.

Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV6 due to threats from natural woody vegetative succession and vole herbivory.

*Unit IV14: Waldo*

We are proposing to designate Unit IV14 as critical habitat for *Lomatium cookii*. This unit consists of 40 ha (100 ac) of intact wet meadow habitat. This unit is presently occupied by the species and was occupied at the time of listing. Unit IV14 contains all of the PCEs for *Lomatium cookii* and was identified in the draft recovery plan as the French Flat recovery core area (USFWS 2006, pp. IV-11, IV-14). The unit is located 3.4 km (2.1 mi) east-southeast O'Brien, 230 m (750 ft) west of Waldo, 2.4 km (1.5 mi) southeast of Indian Hill, and is 1.5 km (0.9 mi) southwest of Esterly Lakes. The land within this unit is under 59 percent Federal ownership and 41 percent private ownership.

This unit includes a single *Lomatium cookii* population on BLM-managed land that has not been visited since 1998. Aerial imagery suggests that the open mixed oak-conifer habitat in the unit includes patchy wet meadows and appears to be threatened by succession of natural woody vegetation succession and mineral mining. Aerial imagery suggests that the wet meadow habitat, as of 2006, is slowly becoming degraded and may require some management to maintain early seral stage vegetation (USDA 2006a). The primary threats to the habitat in this unit are mining and natural vegetation succession.

Special management considerations or protection may be required to restore, protect, and maintain the PCEs supported by Unit IV14 due to threats from woody vegetative succession and mineral mining.

Tables 1 and 2 provide a summary of the approximate area (ha and ac) of units in Jackson County by Federal, State, county, municipal, and private ownership determined to meet the definition of critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. Table 3 provides a summary of the approximate area (ha/ac) of units for *Lomatium cookii* in Josephine County by Federal, State, and private ownership determined to meet the definition of critical habitat.

TABLE 1—CRITICAL HABITAT UNITS AND OWNERSHIP IN HECTARES (ACRES) FOR *Limnanthes floccosa* SSP. *grandiflora* IN JACKSON COUNTY, OREGON (ALL TOTALS ARE ROUNDED).

| Critical Habitat Unit | Private | Municipal | County | State | Federal | Total Area |
|---|---|---|---|---|---|---|
| Shady Cove (RV1) | 8 (20) | | | | | 8 (20) |
| Hammel Road (RV2) | 84 (207) | ..... | ..... | ..... | ..... | 84 (207) |
| North Eagle Point (RV3A-D) | 539 (1,331) | ..... | ..... | ..... | ..... | 539 (1,331) |
| Rogue Plains (RV4) | 244.5 (604) | ..... | 0.5 (1) | ..... | ..... | 245 (605) |
| Table Rock Terrace (RV5) | 49 (121.5) | ..... | ..... | ..... | ..... | 49 (122) |
| White City (RV6A-H) | 447 (1,104) | 87 (214) | 68 (168) | 246 (609) | ..... | 848 (2,095) |
| Agate Lake (RV7) | 397 (981.5) | ..... | ..... | ..... | 29 (71) | 426 (1,053) |
| Whetstone Creek (RV8) | 290 (719.5) | 37 (91.5) | 0.2 (0.5) | 34 (84) | ..... | 362 (896) |
| Total Area | 2,059.5 (5,088) | 124 (306) | 69 (170) | 279.5 (691) | 29 (71) | 2,561 (6,327) |

TABLE 2—CRITICAL HABITAT UNITS AND OWNERSHIP IN HECTARES (ACRES) FOR *Lomatium cookii* IN JACKSON COUNTY, OREGON (TOTALS ARE ROUNDED).

| Critical Habitat Unit | Private | Municipal | County | State | Federal | Total Area |
|---|---|---|---|---|---|---|
| White City (RV6A, F, G, H) | 324 (802) | 87 (214) | 56 (138) | 141 (349) | ..... | 608 (1,503) |
| Whetstone Creek (RV8) | 291 (719.5) | 37 (91.5) | 0.2 (0.5) | 34 (84) | ..... | 362 (895.5) |
| Medford Airport (RV9A-B) | 3 (8) | 0.4 (1) | 73 (180) | ..... | ..... | 76 (190) |
| Total Area | 620 (1,532) | 124.4 (307) | 129.2 (319) | 174 (430) | ..... | 1,046 (2,589) |

TABLE 3—CRITICAL HABITAT UNITS AND OWNERSHIP IN HECTARES (ACRES) FOR *Lomatium cookii* IN JOSEPHINE COUNTY, OREGON (TOTALS ARE ROUNDED).

| Critical Habitat Unit | Private | State | Federal | Total Area |
|---|---|---|---|---|
| Anderson Creek (IV1) | 53.4 (131.9) | ..... | ..... | 53 (132) |

TABLE 3—CRITICAL HABITAT UNITS AND OWNERSHIP IN HECTARES (ACRES) FOR *Lomatium cookii* IN JOSEPHINE COUNTY, OREGON (TOTALS ARE ROUNDED).—Continued

| Critical Habitat Unit | Private | State | Federal | Total Area |
|---|---|---|---|---|
| Draper Creek (IV2) | 39.4 (97.3) | ..... | ..... | 39 (97) |
| Reeves Creek North (IV3) | 44 (109) | ..... | 61 (151) | 105 (260) |
| Reeves Creek East (IV4) | 33 (81.4) | ..... | 36 (88.5) | 69 (170) |
| Reeves Creek South (IV5) | 55 (137) | ..... | 103 (254) | 158 (391) |
| Laurel Road (IV6A-B) | 192.8 (476) | 4 (10) | 12 (29.5) | 209 (516) |
| Illinois River Forks State Park (IV7) | 17 (42) | 24.8 (60) | 13.8 (34) | 55 (136) |
| Woodcock Mountain (IV8) | 336.9 (832.5) | ..... | 10.7 (26.5) | 348 (859) |
| Riverwash (IV9) | 7.4 (18.3) | 0.6 (1.5) | 4.1 (10.2) | 12 (30) |
| French Flat North (IV10) | 34.8 (86) | ..... | 9.8 (24.3) | 45 (110) |
| Rough and Ready Creek (IV11) | 31.6 (78) | ..... | 29.7 (73.5) | 61 (152) |
| French Flat Middle (IV12) | 351.5 (868.6) | ..... | 277.2 (685) | 617 (1,524) |
| Indian Hill (IV12) | 3.1 (7.7) | ..... | 15.1 (37.3) | 18 (45) |
| Waldo (IV14) | 16.4 (40.6) | ..... | 28.9 (59) | 40 (100) |
| Total Area | 1,215.9 (3,006.3) | 29.4 (71.5) | 601.3 (1,472.8) | 1829 (4,521) |

*Effects of Critical Habitat Designation*

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. However, decisions by the courts of appeals for the Fifth and Ninth Circuits have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F. 3d 1059 (9th Cir 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442F (5th Cir 2001)). Instead, we rely upon the statutory provisions of the Act to make that determination. Under the statutory provisions of the Act, the key factor in determining whether an action will destroy or adversely modify critical habitat is whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain those PCEs that relate to the ability of the area to support the species) to serve its intended conservation role for the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. This is a procedural requirement only, as any conservation recommendations in a conference report or opinion are strictly advisory. However, once proposed species become listed, or proposed critical habitat is designated as final, the full prohibitions of section 7(a)(2) of the Act apply to any Federal action. The primary utility of the conference procedures is to maximize the opportunity for a Federal agency to adequately consider proposed species and critical habitat and avoid potential delays in implementing their proposed action as a result of the section 7(a)(2) compliance process, should those species be listed or the critical habitat designated.

We may conduct conferences either informally or formally. We typically use informal conferences as a means of providing advisory conservation recommendations to assist the agency in eliminating conflicts that the proposed action may cause with respect to the proposed critical habitat. We typically use formal conferences when the Federal agency or the Service believes the proposed action is likely to adversely affect a species proposed for listing or degrade proposed critical habitat in some manner.

We generally provide the results of an informal conference in a conference report, while we provide the results of a formal conference in a conference opinion. We typically prepare conference opinions on proposed critical habitat in accordance with procedures contained at 50 CFR 402.14, as if the proposed critical habitat was already designated. If no substantial new information or changes in the action alter the content of the opinion, we may adopt the conference opinion as the biological opinion when the critical habitat is designated (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. Activities on State, tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway

Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7(a)(2) consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7(a)(2) consultations.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. At the conclusion of this consultation, the Service will issue either:

(1) a concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) a biological opinion for Federal actions that may affect, but are likely to adversely affect, listed species or critical habitat.

If we issue a biological opinion concluding that a project is likely to result in jeopardy to a listed species or the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable, to avoid these outcomes. We define ''reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where a new species is listed or critical habitat is subsequently designated that may be affected and the Federal agency has retained discretionary involvement or control over the action. Consequently, some Federal agencies may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement may affect subsequently listed species or designated critical habitat.

**Application of the Jeopardy and Adverse Modification Standards**

*Jeopardy Standard*

Currently, the Service applies an analytical framework for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* jeopardy analyses that relies heavily on the importance of known populations to the species' survival and recovery. The section 7(a)(2) of the Act analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, the jeopardy analysis focuses on the range-wide statuses of *L. f.* ssp. *grandiflora* and *Lomatium cookii*, respectively, the factors responsible for that condition, and what is necessary for each species to survive and recover. An emphasis is also placed on characterizing the conditions of *L. f.* ssp. *grandiflora* and *Lomatium cookii* in the area affected by the proposed Federal action and the role of affected populations in the survival and recovery of *L. f.* ssp. *grandiflora* and *Lomatium cookii*. That context is then used to determine the significance of adverse and beneficial effects of the proposed Federal action and any cumulative effects for purposes of making the jeopardy determination.

*Adverse Modification Standard*

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Generally, the conservation role of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* critical habitat units is to support the various life-history needs and provide for the conservation of the species. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for *L. f.* ssp. *grandiflora* and *Lomatium cookii*.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the species.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in consultation for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* include, but are not limited to:

(1) Actions that would result in ground disturbance to vernal pool–mounded prairie and seasonally wet meadow habitat. Such activities could include, but are not limited to: residential or recreational development, ORV activity, dispersed recreation, new road construction or widening, existing road maintenance, and incompatible grazing practices (such as grazing during the winter, when pools are wet and most likely to be subjected to disruption of the underlying clay layer). These activities could cause direct loss of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*-occupied areas, and affect vernal pools and wet meadows by damaging or eliminating habitat, altering soil composition due to increased erosion, and increasing densities of nonnative plant species.

In addition, changes in soil composition may lead to changes in the vegetation composition, such as growth of shrub cover resulting in decreased density or vigor of individual *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* plants. These activities may also lead to changes in water flows and inundation periods that would degrade, reduce, or eliminate the habitat necessary for the growth and reproduction of *L. f.* ssp. *grandiflora* and *Lomatium cookii*.

(2) Actions that would significantly alter the hydrological regime of the vernal pool–mounded prairie and wet meadow habitat. Such activities could include residential or recreational development adjacent to meadows, ORV activity, dispersed recreation, new road construction or widening, and existing road maintenance. These activities could alter surface soil layers and hydrological regime in a manner that promotes loss of soil matrix components and moisture necessary to support the growth and reproduction of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*.

(3) Actions that would significantly reduce pollination or seed set (reproduction). Such activities could include, but are not limited to,

residential or recreational development, and grazing or mowing prior to seed set. These activities could prevent reproduction by removal or destruction of reproductive plant parts.

We consider all of the units proposed as critical habitat to contain the physical and biological features essential to the conservation of *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. All units are within the geographic range of the species and, with the possible exception of unit RV1, which has not been surveyed recently, are currently occupied by either *L. f.* ssp. *grandiflora* or *Lomatium cookii* or both. To ensure that their actions do not jeopardize the continued existence of *L. f.* ssp. *grandiflora* and *Lomatium cookii*, Federal agencies already consult with us on activities in areas currently occupied by the two plant species, or in unoccupied areas if the species may be affected by the action.

*Exemptions*

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Public Law No. 108-136) amended the Endangered Species Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, there are no specific lands that meet the criteria for being exempted from the designation of critical habitat pursuant to section 4(a)(3) of the Act.

*Exclusions*

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impacts of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we determine that the benefits of exclusion outweigh the benefits of inclusion, we can exclude the area only if such exclusion would not result in the extinction of the species.

Under section 4(b)(2) of the Act, we must consider all relevant impacts, including economic impacts. In addition to economic impacts, we consider a number of factors in a section 4(b)(2) analysis. For example, we consider whether there are lands owned by the Department of Defense (DOD) where a national security impact might exist. We also consider whether landowners or other public agencies have developed any Habitat Conservation Plans (HCPs) for the area, or whether there are conservation partnerships that would be encouraged or discouraged by designation of, or exclusion from, critical habitat in an area. In addition, we look at the presence of tribal lands or Tribal Trust resources that might be affected, and consider the government-to-government relationship of the United States with the tribal entities. We also consider any social impacts that might occur because of the designation. To ensure our final determination is based on the best available information, we are inviting comments on any foreseeable economic, national security, or other potential impacts resulting from this proposed designation of critical habitat from governmental, business, or private interests, and in particular, any potential impacts on small entities.

We are aware of several draft and one final management plan on lands owned by public agencies. We will consider for exclusion under section 4(b)(2) of the Act any existing management plans located within proposed critical habitat units, including the BOR Agate Lake Management Plan, any State agency management plans, management plans on any Medford District BLM locations occupied by *Lomatium cookii*, and other privately or publicly managed lands about which we receive more information during the 60–day comment period.

We are preparing an analysis of the potential economic impacts of the proposed designation of critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, or from the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). We may exclude areas from the final rule based on the information in the economic analysis.

At this time, we are not proposing any specific exclusions of areas from critical habitat under section 4(b)(2) of the Act for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii*. We will consider any available information about areas covered by conservation or management plans that we should consider for exclusion from the designation under section 4(b)(2) of the Act including whether the benefit of exclusion of

those lands would outweigh the benefits of their inclusion. We specifically request any information on any operative or draft habitat conservation plans for *L. f.* ssp. *grandiflora* and *Lomatium cookii* that have been prepared under section 10(a)(1)(B) of the Act, or any other management or other conservation plans or agreements that benefits either plant or their PCEs.

*Peer Review*

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we are obtaining the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

*Public Hearings*

The Act provides for one or more public hearings on this proposal, if any request for public hearings is received within 45 days of publication of this proposal. Send your request to the address listed in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

**Required Determinations**

*Regulatory Planning and Review*

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order (E.O.) 12866. OMB bases its determination upon the following four criteria:

1. Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

2. Whether the rule will create inconsistencies with other Federal agencies' actions.

3. Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. Whether the rule raises novel legal or policy issues.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (such as small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)-(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly affected by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of

critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly affected because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments because small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not adversely affect the critical habitat. Therefore, a Small Government Agency Plan is not required. However, as we conduct our economic analysis, we will further evaluate this issue and revise this assessment if appropriate.

*Takings*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for each of the two species in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* does not pose significant takings implications for lands within or affected by the proposed designation.

*Federalism*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Oregon. The designation of critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* would impose no additional restrictions to those currently in place and, therefore, would have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the features essential for the conservation of the species would be more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species would be specifically identified. This information would not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

*Civil Justice Reform*

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have issued this proposed critical habitat designation in accordance with the provisions of the Act. This proposed rule identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of each of the species being considered in this proposed rule.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

*National Environmental Policy Act (NEPA)*

It is our position that, outside the jurisdiction of the United States Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the United States Court of Appeals for the Ninth Circuit (Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

*Clarity of the Rule*

We are required by E.O. 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

*Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have determined that there are no tribal lands that were occupied by *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* at the time of listing that contain the features essential for the conservation of the species, and no tribal lands that are in unoccupied areas that are essential for the conservation of the species. Therefore, this proposed designation of critical habitat does not involve any tribal lands.

*Energy Supply, Distribution, or Use*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we

conduct our economic analysis, and revise this assessment as warranted.

*References Cited*

A complete list of all references cited in this rulemaking is available upon request from the State Supervisor, Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section) or from *http://www.regulations.gov*.

**Author(s)**

The primary authors of this document are the staff of the Roseburg Field Office of the Oregon Fish and Wildlife Office.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), revise the entries for *Limnanthes floccosa* ssp. *grandiflora* and *Lomatium cookii* under ''FLOWERING PLANTS'' in the List of Endangered and Threatened Plants to read as follows:

**§ 17.12 Endangered and threatened plants.**

* * * * *

(h) * * *

| Species | | Historic range | Family | Status | When listed | Critical habitat | Special rules |
|---|---|---|---|---|---|---|---|
| Scientific name | Common name | | | | | | |
| Flowering Plants | | | | | | | |
| * | * | * | * | * | * | * | |
| *Limnanthes floccosa* ssp. *grandiflora* | large-flowered woolly meadowfoam | U.S.A. (OR) | Limnanthaceae | E | 733 | 17.96(a) | NA |
| * | * | * | * | * | * | * | |
| *Lomatium cookii* | Cook's lomatium (Cook's desert parsley) | U.S.A. (OR) | Apiaceae | E | 733 | 17.96(a) | NA |
| * | * | * | * | * | * | * | |

* * * * *

3. Amend § 17.96(a) by adding an entry for ''*Lomatium cookii*'' in alphabetical order under Family Apiaceae and by adding an entry for ''*Limnanthes floccosa* ssp. *grandiflora*'' in alphabetical order under Family Limnanthaceae to read as follows:

**§ 17.96 Critical habitat—plants.**

* * * * *

(a) *Flowering plants.*

* * * * *

**Family Apiaceae: Lomatium cookii (Cook's lomatium)**

(1) Critical habitat units for *Lomatium cookii* are depicted for Jackson and Josephine Counties, Oregon, on the maps below.

(2) The primary constituent elements for *Lomatium cookii* are:

(i) In the Agate Desert, vernal pools and ephemeral wetlands and the adjacent upland margins of these depressions that hold water for a sufficient length of time to sustain *Lomatium cookii* germination, growth, and reproduction. These vernal pools or ephemeral wetlands support native plant populations and are seasonally inundated during wet years but do not necessarily fill with water every year due to natural variability in rainfall. Areas of sufficient size and quality are likely to have the following characteristics:

(A) Elevations from 372 to 411 m (1,220 to 1,350 ft);

(B) Associated dominant native plants including, not limited to: *Alopecurus geniculatus, Deschampsia danthonioides*, *Eryngium petiolatum, Lasthenia californica, Myosurus minimus, Navarretia leucocephala* ssp. *leucocephala, Phlox gracilis, Plagiobothrys bracteatus*, *Trifolium depauperatum*, and *Triteleia hyacinthina*; and

(C) A minimum area of 8 ha (20 ac) to provide intact hydrology and protection from development and weed sources.

(ii) In the Illinois River Valley, wet meadows in Oregon Oak and pine forests that are seasonally inundated and support native plant populations. Areas of sufficient size and quality are likely to have the following characteristics:

(A) Elevations between from 383 to 488 m (1,256 to 1,600 ft);

(B) Associated dominant native plants including, not limited to *Achnatherum lemmonii, Camassia* spp., *Danthonia californica*, *Deschampsia cespitosa, Festuca roemeri*, *Poa secunda, Ranunculus occidentalis*, and *Limnanthes gracilis* var. *gracilis*;

(C) Occur primarily in bottomland *Quercus garryana–Quercus kelloggii–Pinus ponderosa* (Oregon white oak–California black oak–ponderosa pine) forest openings along seasonal creeks; and

(D) A minimum area of 12 ha (30 ac) to provide intact hydrology and protection from development and weed sources.

(iii) In the Agate Desert, the hydrologically and ecologically functional system of interconnected pools or ephemeral wetlands or depressions within a matrix of surrounding uplands that together form vernal pool complexes within the greater watershed. The associated features may include the pool basin and ephemeral wetlands; an intact hardpan subsoil underlying the surface soils up to 0.75 m (2.5 ft); and surrounding uplands, including mound topography and other geographic and edaphic features that support systems of hydrologically interconnected pools and other ephemeral wetlands (which may vary in extent depending on site-specific characteristics of pool size and depth, soil type, and hardpan depth).

(iv) In the Illinois Valley, the hydrologically and ecologically

functional system of streams, slopes and wooded systems that surround and maintain seasonally wet alluvial meadows underlain by relatively undisturbed ultramafic soils within the greater watershed.

(v) In the Agate Desert, silt, loam, and clay soils that are of ultramafic and nonultramafic alluvial origin, with a 0 to 3 percent slope, classified as Agate–Winlo or Provig–Agate soils.

(vi) In the Illinois Valley, silt, loam, and clay soils that are of ultramafic and nonultramafic alluvial origin, with a 0 to 30 percent slope, classified as Abegg gravelly loam, Brockman clay loam, Copsey clay, Cornut–Dubakel complex, Dumps, Eightlar extremely stony clay, Evans loam, Foehlin gravelly loam, Josephine gravelly loam, Kerby loam, Newberg fine sandy loam, Pearsoll–Rock outcrop complex, Pollard loam, Riverwash, Speaker–Josephine gravelly loam, Takilma cobbly loam, or Takilma Variant extremely cobbly loam.

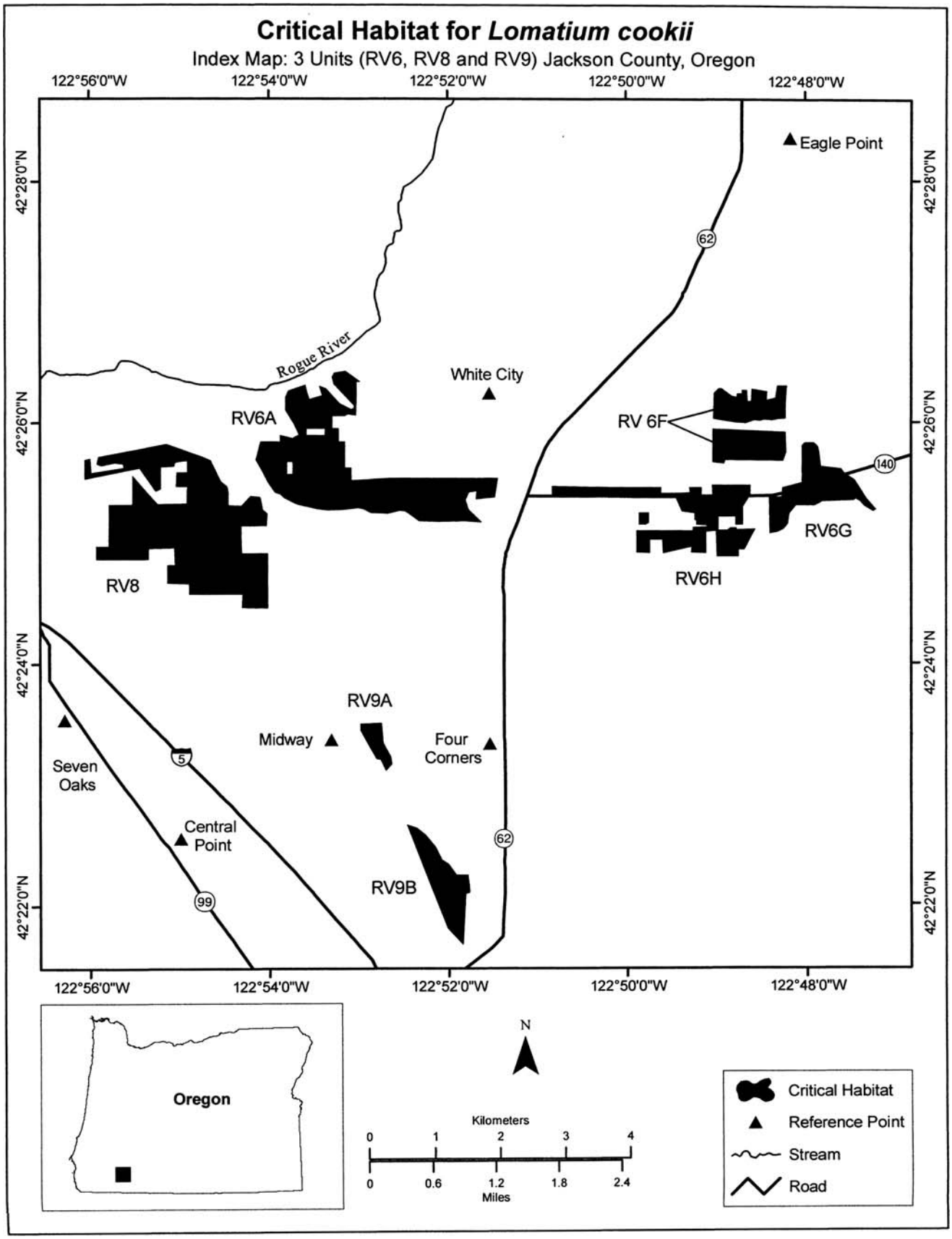
(vii) No or negligible presence of competitive nonnative invasive plant species. (In this usage, ''negligible'' means a minimal level of nonnative plant species that will still allow *Lomatium cookii* to continue to survive and recover.)

(3) Critical habitat does not include manmade structures (including, but not limited to, buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule and not containing one or more of the primary constituent elements.

(4) Critical habitat map units. These critical habitat units were mapped using Universal Transverse Mercator, Zone 10, North American Datum 1983 (UTM NAD 83) coordinates. These coordinates establish the vertices and endpoints of the boundaries of the units.

(5) *Note*: Jackson County Index Map for critical habitat for *Lomatium cookii* follows:

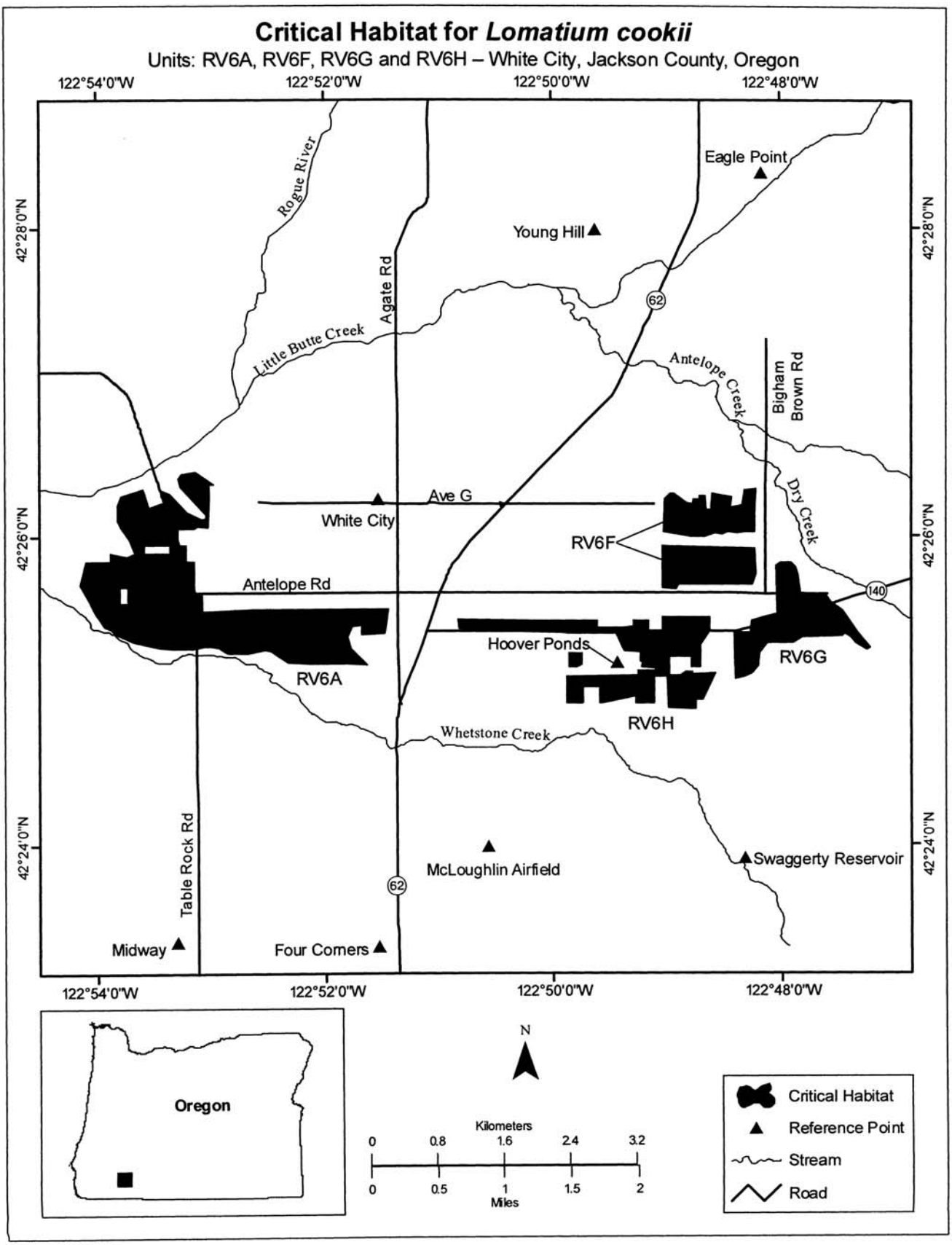
**BILLING CODE 4310–55–S**


Critical Habitat for Lomatium cookii
Index Map: 3 Units (RV6, RV8 and RV9) Jackson County, Oregon
122°56'0"W
122°54'0"W
122°52'0"W
122°50'0"W
122°48'0"W
42°28'0"N
42°26'0"N
42°24'0"N
42°22'0"N
Eagle Point
Rogue River
White City
RV6A
RV 6F
RV8
RV6G
RV6H
RV9A
Midway
Four Corners
Seven Oaks
Central Point
RV9B
62
140
5
99
Oregon
N
Kilometers
0 1 2 3 4
0 0.6 1.2 1.8 2.4
Miles
Critical Habitat
Reference Point
Stream
Road

(6) Unit RV6, subunits A, F, G, and H for *Lomatium cookii*: White City, Jackson County, Oregon.

(i) Unit RV6 for *Lomatium cookii* consists of 608 ha (1,503 ac) of intact vernal pool–mounded prairie and swale habitats. RV6 is located around White City, is 1.6 km (1.0 mi) southwest of Eagle Point, and is 440 m (1,444 ft) southeast of the confluence of the Rogue River and Little Butte Creek. Subunit RV6A is located north of Whetstone Creek and is 500 m (1,200 ft) west of the junction of Highway 62 and Antelope Road. Subunits RV6F and RV6G are located approximately 500 feet west of Dry Creek and are east of Highway 62 in White City. Subunit RV6H is located north of Whetstone Creek and south of Antelope Road. Subunit RV6H roughly encircles the Hoover Ponds, east of Highway 62, and is 850 m (2790 ft) east of subunit RV6A.

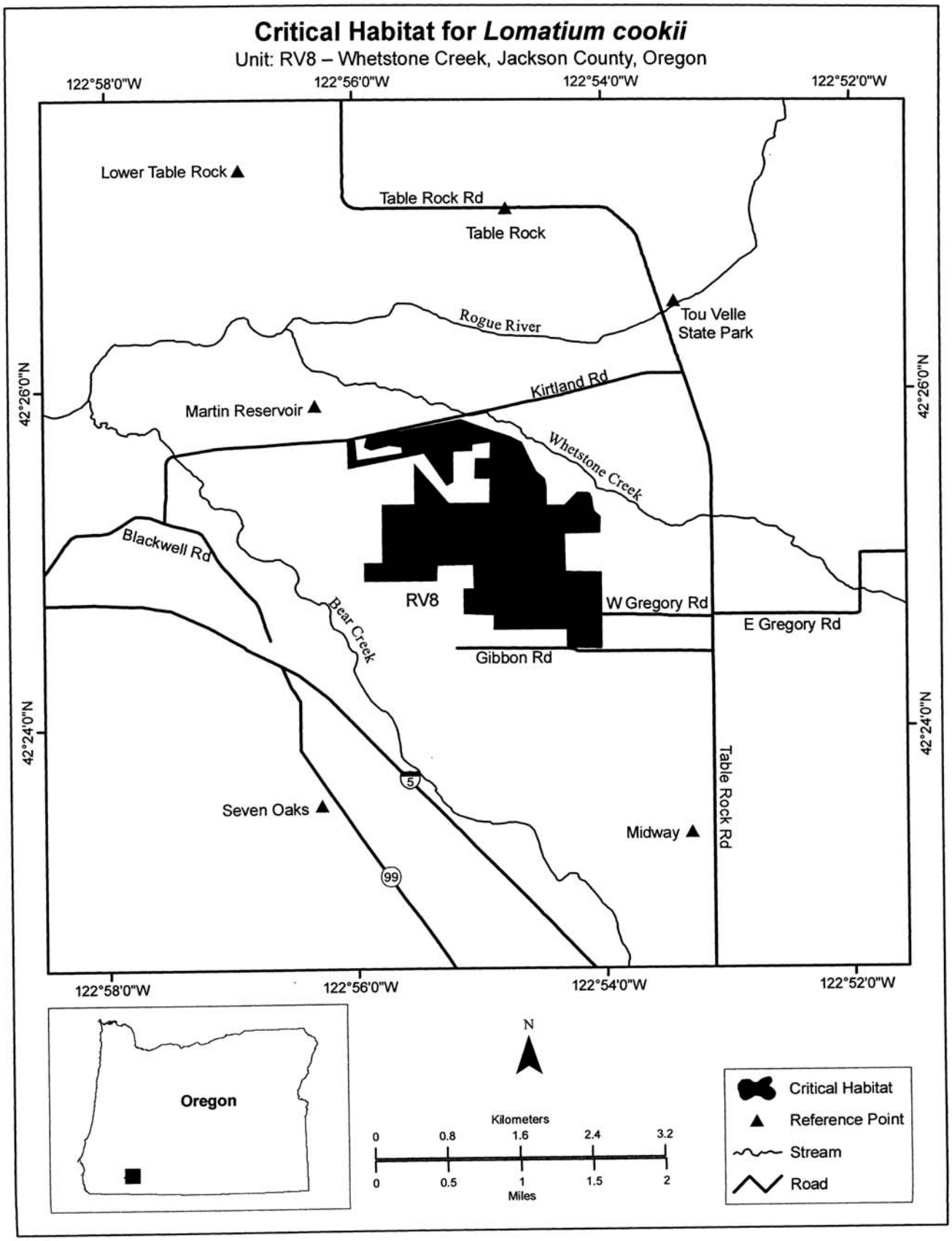
(ii) *Note*: Map of Unit RV6 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for Lomatium cookii
Units: RV6A, RV6F, RV6G and RV6H – White City, Jackson County, Oregon
122°54'0"W
122°52'0"W
122°50'0"W
122°48'0"W
42°28'0"N
42°26'0"N
42°24'0"N
Rogue River
Eagle Point
Young Hill
Agate Rd
62
Little Butte Creek
Antelope Creek
Bigham Brown Rd
Dry Creek
Ave G
White City
RV6F
Antelope Rd
140
Hoover Ponds
RV6G
RV6A
RV6H
Whetstone Creek
Table Rock Rd
McLoughlin Airfield
Swaggerty Reservoir
Midway
Four Corners
Oregon
N
Kilometers
0
0.8
1.6
2.4
3.2
0
0.5
1
1.5
2
Miles
Critical Habitat
Reference Point
Stream
Road

(7) Unit RV8 for *Lomatium cookii*: Whetstone Creek, Jackson County, Oregon.

(i) Unit RV8 for *Lomatium cookii* consists of 362 ha (896 ac) of intact vernal pool–mounded prairie and swale habitat. Unit RV8 is located approximately 1.4 km (0.9 mi) southeast of the confluence of the Rogue River and Whetstone Creek, 2.2 km (1.4 mi) southwest of Tou Velle State Park, and 2.9 km southeast of the confluence of Bear Creek and the Rogue River. The unit roughly parallels a 2.6 km (1.6 mi) stretch of Whetstone Creek to the south.

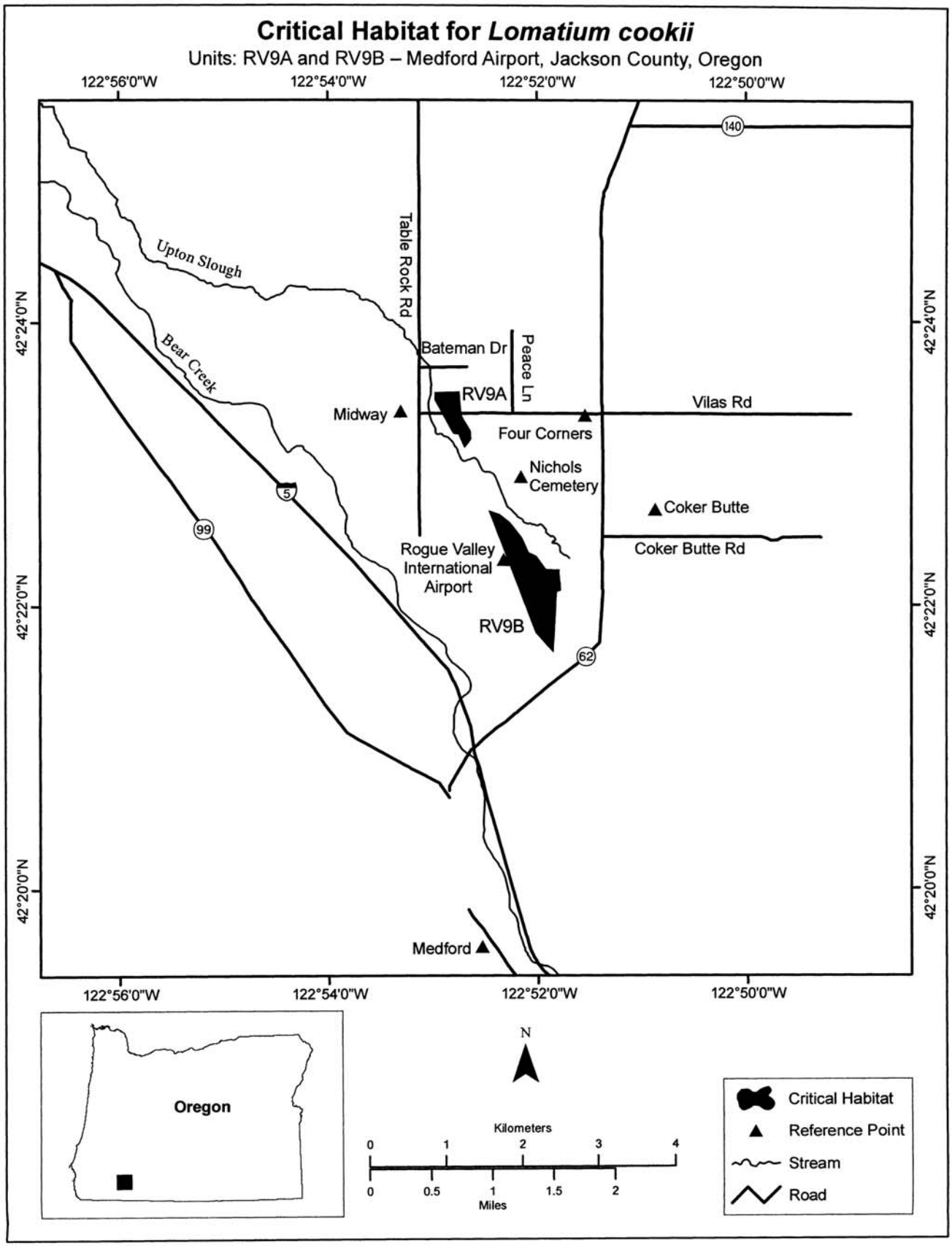
(ii) *Note*: Map of Unit RV8 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for Lomatium cookii
Unit: RV8 – Whetstone Creek, Jackson County, Oregon
122°58'0"W
122°56'0"W
122°54'0"W
122°52'0"W
42°26'0"N
42°24'0"N
Lower Table Rock
Table Rock Rd
Table Rock
Rogue River
Tou Velle State Park
Kirtland Rd
Martin Reservoir
Whetstone Creek
Blackwell Rd
RV8
W Gregory Rd
E Gregory Rd
Bear Creek
Gibbon Rd
Table Rock Rd
5
Seven Oaks
Midway
99
Oregon
N
Kilometers
0
0.8
1.6
2.4
3.2
0
0.5
1
1.5
2
Miles
Critical Habitat
Reference Point
Stream
Road

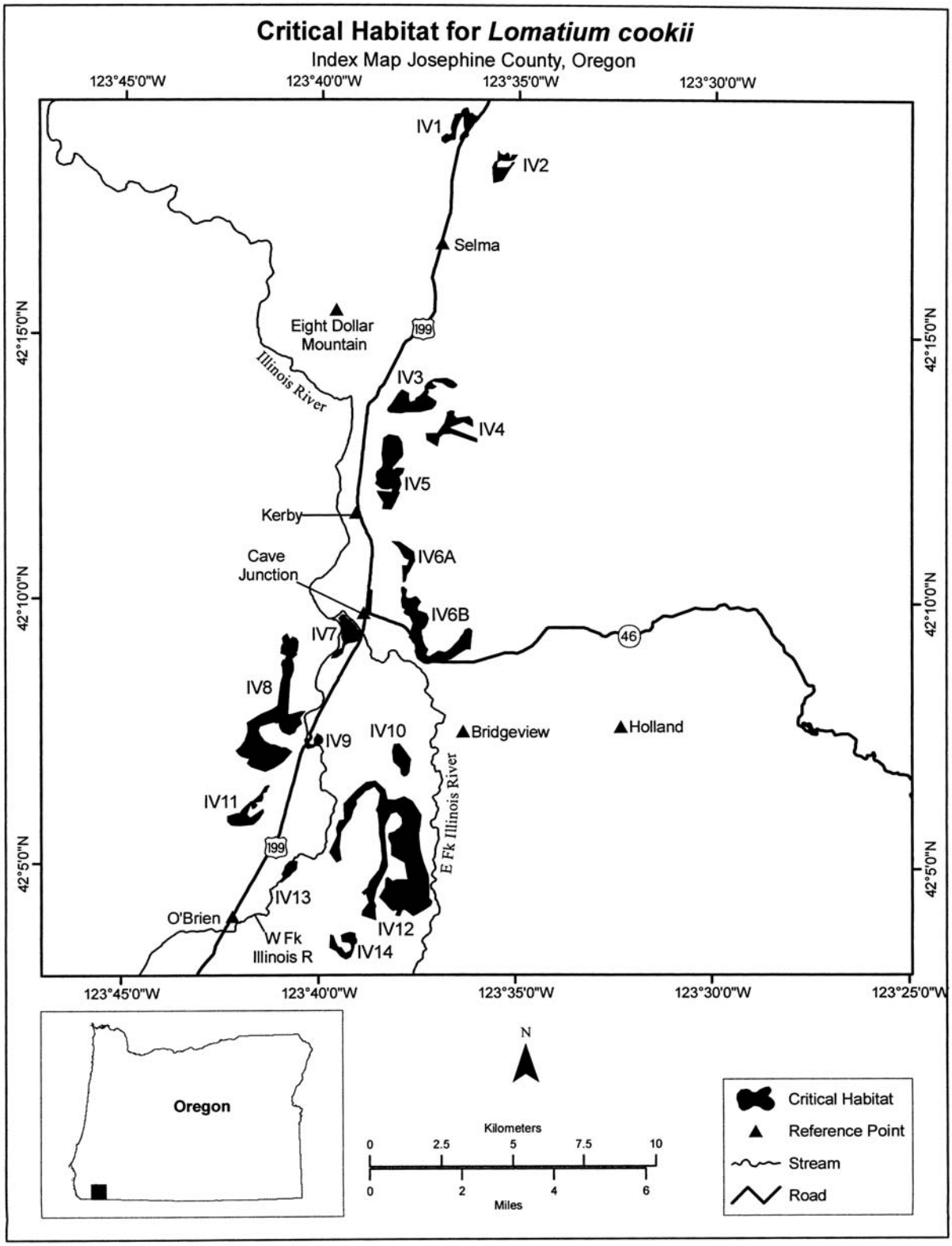
(8) Unit RV9 for *Lomatium cookii*: Medford Airport, Jackson County, Oregon.

(i) Unit RV9 consists of 77 ha (190 ac) of slightly degraded vernal pool–mounded prairie habitat. The two subunits of RV9 are located mostly within the Rogue Valley International – Medford Airport, approximately 2 km (1.2 mi) west of Coker Butte and 1.5 km (0.9 mi) northeast of Bear Creek. Subunit RV9A is located 1.4 km (0.9 mi) north of the Rogue Valley International – Medford Airport and is 300 m (980 ft) east of the junction of Vilas Road and Table Rock Road. Subunit RV9B is between Upton Slough and Bear Creek and 1.7 km northeast of the junction of Interstate 5 and Highway 62.

(ii) *Note*: Map of Unit RV9 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for Lomatium cookii
Units: RV9A and RV9B – Medford Airport, Jackson County, Oregon
122°56'0"W
122°54'0"W
122°52'0"W
122°50'0"W
42°24'0"N
42°22'0"N
42°20'0"N
140
Upton Slough
Bear Creek
Table Rock Rd
Bateman Dr
Peace Ln
RV9A
Midway
Vilas Rd
Four Corners
Nichols Cemetery
Coker Butte
Coker Butte Rd
5
99
Rogue Valley International Airport
RV9B
62
Medford
Oregon
N
Kilometers
0
1
2
3
4
0
0.5
1
1.5
2
Miles
Critical Habitat
Reference Point
Stream
Road

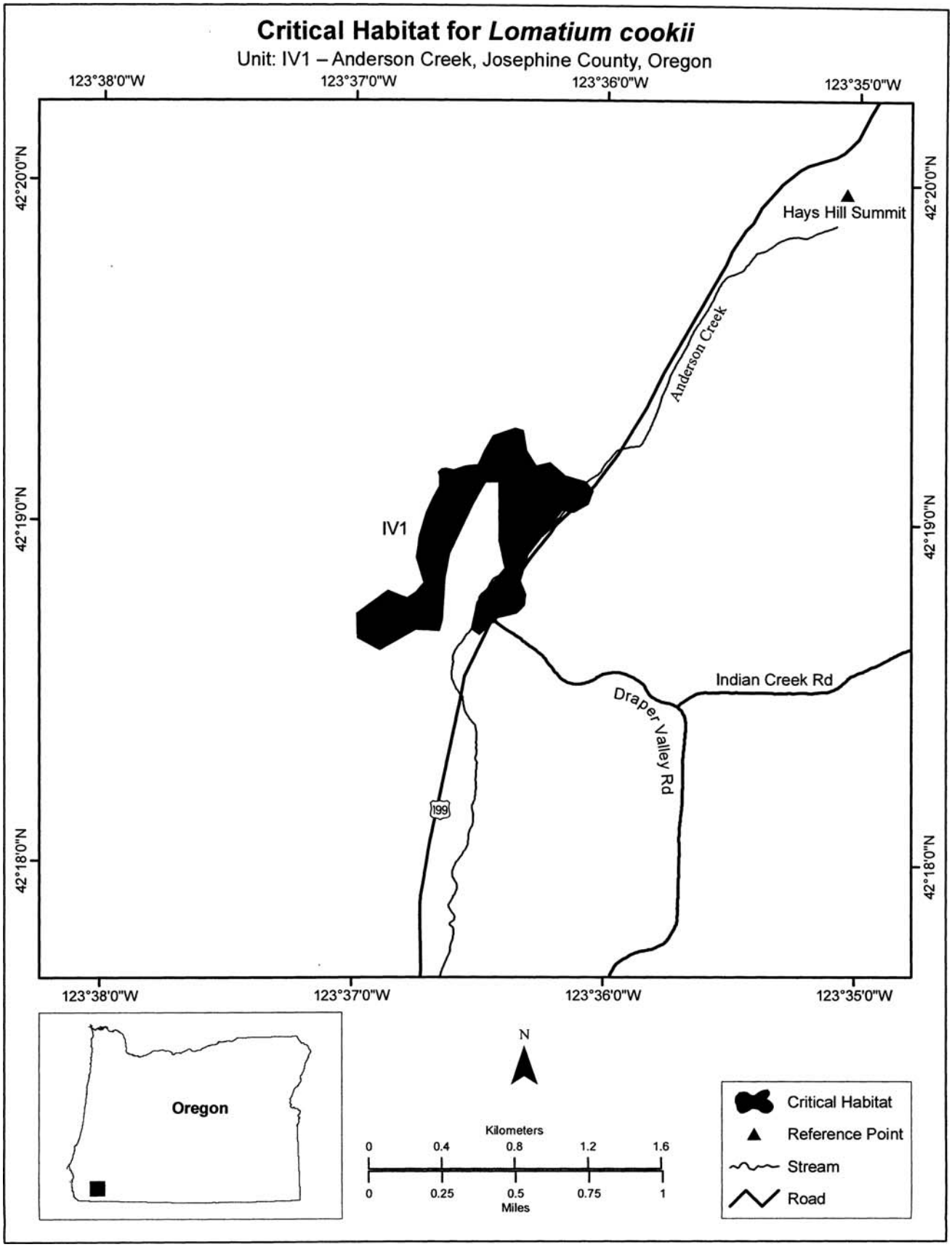
(9) *Note*: Josephine County Index Map for critical habitat for *Lomatium cookii* follows:



(10) Unit IV1 for *Lomatium cookii*: Anderson Creek, Josephine County, Oregon.

(i) Unit IV1 consists of 53 ha (132 ac) of intact wet meadow habitat. It is located 3.5 km (2.2 mi) north of Selma, 14 km (8.8 mi) north of Cave Junction, along a 1.0 km (0.6 mi) stretch of Anderson Creek and Highway 199, 2.0 km (1.2 mi) southwest of Hays Hill Summit, and is 1.7 km (1.0 mi) northwest of the junction of Draper Valley Road and Indian Creek Road.

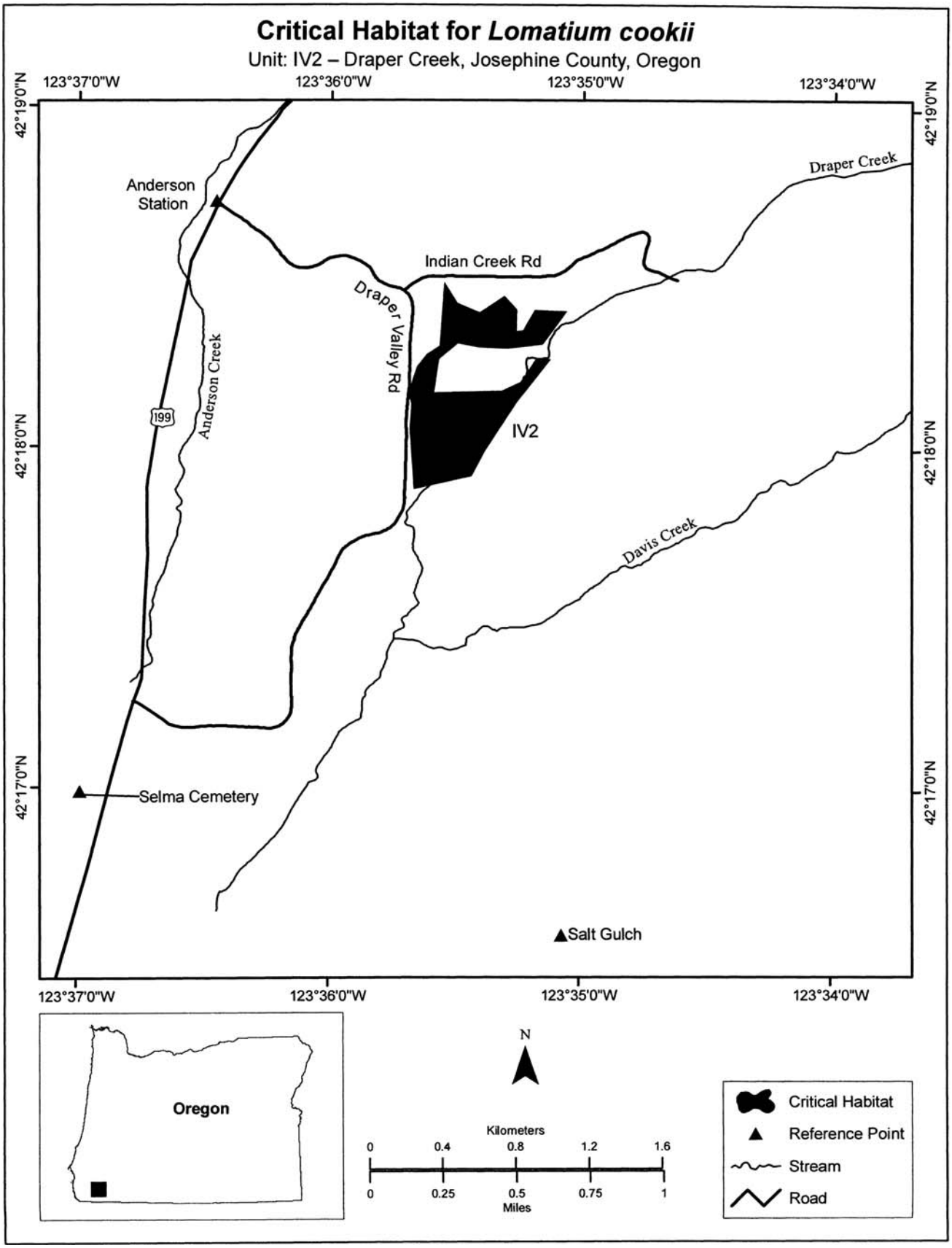
(ii) *Note*: Map of Unit IV1 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV1 – Anderson Creek, Josephine County, Oregon
123°38'0"W
123°37'0"W
123°36'0"W
123°35'0"W
42°20'0"N
42°19'0"N
42°18'0"N
Hays Hill Summit
Anderson Creek
IV1
Indian Creek Rd
Draper Valley Rd
199
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(11) Unit IV2 for *Lomatium cookii*: Draper Creek, Josephine County, Oregon.

(i) Unit IV2 is composed of 39 ha (97 ac) of intact wet meadow habitat. It is located 2.7 km (1.7 mi) northeast of Selma, 13.5 km (8.4 mi) north of Cave Junction, along a 900 m (2,900 ft) stretch of Draper Creek, located 800 m (2,600 ft) east of Anderson Creek. The unit is 800 m (2,600 ft) north-northwest of the confluence of Draper Creek and Davis Creek and is 200 m (650 ft) southeast of the junction of Draper Valley Road and Indian Creek Road.

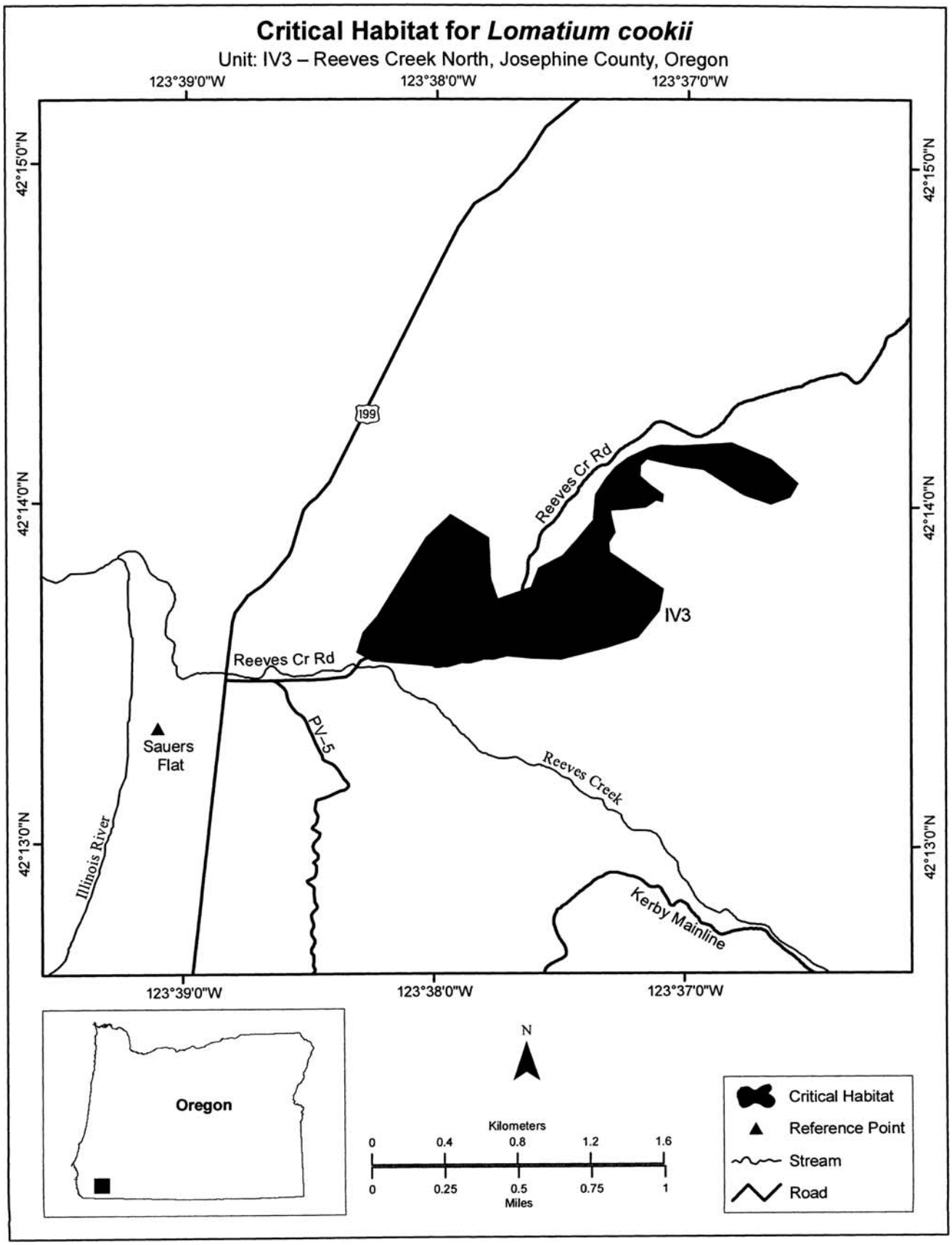
(ii) *Note*: Map of Unit IV2 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV2 – Draper Creek, Josephine County, Oregon
123°37'0"W
123°36'0"W
123°35'0"W
123°34'0"W
42°19'0"N
42°18'0"N
42°17'0"N
Anderson Station
Indian Creek Rd
Draper Creek
Draper Valley Rd
Anderson Creek
199
IV2
Davis Creek
Selma Cemetery
Salt Gulch
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(12) Unit IV3 for *Lomatium cookii*: Reeves Creek North, Josephine County, Oregon.

(i) Unit IV3 consists of 105 ha (260 ac) of wet meadow habitat. The unit is located 1.4 km (0.9 mi) east of the confluence between Reeves Creek and the Illinois River and extends along a 2.0 km (1.2 mi) stretch of Reeves Creek, beginning 800 m (2,600 ft) northeast of the junction of Highway 199 and Reeves Creek Road.

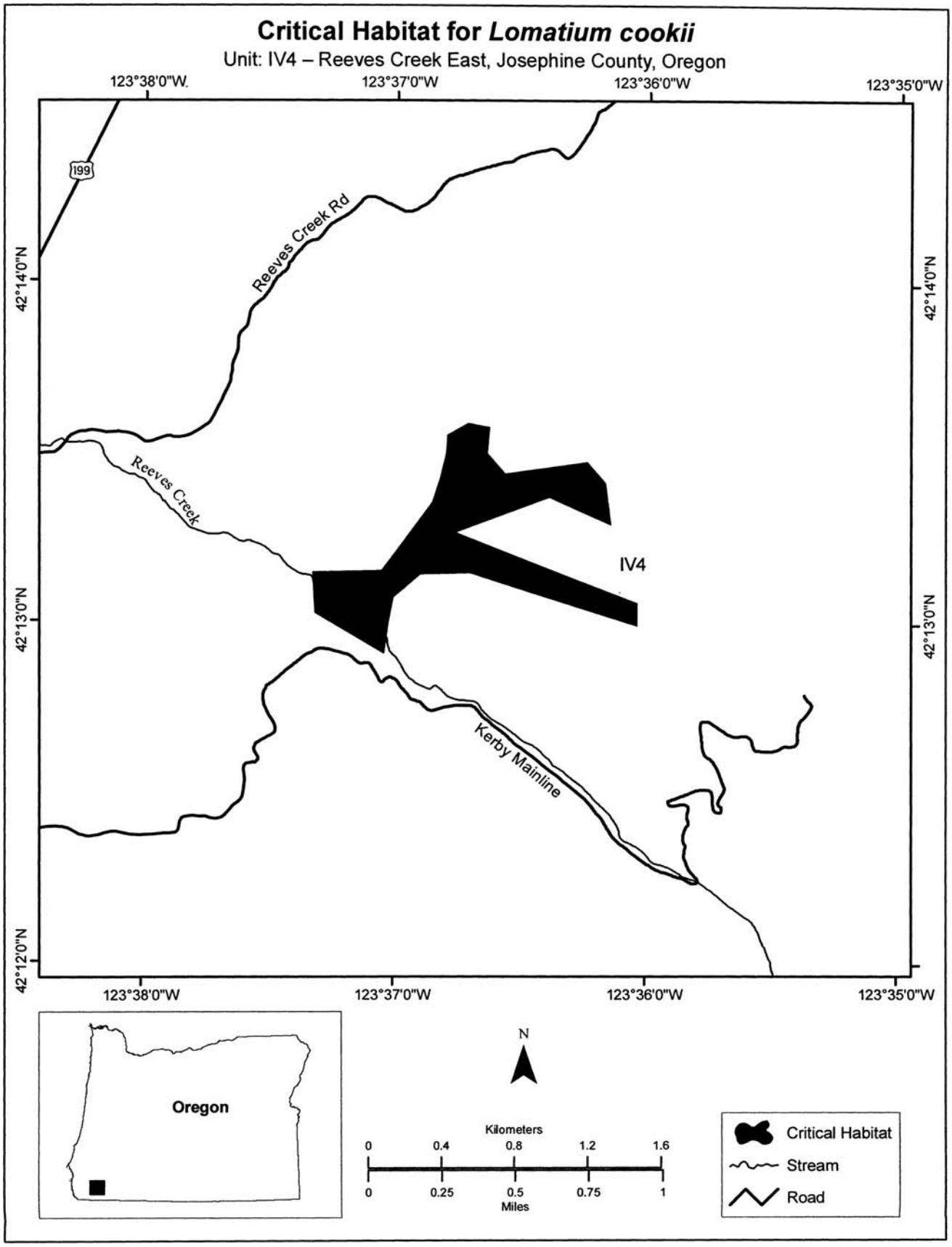
(ii) *Note*: Map of Unit IV3 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV3 – Reeves Creek North, Josephine County, Oregon
123°39'0"W
123°38'0"W
123°37'0"W
42°15'0"N
42°14'0"N
42°13'0"N
199
Reeves Cr Rd
IV3
Reeves Cr Rd
Sauers Flat
PV-5
Reeves Creek
Illinois River
Kerby Mainline
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(13) Unit IV4 for *Lomatium cookii*: Reeves Creek East, Josephine County, Oregon.

(i) Unit IV4 consists of 69 ha (170 ac) of intact wet meadow habitat. It is located 6.2 km (3.9 mi) south of Selma and 5.3 km (3.3 mi) northwest of Cave Junction. It occurs along a 500 m (1,640 ft) stretch of Reeves Creek located 700 m (2,300 ft) southeast of Unit IV3.

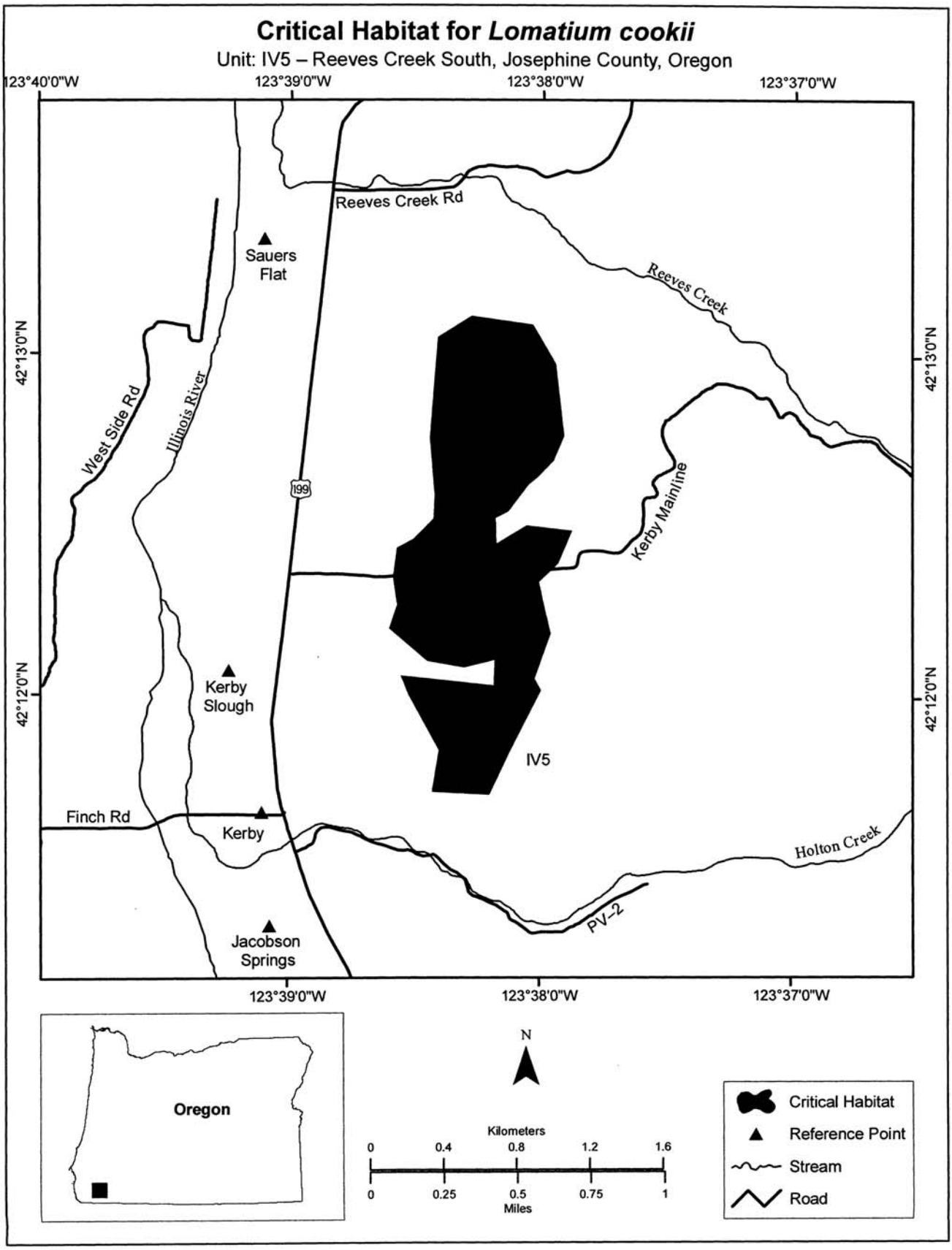
(ii) *Note*: Map of Unit IV4 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV4 – Reeves Creek East, Josephine County, Oregon
123°38'0"W
123°37'0"W
123°36'0"W
123°35'0"W
42°14'0"N
42°13'0"N
42°12'0"N
199
Reeves Creek Rd
Reeves Creek
IV4
Kerby Mainline
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Stream
Road

(14) Unit IV5 for *Lomatium cookii*: Reeves Creek South, Josephine County, Oregon.

(i) Unit IV5 consists of 158 ha (391 ac) of intact wet meadow habitat. The unit is roughly parallel to Highway 199 for 2.5 km (1.6 mi), which is 500 m (1,640 ft) west of the unit. The unit is located 1.6 km (1.0 mi) north of Cave Junction, 1 km (0.6 mi) southeast of Sauers Flat, 800 m (2,600 ft) east of Kerby, and 1.2 km (0.7 mi) east of the confluence between Holton Creek and the Illinois River.

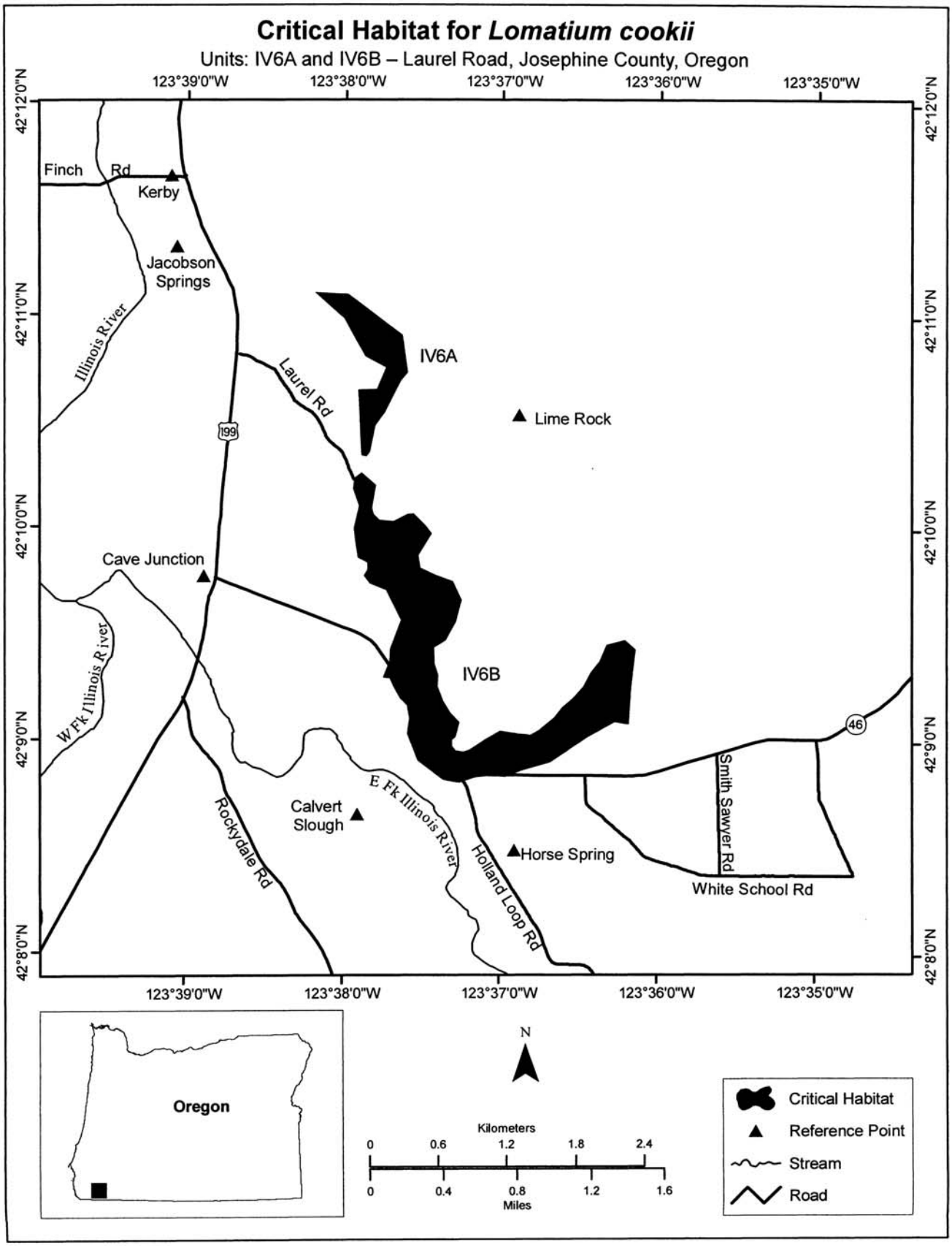
(ii) *Note*: Map of Unit IV5 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV5 – Reeves Creek South, Josephine County, Oregon
123°40'0"W
123°39'0"W
123°38'0"W
123°37'0"W
42°13'0"N
42°12'0"N
Reeves Creek Rd
Sauers Flat
Reeves Creek
West Side Rd
Illinois River
199
Kerby Mainline
Kerby Slough
IV5
Finch Rd
Kerby
Holton Creek
PV-2
Jacobson Springs
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(15) Unit IV6 for *Lomatium cookii*: Laurel Road, Josephine County, Oregon.

(i) Unit IV6 totals 209 ha (516 ac) of intact wet meadow habitat. It is located west and alongside of the base of Lime Rock, 1.2 km (0.7 mi) east of the city of Cave Junction, and follows along Highway 46 for 1.5 km (0.9 mi). Subunit IV6A is located 1.3 km (0.8 mi) west of Lime Rock summit, 1.0 km east of the junction of Laurel Road and Highway 199, and is roughly parallel to Highway 199 for 1.3 km (0.8 mi), which lies approximately 1.0 km (0.6 mi) west of the subunit. Subunit IV6B is 2.7 km (1.7 mi) east of the confluence of the east and west forks of the Illinois River and from the intersection of Holland Loop Road and Highway 46; it extends approximately 1.8 km (1.1 mi) to the northeast and 2.7 km (1.7 mi) to the north.

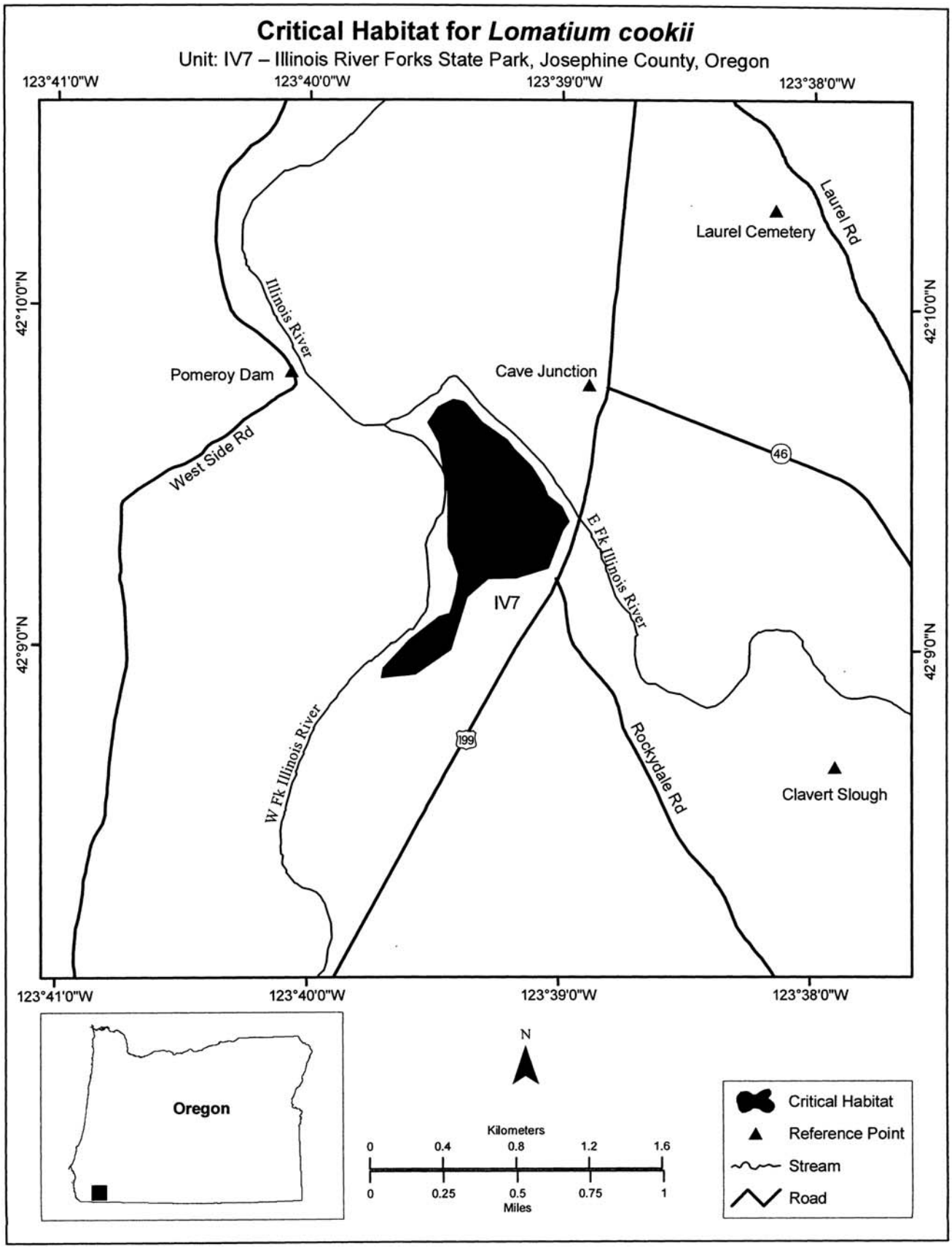
(ii) *Note*: Map of Unit IV6 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Units: IV6A and IV6B – Laurel Road, Josephine County, Oregon
123°39'0"W
123°38'0"W
123°37'0"W
123°36'0"W
123°35'0"W
42°12'0"N
42°11'0"N
42°10'0"N
42°9'0"N
42°8'0"N
Finch Rd
Kerby
Jacobson Springs
Illinois River
Laurel Rd
199
IV6A
Lime Rock
Cave Junction
W Fk Illinois River
IV6B
46
Smith Sawyer Rd
White School Rd
E Fk Illinois River
Calvert Slough
Rockydale Rd
Horse Spring
Holland Loop Rd
Oregon
N
Kilometers
0
0.6
1.2
1.8
2.4
0
0.4
0.8
1.2
1.6
Miles
Critical Habitat
Reference Point
Stream
Road

(16) Unit IV7 for *Lomatium cookii*: Illinois River Forks State Park, Josephine County, Oregon.

(i) Unit IV7 consists of 55 ha (136 ac) of intact wet meadow habitat. The unit is located 500 m (1640 ft) west of the city of Cave Junction, 600 m (1,970 ft) southeast of Pomeroy Dam, and is 230 m (750 ft) east of the confluence of the east and west forks of the Illinois River. The unit occurs along a 2.8 km (1.7 mi) stretch of the West Fork Illinois River.

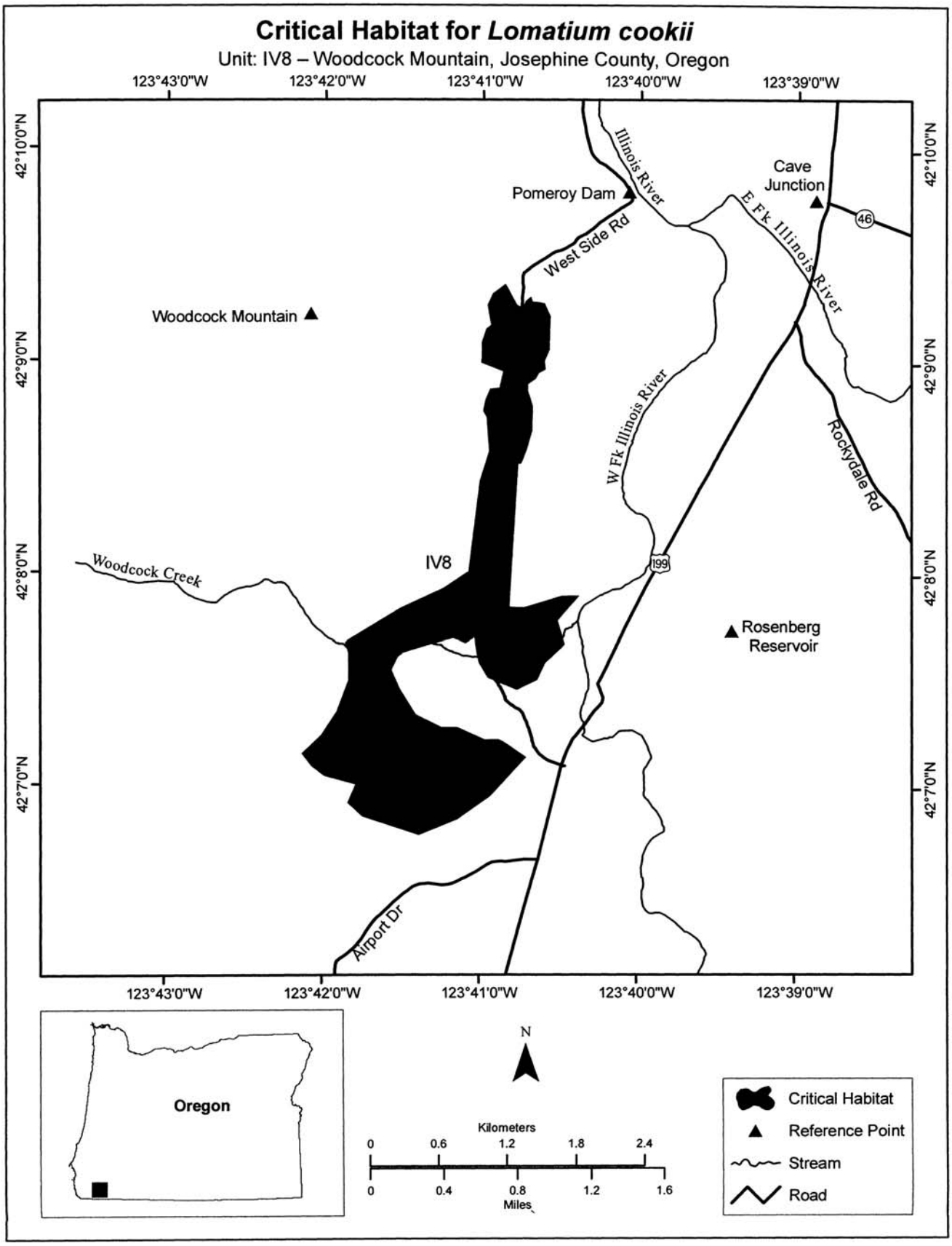
(ii) *Note*: Map of Unit IV7 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV7 – Illinois River Forks State Park, Josephine County, Oregon
123°41'0"W
123°40'0"W
123°39'0"W
123°38'0"W
42°10'0"N
42°9'0"N
Laurel Cemetery
Laurel Rd
Illinois River
Pomeroy Dam
Cave Junction
West Side Rd
46
E Fk Illinois River
IV7
W Fk Illinois River
199
Rockydale Rd
Clavert Slough
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(17) Unit IV8 for *Lomatium cookii*: Woodcock Mountain, Josephine County, Oregon.

(i) Unit IV8 consists of 347.5 ha (859 ac) of intact wet meadow habitat. The unit is located 2.4 km (1.5 mi) southwest of the city of Cave Junction, 5.3 km (3.3 mi) north of O'Brien, is 140 m (ft) west of the confluence of Woodcock Creek and the West Fork Illinois River, and occurs along a 3.3 km (2.0 mi) stretch of West Side Road. Unit IV7 is 400 m (ft) west of Highway 199 and roughly parallels the highway for 5.0 km (3.1 mi).

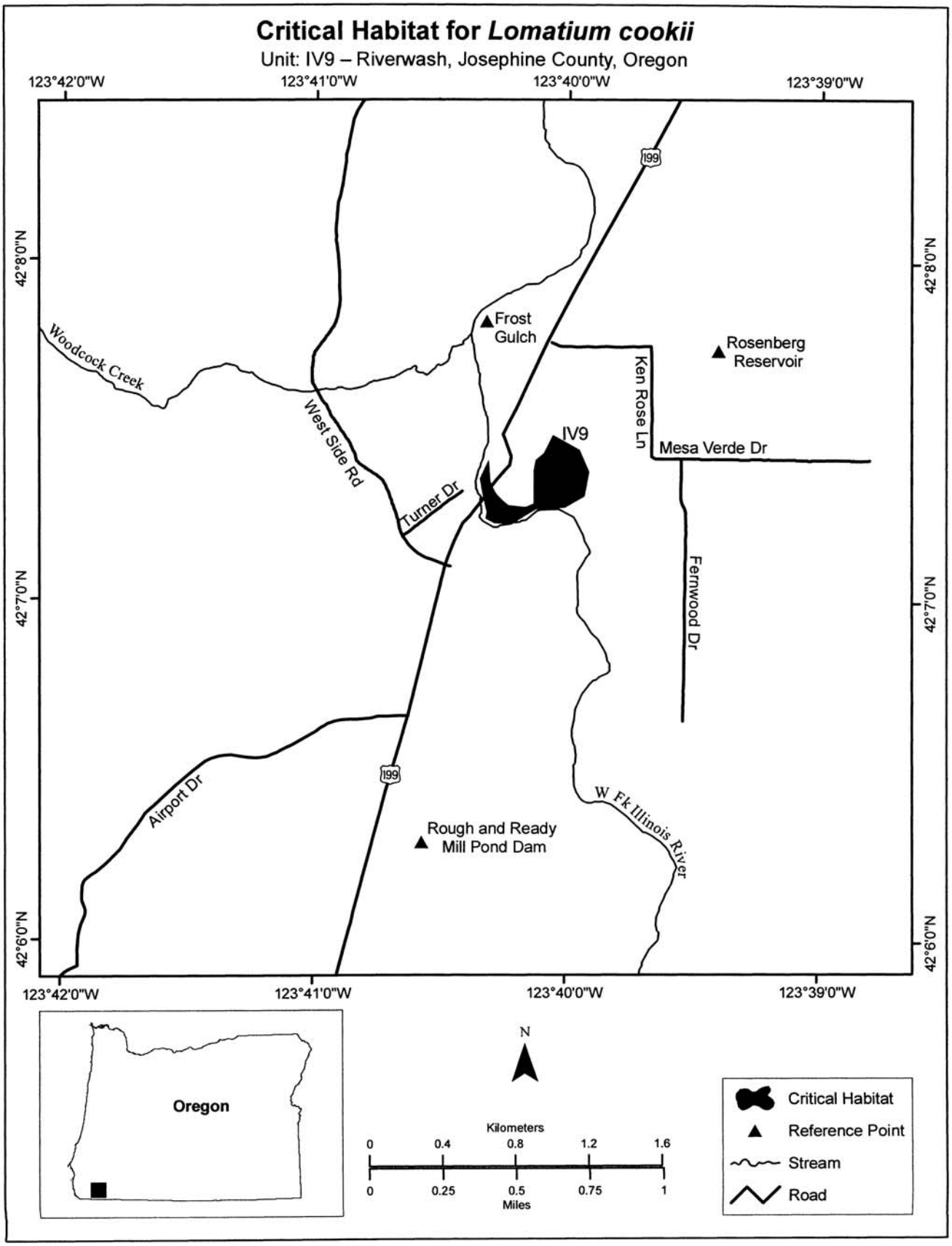
(ii) *Note*: Map of Unit IV8 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV8 – Woodcock Mountain, Josephine County, Oregon
123°43'0"W
123°42'0"W
123°41'0"W
123°40'0"W
123°39'0"W
42°10'0"N
42°9'0"N
42°8'0"N
42°7'0"N
Illinois River
Pomeroy Dam
Cave Junction
46
E Fk Illinois River
West Side Rd
Woodcock Mountain
W Fk Illinois River
Rockydale Rd
Woodcock Creek
IV8
199
Rosenberg Reservoir
Airport Dr
Oregon
N
Kilometers
0
0.6
1.2
1.8
2.4
0
0.4
0.8
1.2
1.6
Miles
Critical Habitat
Reference Point
Stream
Road

(18) Unit IV9 for *Lomatium cookii*: Riverwash, Josephine County, Oregon.

(i) Unit IV9 consists of 12 ha (30 ac) of intact wet meadow and streambank habitat. It is located 4.2 km (2.6 mi) south of Cave Junction, 6.1 km (3.8 mi) north-northeast of O'Brien, and is located along the east bend of the West Fork Illinois River, 700 m (2,300 ft) south (upstream) of the confluence between Woodcock Creek and the West Fork Illinois River.

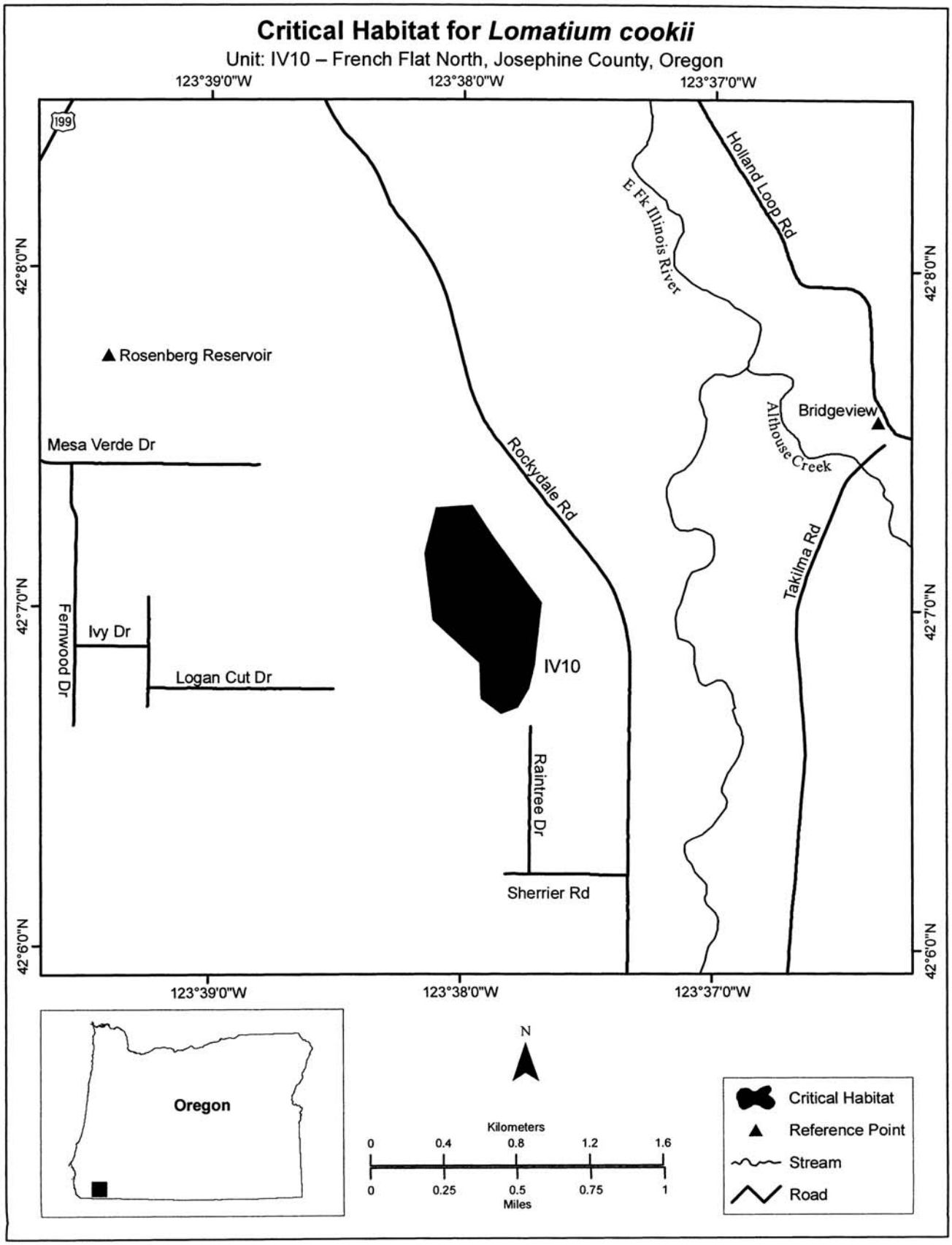
(ii) *Note*: Map of Unit IV9 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV9 – Riverwash, Josephine County, Oregon
123°42'0"W
123°41'0"W
123°40'0"W
123°39'0"W
42°8'0"N
42°7'0"N
42°6'0"N
199
Frost Gulch
Rosenberg Reservoir
Woodcock Creek
West Side Rd
Ken Rose Ln
IV9
Mesa Verde Dr
Turner Dr
Fernwood Dr
Airport Dr
W Fk Illinois River
Rough and Ready Mill Pond Dam
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(19) Unit IV10 for *Lomatium cookii*: French Flat North, Josephine County, Oregon.

(i) Unit IV10 consists of 44.5 ha (110 ac) of intact wet meadow habitat. The unit is located 3.7 km (2.3 mi) south of Cave Junction, 900 m (2,950 ft) north of the intersection of Sherrier Drive and Raintree Drive, 1.7 km (1.1 mi) southwest of the confluence of Althouse Creek and the East Fork Illinois River, and parallels a 300 m (980 ft) stretch of Rockydale Road.

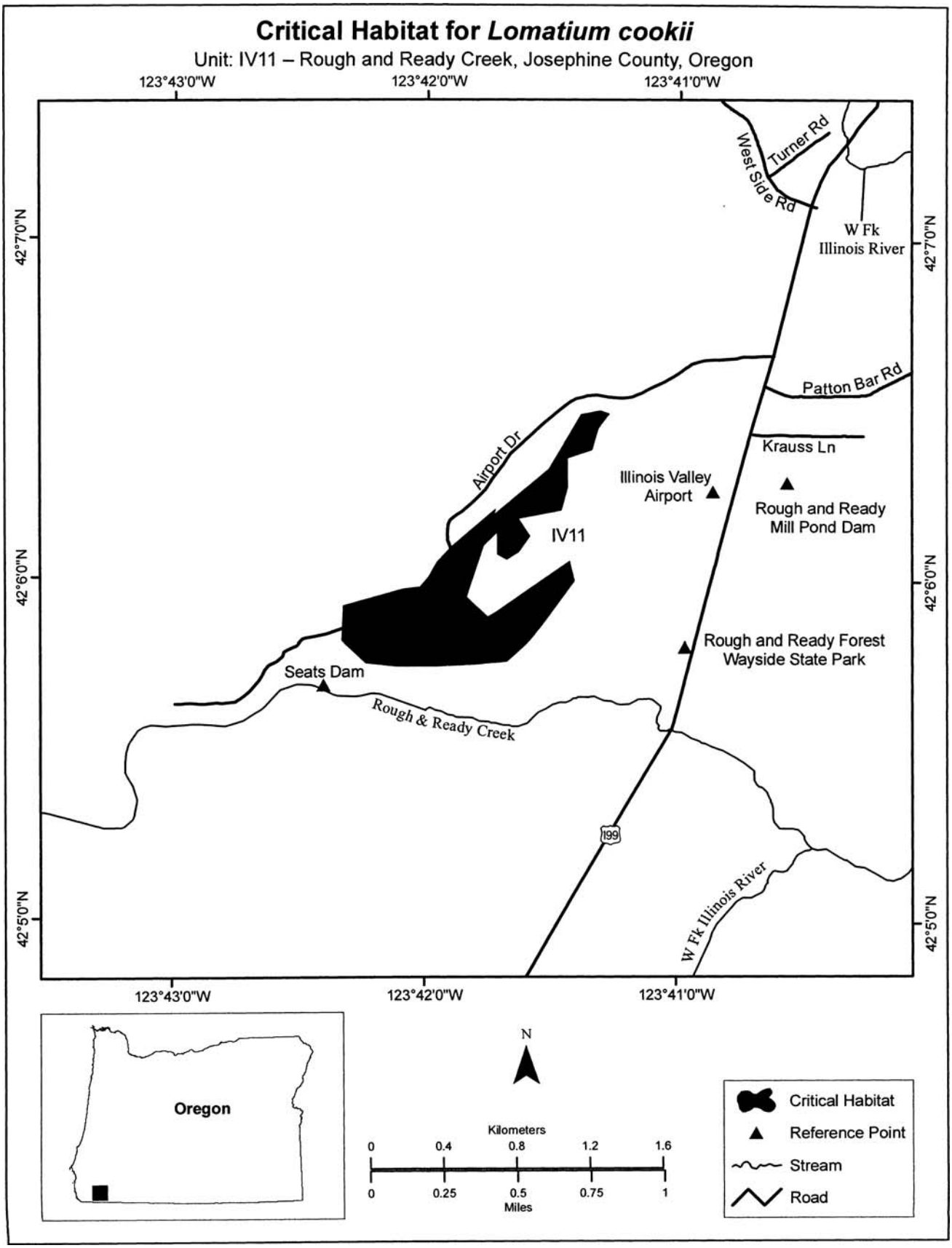
(ii) *Note*: Map of Unit IV10 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV10 – French Flat North, Josephine County, Oregon
123°39'0"W
123°38'0"W
123°37'0"W
42°8'0"N
42°7'0"N
42°6'0"N
199
Rosenberg Reservoir
Mesa Verde Dr
Fernwood Dr
Ivy Dr
Logan Cut Dr
Rockydale Rd
IV10
Raintree Dr
Sherrier Rd
E Fk Illinois River
Holland Loop Rd
Bridgeview
Althouse Creek
Takilma Rd
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(20) Unit IV11 for *Lomatium cookii*: Rough and Ready Creek, Josephine County, Oregon.

(i) Unit IV11 consists of 61.5 ha (152 ac) of intact wet meadow habitat. The unit roughly follows along and is adjacent to a 1.9 km (1.2 mi) stretch of Airport Drive, is located 3 km (1.9 mi) north of O'Brien, 900 m (2,950 ft) west of the Rough and Ready Forest Wayside State Park, and is 122 m (400 ft) east of the confluence with the Illinois River and Rough and Ready Creek.

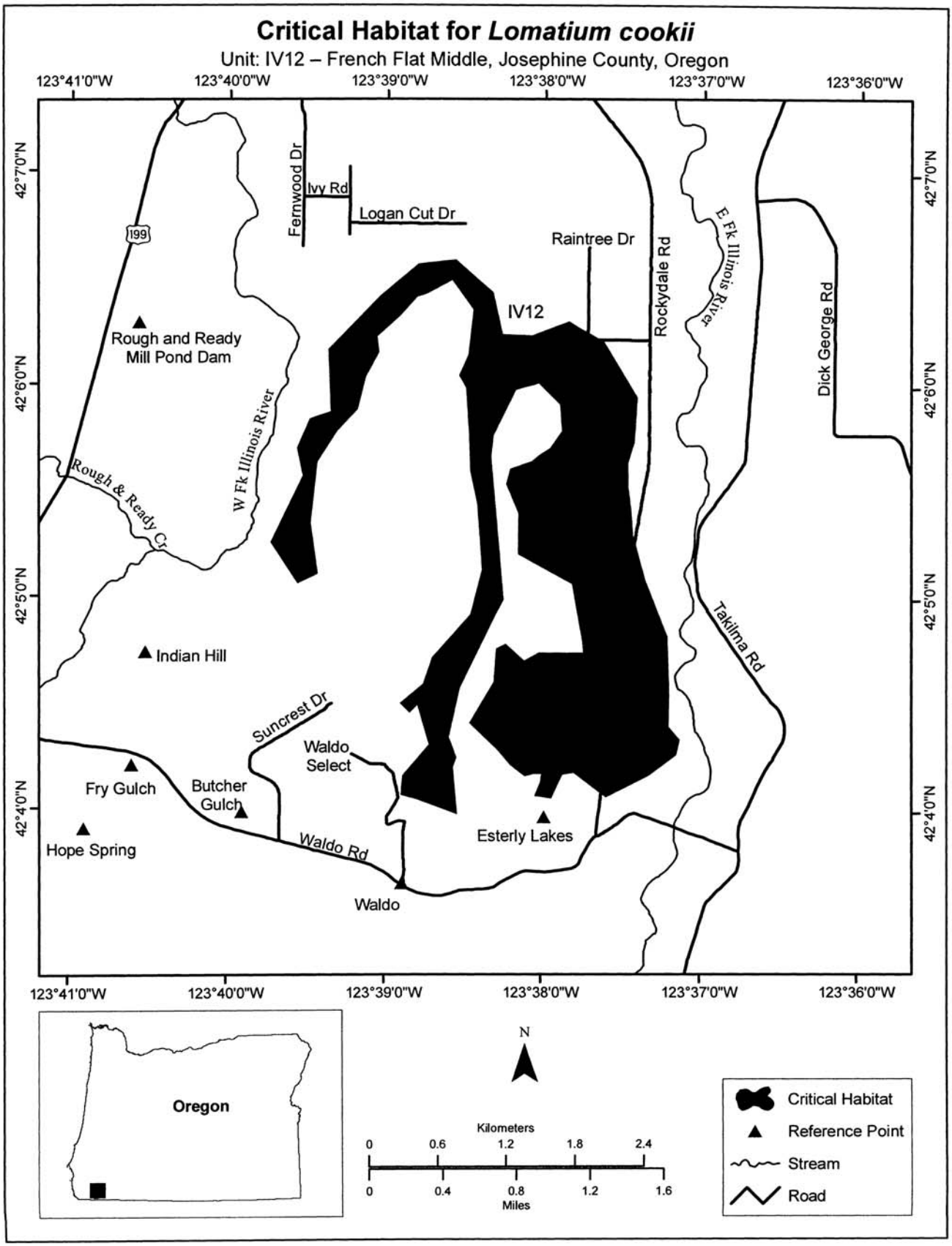
(ii) *Note*: Map of Unit IV11 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV11 – Rough and Ready Creek, Josephine County, Oregon
123°43'0"W
123°42'0"W
123°41'0"W
42°7'0"N
42°6'0"N
42°5'0"N
Turner Rd
West Side Rd
W Fk Illinois River
Patton Bar Rd
Krauss Ln
Airport Dr
Illinois Valley Airport
Rough and Ready Mill Pond Dam
IV11
Rough and Ready Forest Wayside State Park
Seats Dam
Rough & Ready Creek
199
W Fk Illinois River
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(21) Unit IV12 for *Lomatium cookii*: French Flat Middle, Josephine County, Oregon.

(i) Unit IV12 consists of 617 ha (1,524 ac) of intact wet meadow habitat. The unit is located 4.5 km (2.8 mi) east of Cave Junction, 3.7 km (2.3 mi) northeast of O'Brien, 140 m (460 ft) north of Esterly Lakes, 1.4 km (0.9 mi) northeast of Indian Hill, 300 m (960 ft) east of the confluence of Rough and Ready Creek and the West Fork Illinois River, and follows along a 5.0 km (3.1 mi) stretch of Rockydale Road.

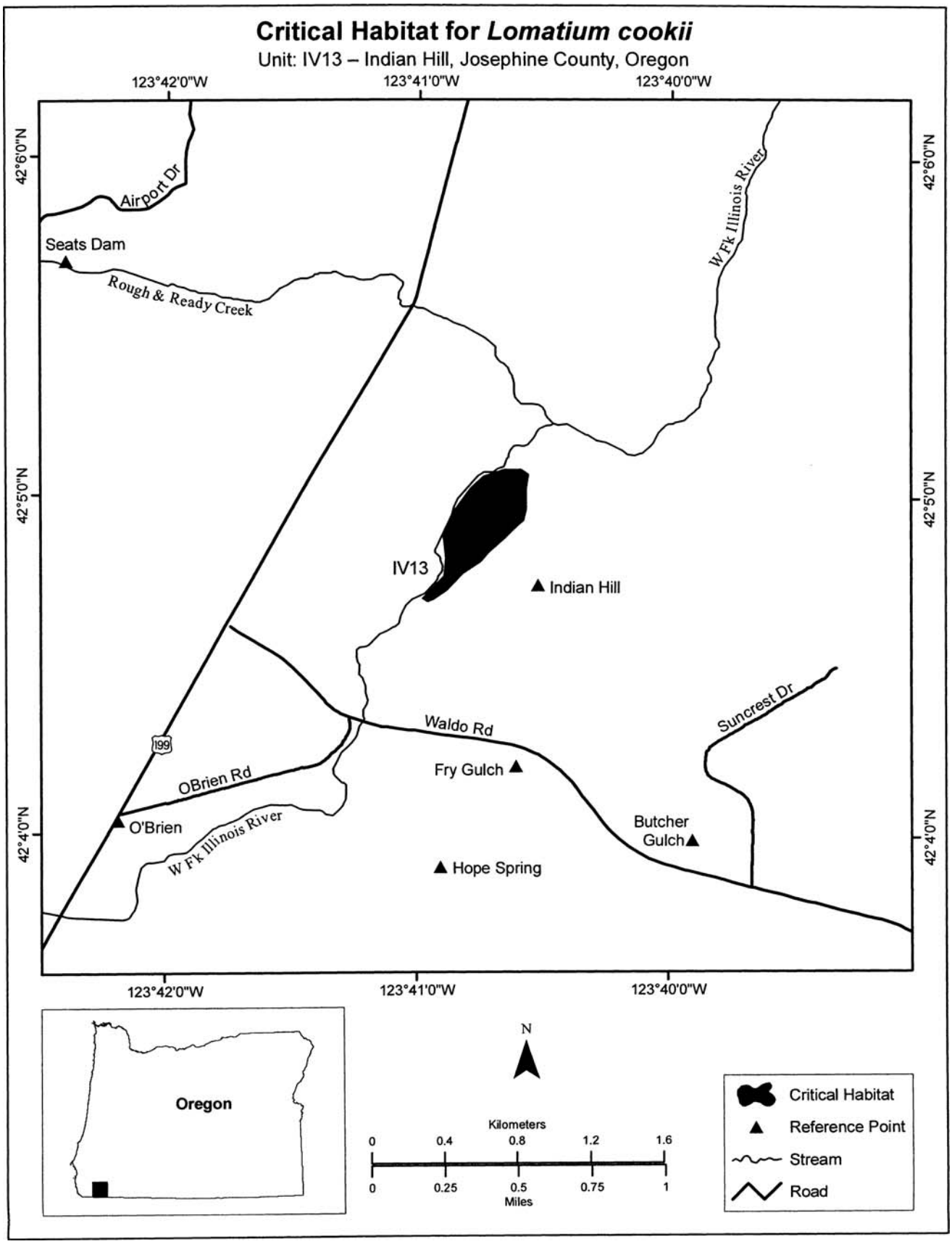
(ii) *Note*: Map of Unit IV12 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV12 – French Flat Middle, Josephine County, Oregon
123°41'0"W
123°40'0"W
123°39'0"W
123°38'0"W
123°37'0"W
123°36'0"W
42°7'0"N
42°6'0"N
42°5'0"N
42°4'0"N
199
Fernwood Dr
Ivy Rd
Logan Cut Dr
Raintree Dr
Rockydale Rd
E Fk Illinois River
Dick George Rd
IV12
Rough and Ready Mill Pond Dam
W Fk Illinois River
Rough & Ready Cr
Indian Hill
Takilma Rd
Suncrest Dr
Waldo Select
Fry Gulch
Butcher Gulch
Hope Spring
Waldo Rd
Esterly Lakes
Waldo
Oregon
N
Kilometers
0
0.6
1.2
1.8
2.4
0
0.4
0.8
1.2
1.6
Miles
Critical Habitat
Reference Point
Stream
Road

(22) Unit IV13 for *Lomatium cookii*: Indian Hill, Josephine County, Oregon.

(i) Unit IV13 consists of 18 ha (45 ac) of intact wet meadow habitat. The unit is located adjacent to and lies east of a 900 m (2,950 ft) stretch of the West Fork Illinois River, located approximately 300 m south (upstream) of the confluence of Rough and Ready Creek and the West Fork Illinois River. The unit is 1.8 km (1.1 mi) northeast of O'Brien and is 350 m (1,150 ft) northwest of Indian Hill.

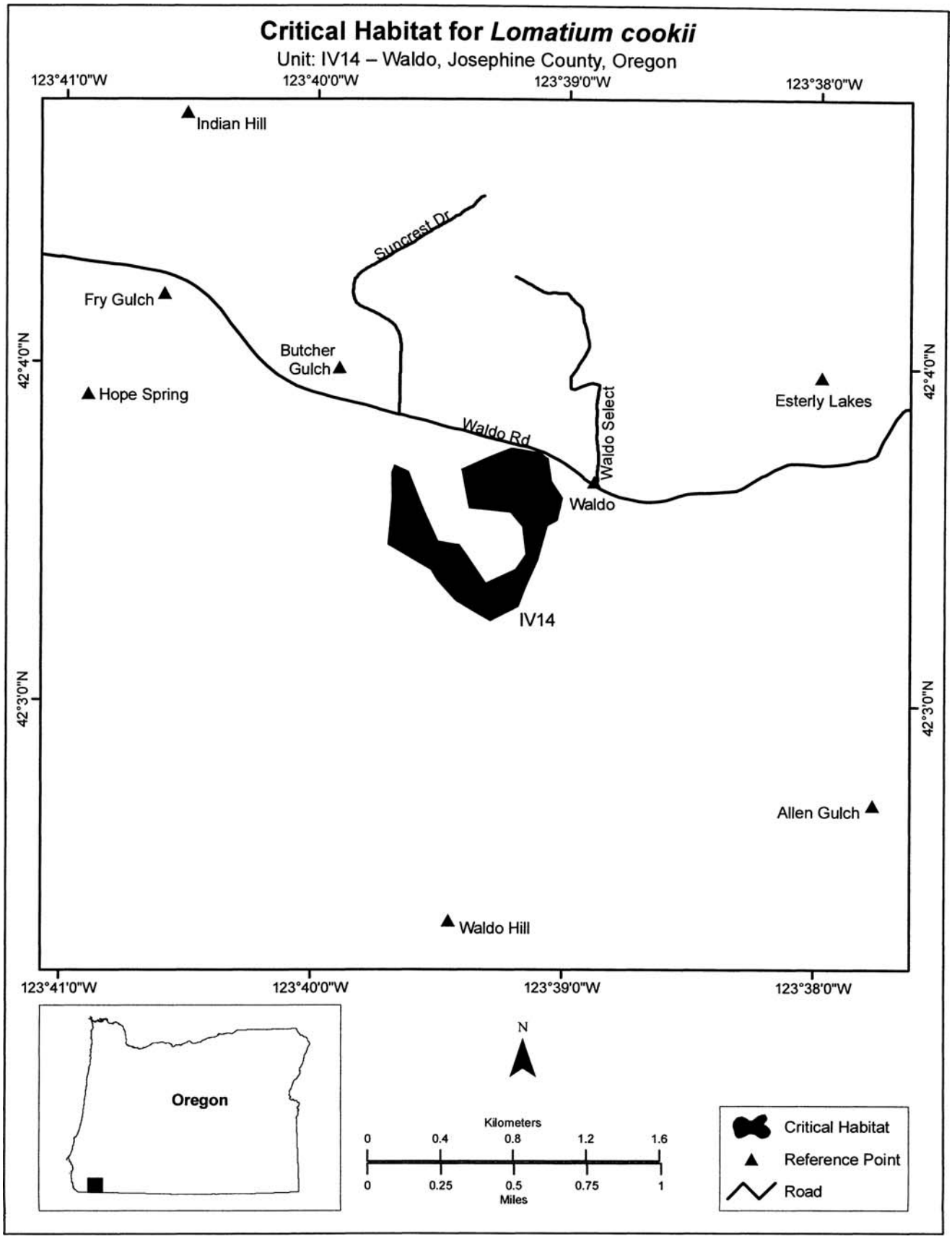
(ii) *Note*: Map of Unit IV13 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV13 – Indian Hill, Josephine County, Oregon
123°42'0"W
123°41'0"W
123°40'0"W
42°6'0"N
42°5'0"N
42°4'0"N
Airport Dr
Seats Dam
Rough & Ready Creek
W Fk Illinois River
IV13
Indian Hill
Waldo Rd
Suncrest Dr
199
OBrien Rd
Fry Gulch
O'Brien
W Fk Illinois River
Butcher Gulch
Hope Spring
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(23) Unit IV14 for *Lomatium cookii*: Waldo, Josephine County, Oregon.

(i) Unit IV14 consists of 40 ha (100 ac) of intact wet meadow habitat. The unit is located 3.4 km (2.1 mi) east-southeast O'Brien, 230 m (750 ft) west of Waldo, 2.4 km (1.5 mi) southeast of Indian Hill, and is 1.5 km (0.9 mi) southwest of Esterly Lakes.

(ii) *Note*: Map of Unit IV14 Critical Habitat for *Lomatium cookii* follows:


Critical Habitat for *Lomatium cookii*
Unit: IV14 – Waldo, Josephine County, Oregon
123°41'0"W
123°40'0"W
123°39'0"W
123°38'0"W
42°4'0"N
42°3'0"N
Indian Hill
Suncrest Dr
Fry Gulch
Butcher Gulch
Hope Spring
Waldo Rd
Waldo Select
Esterly Lakes
Waldo
IV14
Allen Gulch
Waldo Hill
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Road

* * * * *

**Family Limnanthaceae:** *Limnanthes floccosa* **ssp.** *grandiflora* **(large-flowered woolly meadowfoam)**

(1) Critical habitat units for *Limnanthes floccosa* ssp. *grandiflora* are depicted for Jackson County, Oregon, on the maps below.

(2) The primary constituent elements for *Limnanthes floccosa* ssp. *grandiflora* are:

(i) Vernal pools or ephemeral wetlands and the adjacent upland margins of these depressions that hold water for a sufficient length of time to sustain *Limnanthes floccosa* ssp. *grandiflora* germination, growth, and reproduction, occurring in the Agate Desert vernal pool landscape. These vernal pools or ephemeral wetlands are seasonally inundated during wet years but do not necessarily fill with water every year due to natural variability in rainfall, and support native plant populations. Areas of sufficient size and quality are likely to have the following characteristics:

(A)Elevations from 372 to 469 m (1,220 to 1,540 ft);

(B)Associated dominant native plants including, not limited to: *Alopecurus geniculatus, Deschampsia danthonioides*, *Eryngium petiolatum, Lasthenia californica, Myosurus minimus*, *Navarretia leucocephala* ssp. *leucocephala, Phlox gracilis, Plagiobothrys bracteatus*, *Trifolium depauperatum*, and *Triteleia hyacinthine;* and

(C)A minimum area of 8 ha (20 ac) to provide intact hydrology and protection from development and weed sources.

(ii) The hydrologically and ecologically functional system of interconnected pools or ephemeral wetlands or depressions within a matrix of surrounding uplands that together form vernal pool complexes within the greater watershed. The associated features may include the pool basin or depressions; an intact hardpan subsoil underlying the surface soils up to 0.75 m (2.5 ft); and surrounding uplands, including mound topography and other geographic and edaphic features, that support these systems of hydrologically interconnected pools and other ephemeral wetlands (which may vary in extent depending on site-specific characteristics of pool size and depth, soil type and hardpan depth).

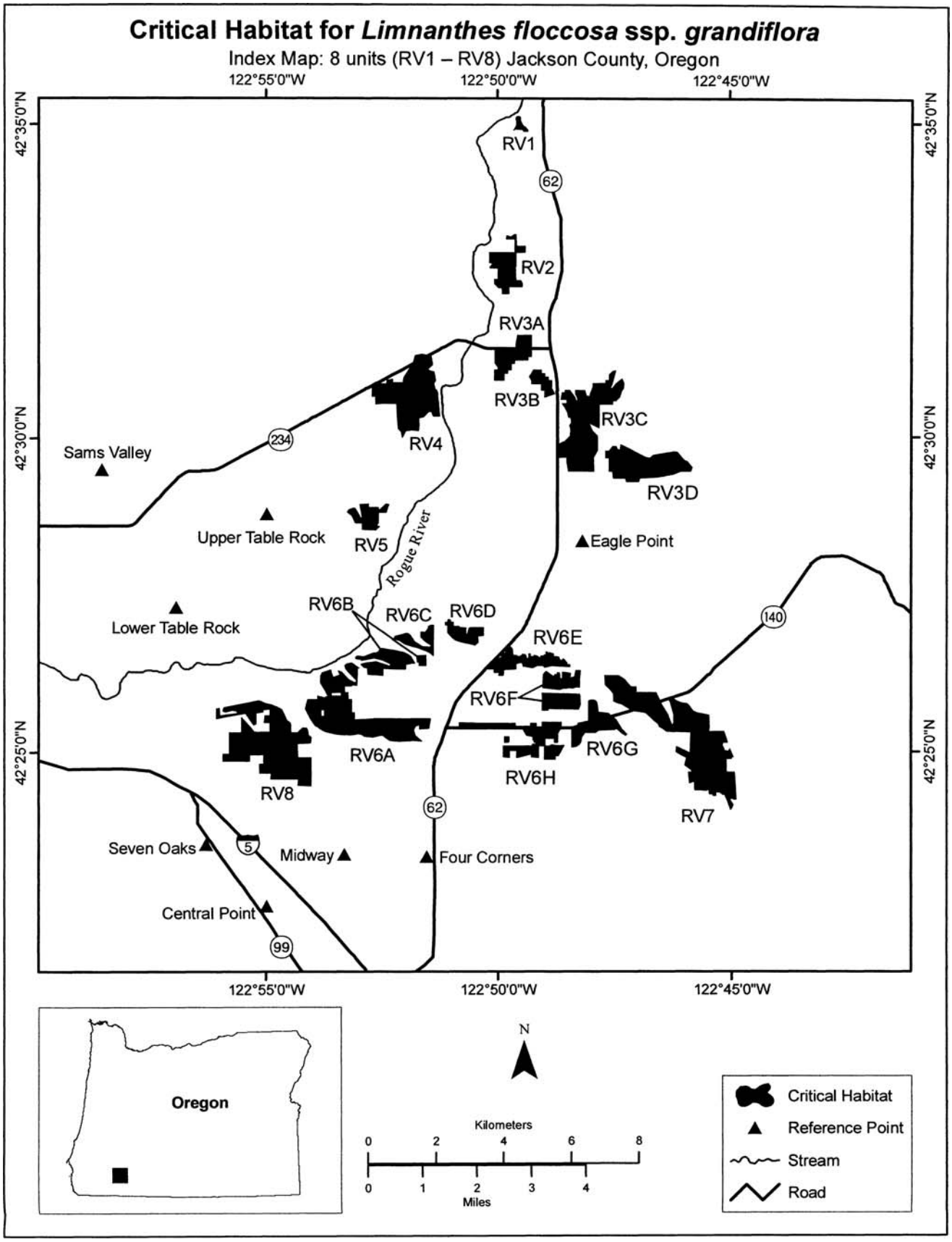
(iii) Silt, loam, and clay soils that are of alluvial origin, with a 0 to 3 percent slope, primarily classified as Agate-Winlo complex soils, but also including Coker clay, Carney clay, Provig-Agate complex soils, and Winlo very gravelly loam soils.

(iv) No or negligible presence of competitive nonnative invasive plant species. (In this usage, ''negligible'' means a minimal level of nonnative plant species that will still allow *Limnanthes floccosa* ssp. *grandiflora* to continue to survive and recover.)

(3) Critical habitat does not include manmade structures (including, but not limited to, buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule and not containing one or more of the primary constituent elements.

(4) Critical habitat unit maps. These critical habitat units were mapped using Universal Transverse Mercator, Zone 10, North American Datum 1983 (UTM NAD 83) coordinates. These coordinates establish the vertices and endpoints of the boundaries of the units.

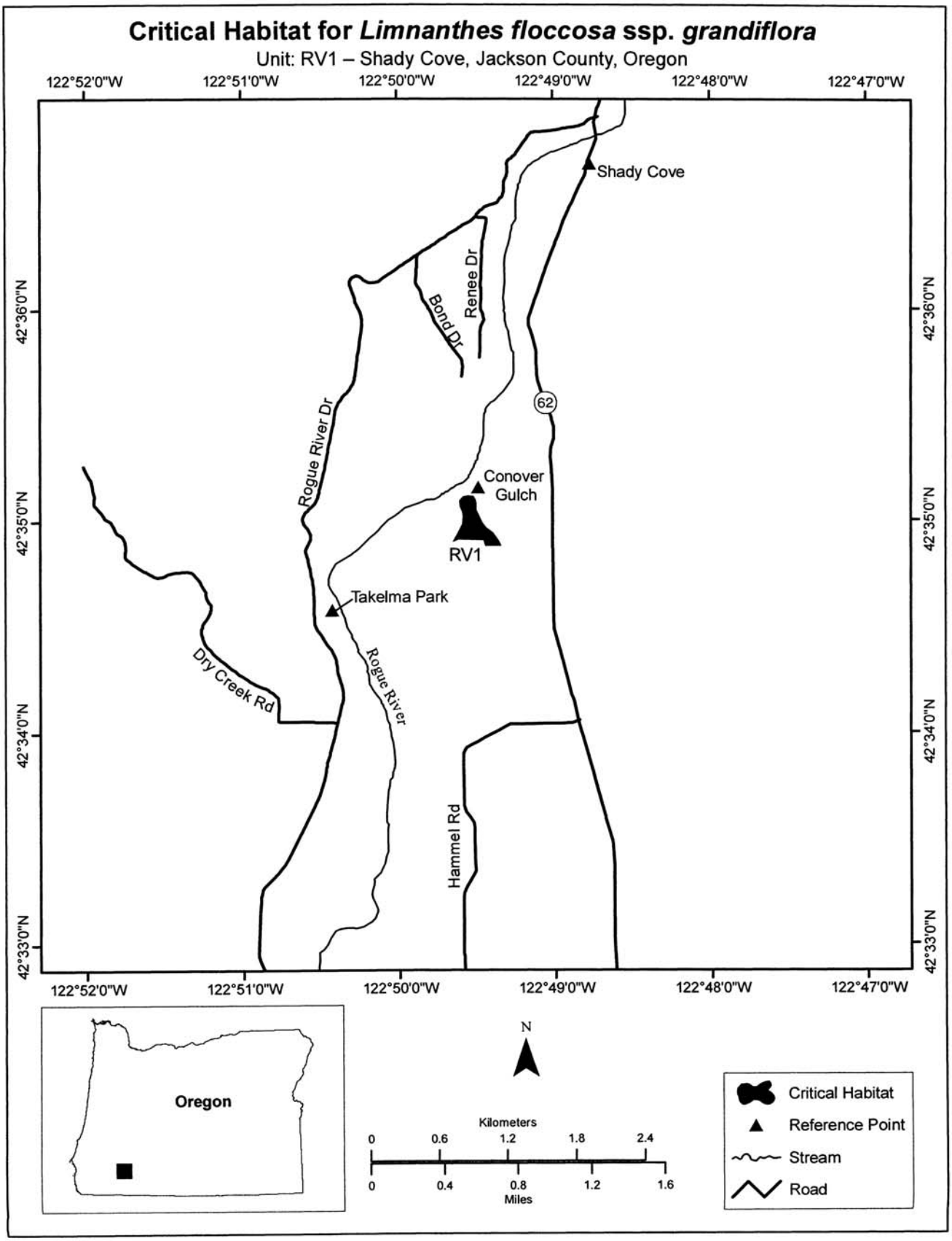
(5) Note: Index Map for critical habitat for *Limnanthes floccosa* ssp. *grandiflora* in Jackson County, Oregon, follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Index Map: 8 units (RV1 – RV8) Jackson County, Oregon
122°55'0"W
122°50'0"W
122°45'0"W
42°35'0"N
42°30'0"N
42°25'0"N
RV1
RV2
RV3A
RV3B
RV3C
RV3D
RV4
RV5
RV6A
RV6B
RV6C
RV6D
RV6E
RV6F
RV6G
RV6H
RV7
RV8
Sams Valley
Upper Table Rock
Lower Table Rock
Eagle Point
Rogue River
Seven Oaks
Midway
Four Corners
Central Point
62
234
140
5
99
Oregon
N
Kilometers
0 2 4 6 8
0 1 2 3 4
Miles
Critical Habitat
Reference Point
Stream
Road

(6) Unit RV1 for *Limnanthes floccosa ssp. grandiflora*: Shady Cove, Jackson County, Oregon.

(i) Unit RV1 consists of approximately 8 ha (20 ha) of intact vernal pool–mounded prairie habitat. The unit is located 460 m (1,500 ft) west of Highway 62 and parallels a 430 m (ft) stretch of the highway. The unit is 0.8 km (0.5 mi) south of Shady Cove, 1.3 km (0.8 mi) northeast of Takelma Park, and is 122 m (400 ft) east of the Rogue River.

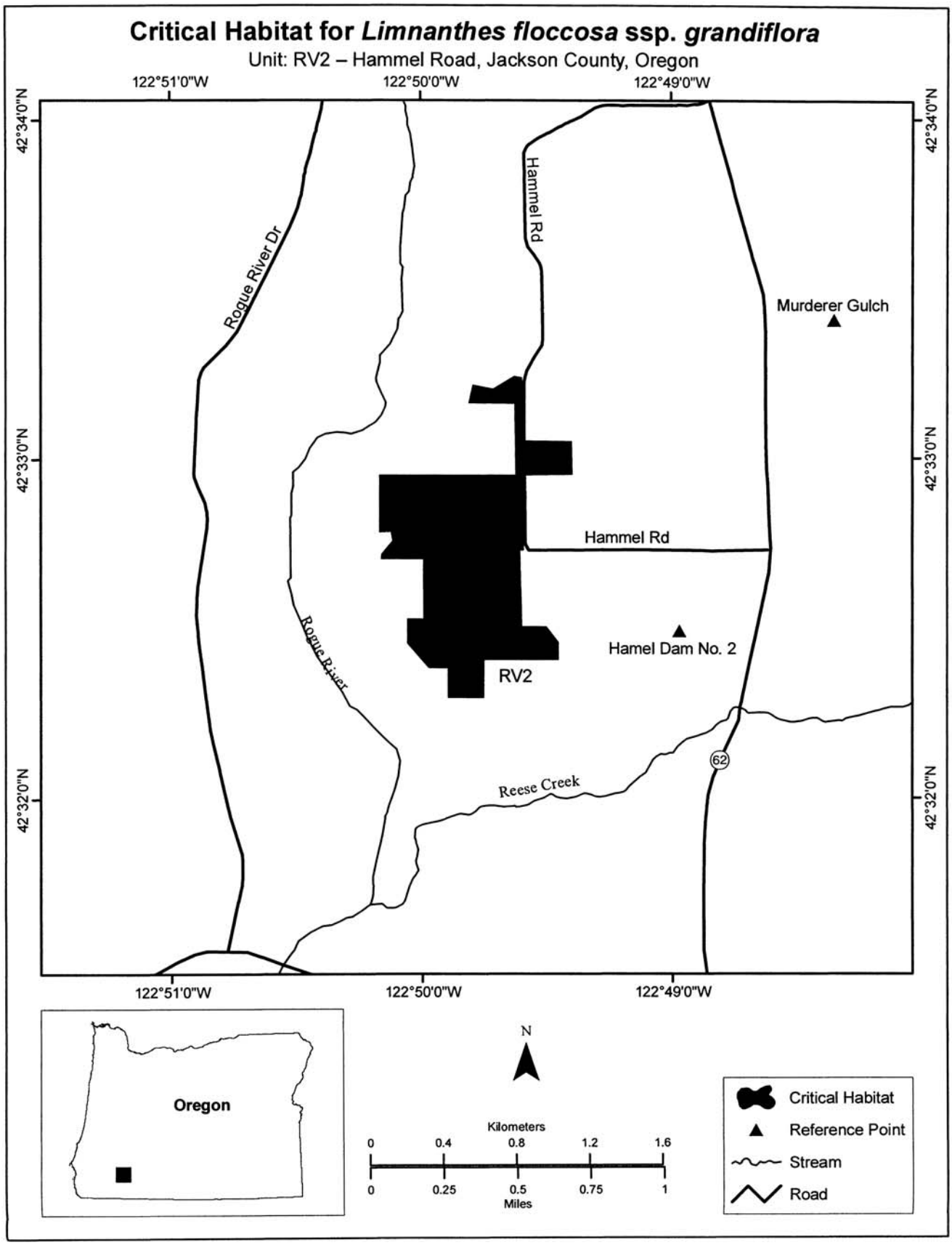
(ii) *Note*: Map of Unit RV1 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Unit: RV1 – Shady Cove, Jackson County, Oregon
122°52'0"W
122°51'0"W
122°50'0"W
122°49'0"W
122°48'0"W
122°47'0"W
42°36'0"N
42°35'0"N
42°34'0"N
42°33'0"N
Shady Cove
Renee Dr
Bond Dr
62
Rogue River Dr
Conover Gulch
RV1
Takelma Park
Dry Creek Rd
Rogue River
Hammel Rd
Oregon
N
Kilometers
0
0.6
1.2
1.8
2.4
0
0.4
0.8
1.2
1.6
Miles
Critical Habitat
Reference Point
Stream
Road

(7) Unit RV2 for *Limnanthes floccosa* ssp. *grandiflora*: Hammel Road, Jackson County, Oregon.

(i) Unit RV 2 consists of approximately 84 ha (207 ac) of intact vernal pool–mounded prairie. The unit located 1.2 km (0.75 mi) northeast of the confluence of Reese Creek and the Rogue River, 1.3 km (0.8 mi) west of Highway 62, and 430 m (1,400 ft) east of the Rogue River.

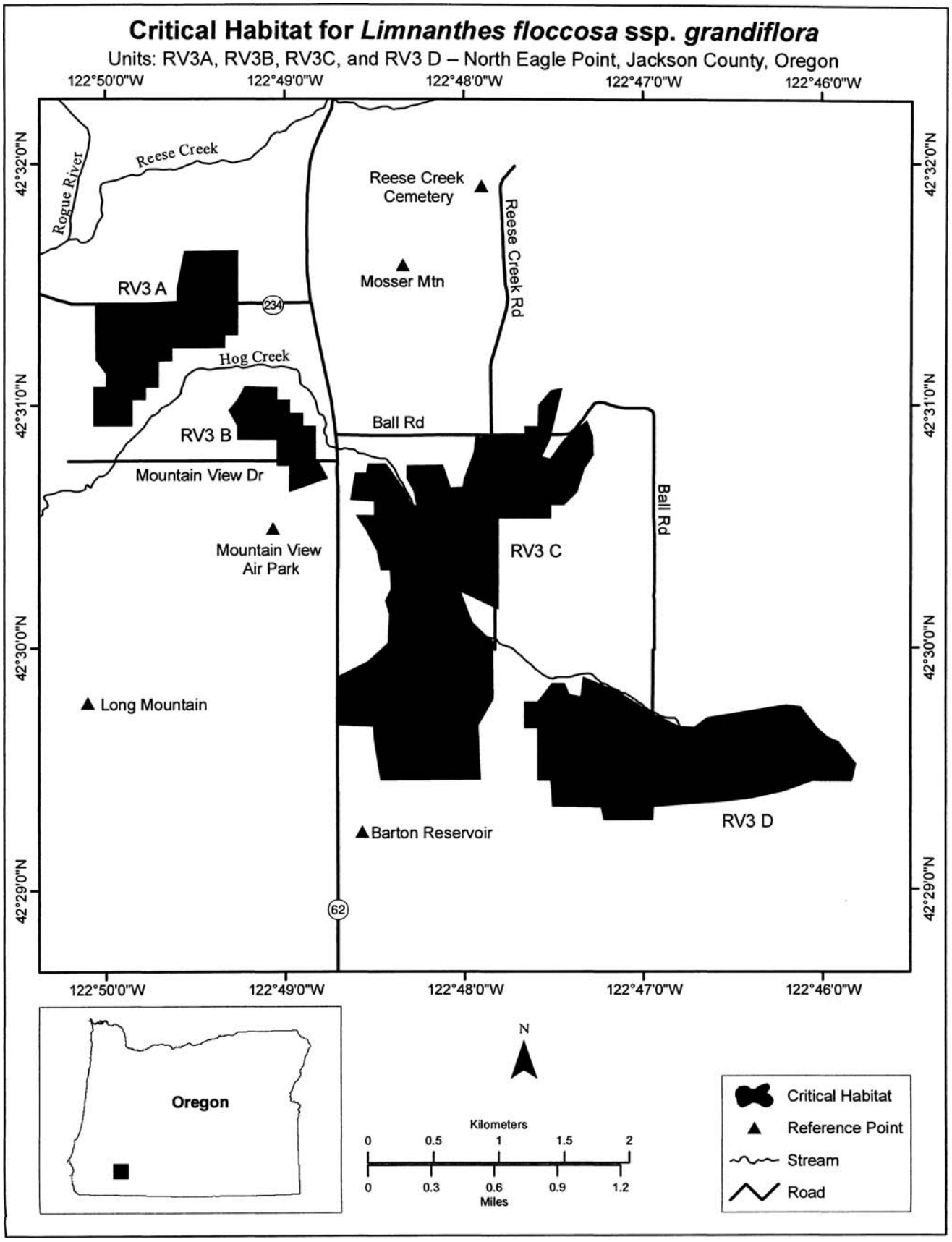
(ii) *Note*: Map of Unit RV2 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Unit: RV2 – Hammel Road, Jackson County, Oregon
122°51'0"W
122°50'0"W
122°49'0"W
42°34'0"N
42°33'0"N
42°32'0"N
Rogue River Dr
Hammel Rd
Murderer Gulch
Hammel Rd
Rogue River
Hamel Dam No. 2
RV2
Reese Creek
62
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(8) Unit RV3 for *Limnanthes floccosa* ssp. *grandiflora*: North Eagle Point, Jackson County, Oregon.

(i) Unit RV3 is composed of four subunits and totals 538.5 ha (1,331 ac) of intact vernal pool habitat. The unit is located southwest of Mosser Mountain and northeast of Long Mountain. The four subunits loosely follow a 6.9 km (4.3 mi) stretch of Hog Creek beginning at its origin. Originating 3.8 km (2.4 mi) east of Highway 62 in subunit RV3D, Hog Creek runs through RV3C, crosses Highway 62, flows between RV3B (located 100 m (328 ft) west of Highway 62) and RV3A (located 600 m (1,970 ft) west of Highway 62), before emptying into the Rogue River after 2.4 km (1.5 mi). Subunit RV3A is located 560 m (1,837 ft) southeast of the confluence of Reese Creek and the Rogue River. Subunit RV3B is located 100 m (328 ft) west of Highway 62 at the intersection of Ball Road and extends along an 835 m (2,740 ft) stretch of Hog Creek. Subunit RV3C is located 2 km (1.2 mi) north of Eagle Point (see Index map) and extends 2.6 km (1.6 mi) south of the junction of Ball Road and Reese Creek Road. Subunit RV3D is located 3.2 km (2 mi) east of Long Mountain and is 2.4 km (1.5 mi) southeast of the junction of Highway 62 and Ball Road. It extends along a 1.8 km (1.1 mi) stretch of Hog Creek.

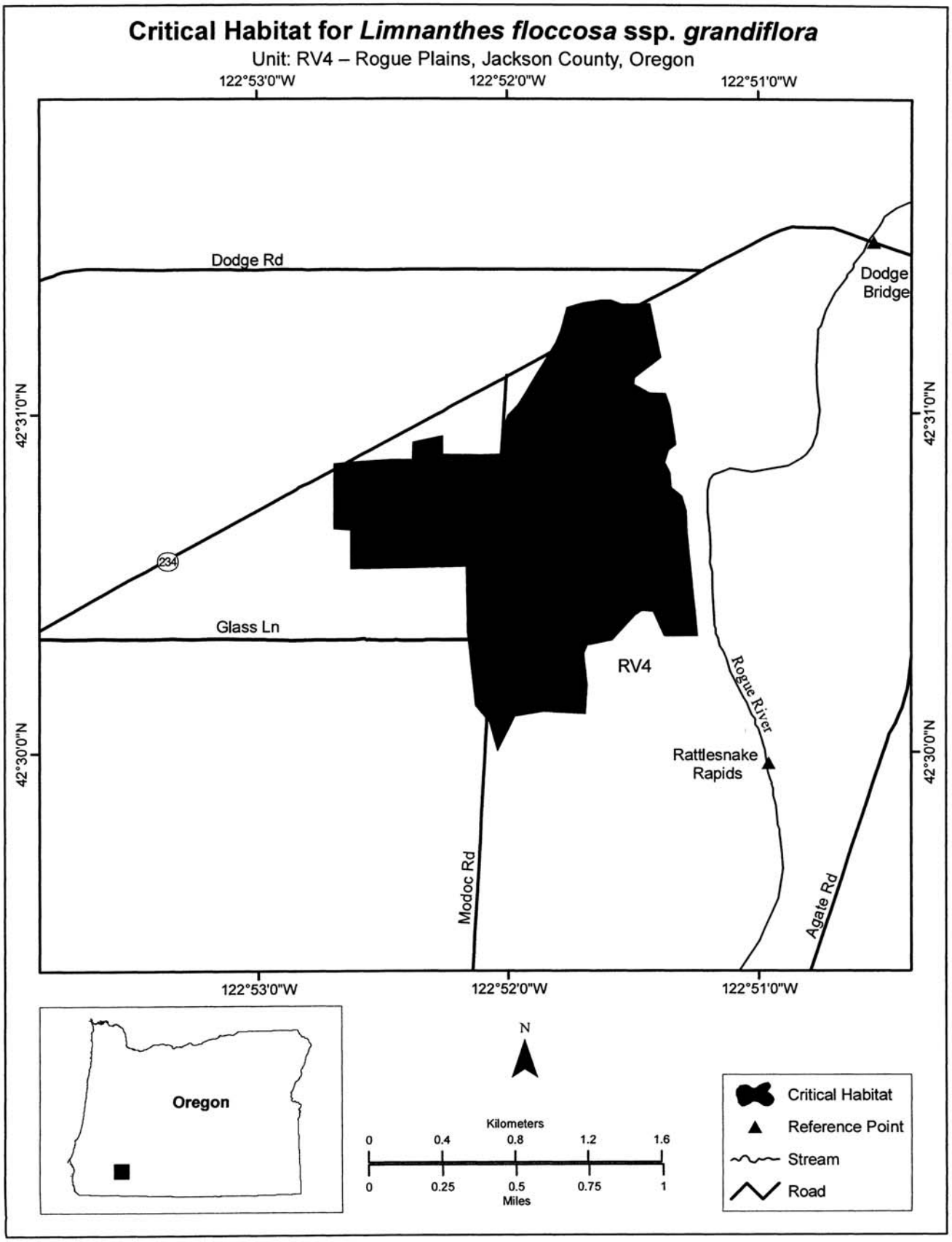
(ii) *Note*: Map of Unit RV3 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Units: RV3A, RV3B, RV3C, and RV3 D – North Eagle Point, Jackson County, Oregon
122°50'0"W
122°49'0"W
122°48'0"W
122°47'0"W
122°46'0"W
42°32'0"N
42°31'0"N
42°30'0"N
42°29'0"N
Rogue River
Reese Creek
Reese Creek Cemetery
Reese Creek Rd
Mosser Mtn
RV3 A
234
Hog Creek
RV3 B
Ball Rd
Mountain View Dr
Mountain View Air Park
RV3 C
Ball Rd
Long Mountain
Barton Reservoir
RV3 D
62
Oregon
N
Kilometers
0
0.5
1
1.5
2
0
0.3
0.6
0.9
1.2
Miles
Critical Habitat
Reference Point
Stream
Road

(9) Unit RV4 for *Limnanthes floccosa* ssp. *grandiflora*: Rogue Plains, Jackson County, Oregon.

(i) Unit RV4 consists of 245 ha (605 ac) of intact vernal pool–mounded prairie habitat. The unit is located 122 m (400 ft) southeast of the junction of Highway 234 and Modoc Road. It extends 2 km (1.2 mi) south along Modoc Road from the intersection, is located 1.4 km (0.87 mi) southwest of Dodge Bridge, and 1.0 km (0.6 mi) northwest of Rattlesnake Rapids on the Rogue River.

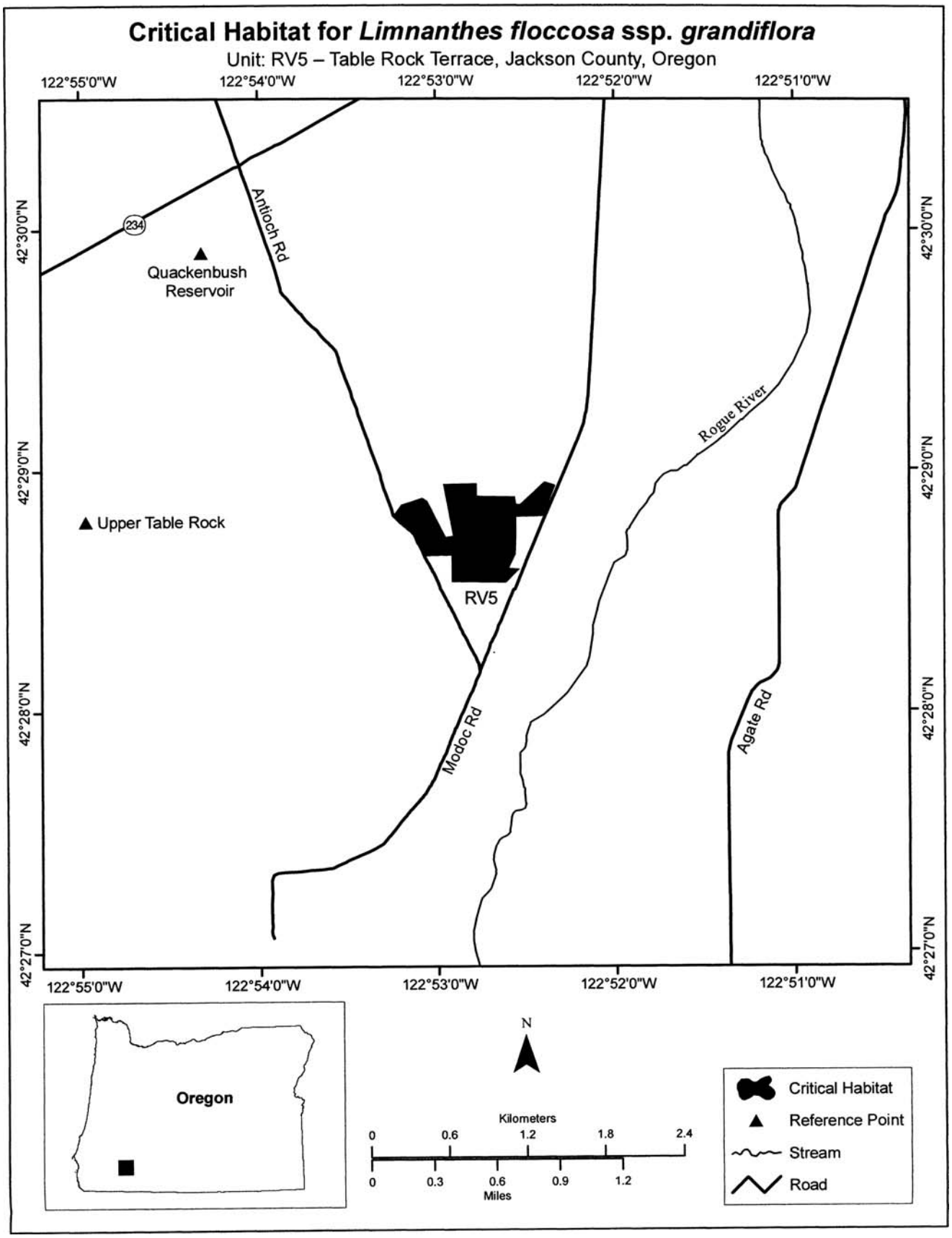
(ii) *Note*: Map of Unit RV4 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Unit: RV4 – Rogue Plains, Jackson County, Oregon
122°53'0"W
122°52'0"W
122°51'0"W
42°31'0"N
42°30'0"N
Dodge Rd
Dodge Bridge
234
Glass Ln
RV4
Rogue River
Rattlesnake Rapids
Modoc Rd
Agate Rd
Oregon
N
Kilometers
0
0.4
0.8
1.2
1.6
0
0.25
0.5
0.75
1
Miles
Critical Habitat
Reference Point
Stream
Road

(10) Unit RV5 for *Limnanthes floccosa ssp. grandiflora*: Table Rock Terrace, Jackson County, Oregon.

(i) Unit RV5 includes 49.5 ha (122 ac) of intact vernal pool–mounded prairie habitat. The unit is located on privately owned land 670 m (2,200 ft) north of the junction of Modoc and Antioc Roads, is 1.4 km (0.9 mi) east of Upper Table Rock, and 650 m (2,300 ft) west of the Rogue River. This unit follows along an 800 m (2,600 ft) stretch of Modoc Road to the east of the unit and a 700 m (2,300 ft) stretch of Antioc Road to the west of the unit.

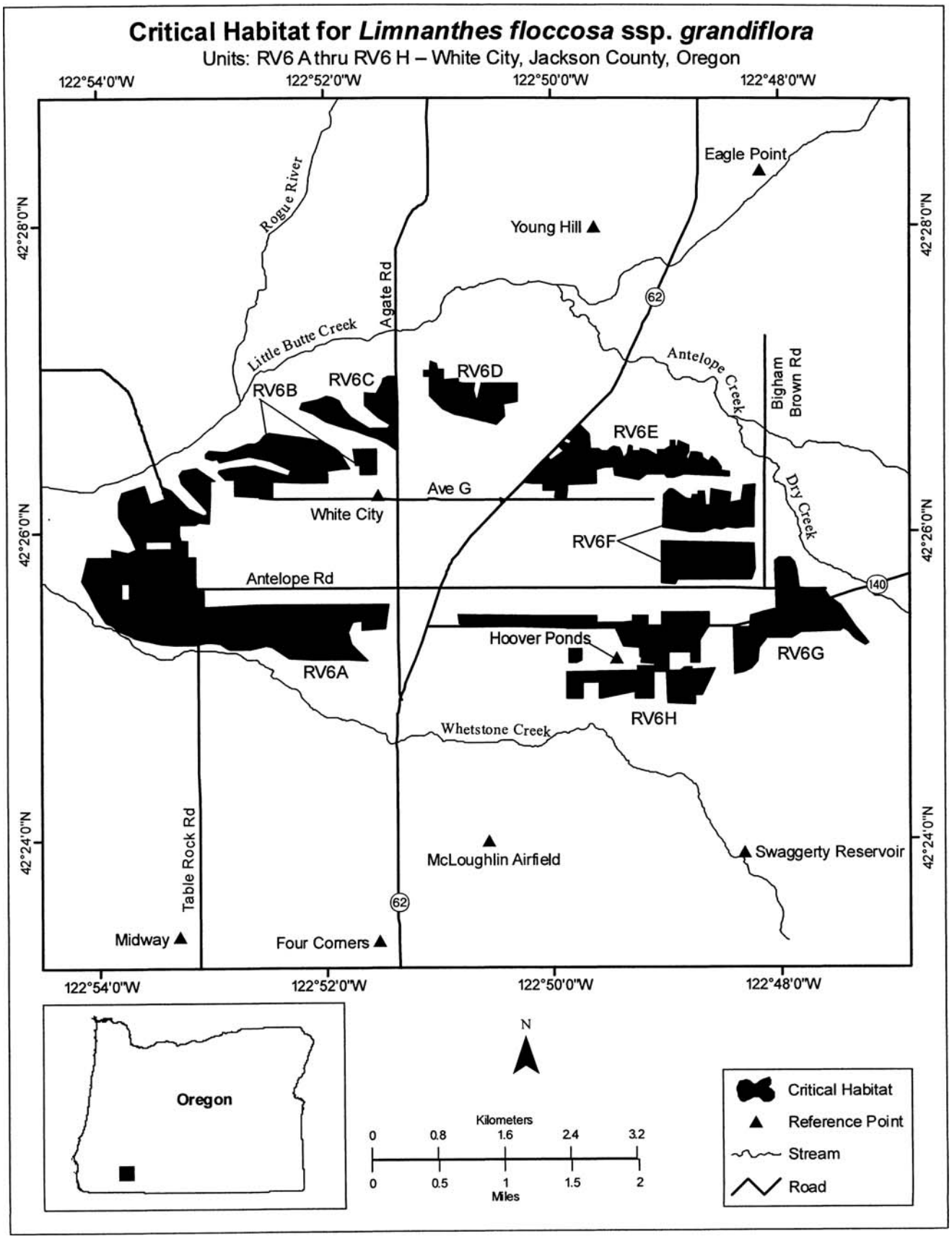
(ii) *Note*: Map of Unit RV5 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Unit: RV5 – Table Rock Terrace, Jackson County, Oregon
122°55'0"W
122°54'0"W
122°53'0"W
122°52'0"W
122°51'0"W
42°30'0"N
42°29'0"N
42°28'0"N
42°27'0"N
234
Antioch Rd
Quackenbush Reservoir
Upper Table Rock
RV5
Rogue River
Modoc Rd
Agate Rd
Oregon
N
Kilometers
0
0.6
1.2
1.8
2.4
0
0.3
0.6
0.9
1.2
Miles
Critical Habitat
Reference Point
Stream
Road

(11) Unit RV6 for *Limnanthes floccosa* ssp. *grandiflora*: White City, Jackson County, Oregon.

(i) Unit RV6 for *Limnanthes floccosa* ssp. *grandiflora* is 848 ha (2,095 ac) in size and includes intact vernal pool–mounded prairie and swale habitats. The unit is located around White City, is 1.6 km (1.0 mi) southwest of Eagle Point, and is 440 m (1,444 ft) southeast of the confluence of the Rogue River and Little Butte Creek. Subunit RV6A is located north of Whetstone Creek and is 500 m (1,200 ft) west of the junction of Highway 62 and Antelope Road. Subunits RV6B, RV6C, RV6D, and RV6E are located north of Avenue G in White City, south of Little Butte Creek, and 670 m (2,200 ft) southwest of Antelope Creek. Subunits RV6F and RV6G are located approximately 500 feet west of Dry Creek and are east of Highway 62 in White City. Subunit RV6H is located north of Whetstone Creek and south of Antelope Road. Subunit RV6H roughly encircles the Hoover Ponds, east of Highway 62, and is 850 m (2790 ft) east of subunit RV6A.

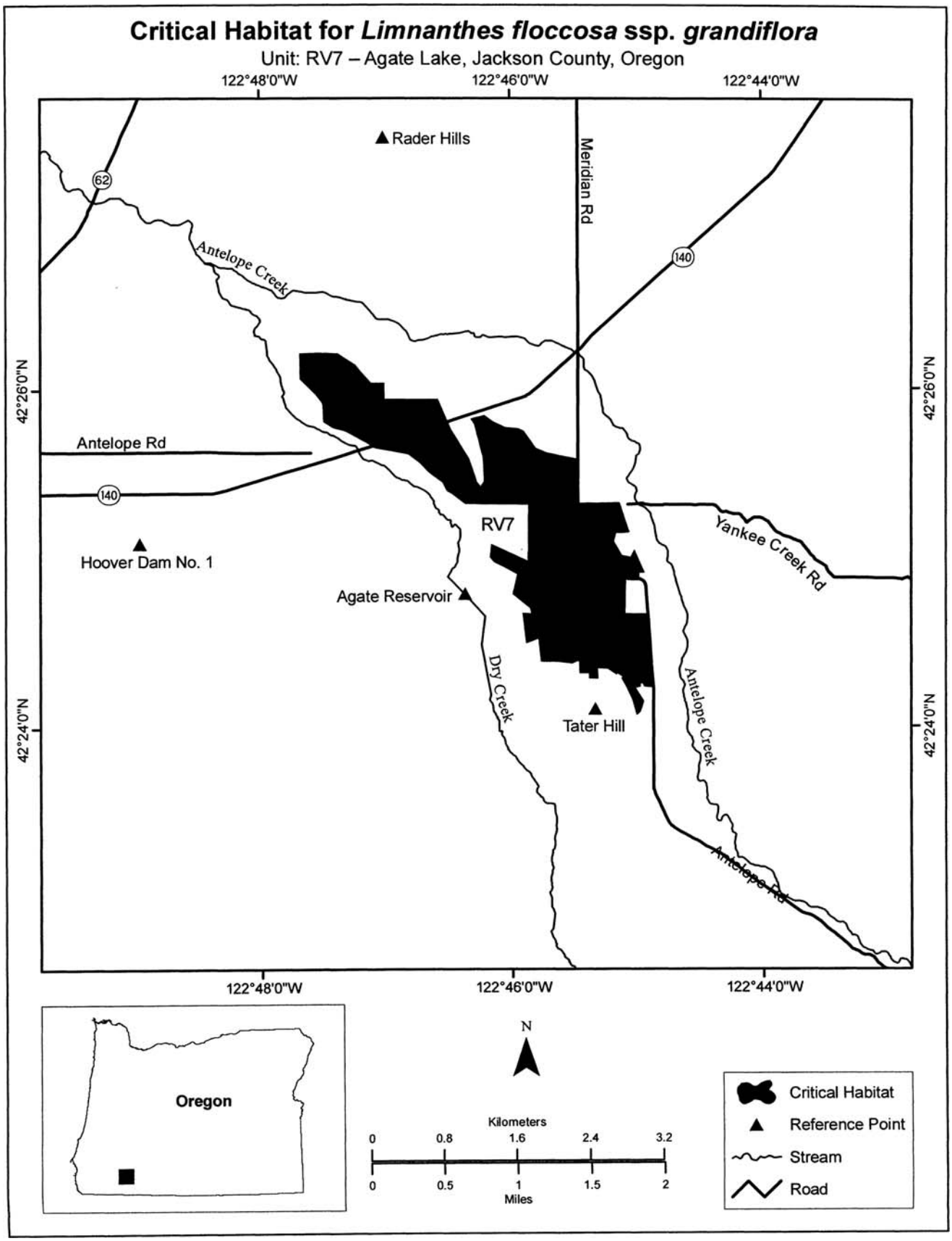
(ii) *Note*: Map of Unit RV6 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Units: RV6 A thru RV6 H – White City, Jackson County, Oregon
122°54'0"W
122°52'0"W
122°50'0"W
122°48'0"W
42°28'0"N
42°26'0"N
42°24'0"N
Rogue River
Little Butte Creek
Agate Rd
Young Hill
Eagle Point
62
Antelope Creek
Bigham Brown Rd
Dry Creek
RV6B
RV6C
RV6D
RV6E
RV6F
RV6G
RV6H
RV6A
Ave G
White City
Antelope Rd
140
Hoover Ponds
Whetstone Creek
Table Rock Rd
McLoughlin Airfield
Swaggerty Reservoir
Midway
Four Corners
Oregon
N
Kilometers
0
0.8
1.6
2.4
3.2
0
0.5
1
1.5
2
Miles
Critical Habitat
Reference Point
Stream
Road

(12) Unit RV7: for *Limnanthes floccosa* spp. *grandiflora*: Agate Lake, Jackson County, Oregon.

(i) Unit RV7 consists of 426 ha (1,053 ac) of intact vernal pool–mounded prairie and swale habitat. The unit is located 500 m (1,640 ft) east of the Agate Reservoir, along a 5.4-km (3.4-mi) stretch roughly parallel and between Dry Creek and Antelope Creek, is 330 m (1,080 ft) north of Tater Hill, and is 1.4 km (0.9 mi) southeast of the confluence of Dry Creek and Antelope Creek.

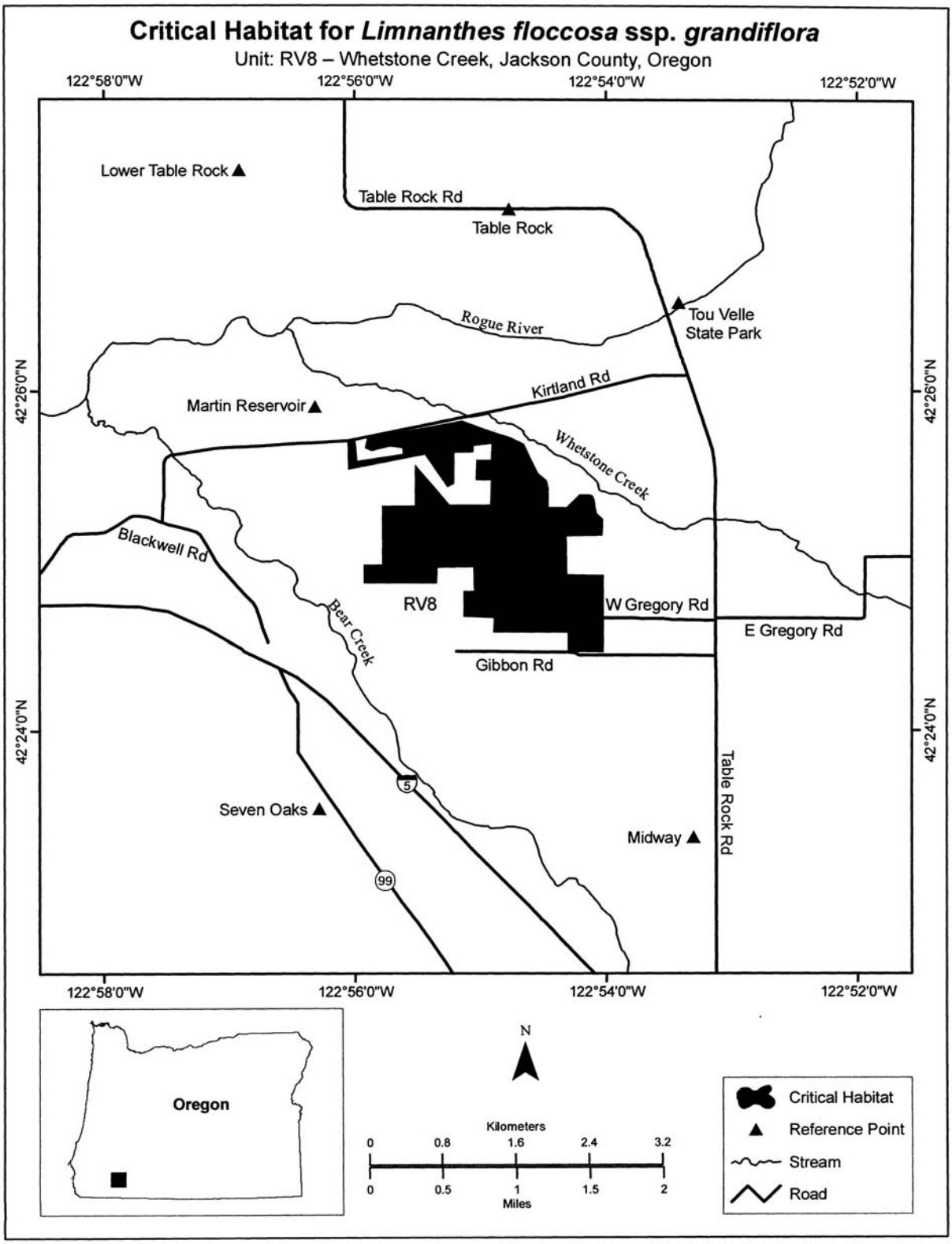
(ii) *Note*: Map of Unit RV7 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:


Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora*
Unit: RV7 – Agate Lake, Jackson County, Oregon
122°48'0"W
122°46'0"W
122°44'0"W
42°26'0"N
42°24'0"N
Rader Hills
Meridian Rd
62
140
Antelope Creek
Antelope Rd
RV7
Hoover Dam No. 1
Agate Reservoir
Yankee Creek Rd
Dry Creek
Tater Hill
Antelope Creek
Antelope Rd
Oregon
N
Kilometers
0
0.8
1.6
2.4
3.2
Miles
0
0.5
1
1.5
2
Critical Habitat
Reference Point
Stream
Road

(13) Unit RV8 for *Limnanthes floccosa ssp. grandiflora*: Whetstone Creek, Jackson County, Oregon.

(i) Unit RV8 consists of 362.5 ha (896 ac) of intact vernal pool–mounded prairie and swale habitat. The unit is located approximately 1.4 km (0.9 mi) southeast of the confluence of the Rogue River and Whetstone Creek, 2.2 km (1.4 mi) southwest of Tou Velle State Park, and 2.9 km southeast of the confluence of Bear Creek and the Rogue River. The unit roughly parallels a 2.6 km (1.6 mi) stretch of Whetstone Creek to the south.

(ii) *Note*: Map of Unit RV8 Critical Habitat for *Limnanthes floccosa* ssp. *grandiflora* follows:




* * * * *

Dated: July 13, 2009

**Jane Lyder**

*Deputy Assistant Secretary for Fish and Wildlife and Parks*

[FR Doc. E9–17522 Filed 7–27–09; 8:45 am]

**BILLING CODE 4310–55–C**

Federal Register

Tuesday,
July 28, 2009

# Part III

# Department of the Treasury

## Alcohol and Tobacco Tax and Trade Bureau

## 27 CFR Parts 17, 19, 20, et al.

## Liquor Dealer Recordkeeping and Registration, and Repeal of Certain Special (Occupational) Taxes; Temporary Rule and Proposed Rule

**DEPARTMENT OF THE TREASURY**

**Alcohol and Tobacco Tax and Trade Bureau**

**27 CFR Parts 17, 19, 20, 22, 24, 25, 26, 27, 28, 31, 40, 44, 46, and 70**

**[Docket No. TTB–2009–0003; T.D. TTB–79; Re: Notice No. 96]**

**RIN 1513–AB63**

# Liquor Dealer Recordkeeping and Registration, and Repeal of Certain Special (Occupational) Taxes

**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau, Treasury.

**ACTION:** Temporary rule; Treasury decision.

**SUMMARY:** This temporary rule amends the regulations administered by the Alcohol and Tobacco Tax and Trade Bureau, to reflect the repeal of certain special (occupational) taxes by section 11125 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. The repeal involves such taxes on alcohol beverage producers and dealers, tax-free alcohol users, denatured spirits users and dealers, and persons claiming drawback for the manufacture of nonbeverage alcoholic products. In place of the special (occupational) tax requirement, the amended law requires recordkeeping and registration by dealers in distilled spirits, wines, and beer, and by manufacturers of nonbeverage products who claim drawback. We also are soliciting comments from all interested parties on these regulatory amendments through a notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

**DATES:** *Effective Dates:* This temporary rule is effective July 28, 2009 through July 30, 2012.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning registration or occupational tax filing procedures, contact Jackie Feinauer, National Revenue Center, Alcohol and Tobacco Tax and Trade Bureau (800–937–8864); for other questions concerning this document, contact Steve Simon, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau (202–453–2164).

**SUPPLEMENTARY INFORMATION:**

## Background

On August 10, 2005, the President signed into law the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,'' Public Law 109–59, 119 Stat. 1953 (the Act). Section 11125 of the Act amended certain provisions of the Internal Revenue Code of 1986 (IRC) (26 U.S.C.) to repeal, effective July 1, 2008, the provisions covering special (occupational) taxes (also referred to in this document as SOT or special taxes) on:

- Producers and dealers of alcohol beverages,
- Manufacturers of nonbeverage products,
- Users of tax-free alcohol, and
- Users and dealers of specially denatured spirits.

Although section 11125 repealed the tax for these occupations, it did not remove the recordkeeping and registration requirements for dealers in alcohol beverages and for manufacturers of nonbeverage products. Under section 11125, all persons who sell distilled spirits, wine, or beer are dealers. As explained below, this covers only those dealers who sell alcohol products fit for beverage use.

The IRC chapter 51 and 52 provisions referred to above, and the regulations promulgated thereunder and contained in title 27 of the Code of Federal Regulations, are administered by the Alcohol and Tobacco Tax and Trade Bureau (TTB).

In order to remove the special (occupational) taxes on producers and marketers of alcohol beverages, paragraph (a) of section 11125 repealed the following subparts and sections of IRC chapter 51, subchapter A, part II:

- Subpart A relating to proprietors of distilled spirits plants, bonded wine cellars, etc. (26 U.S.C. 5081);
- Subpart B relating to brewers (26 U.S.C. 5091–5093);
- Subpart D relating to wholesale dealers, except for sections 5114 and 5116 (26 U.S.C. 5111–5113 and 5117);
- Subpart E relating to retail dealers, except for section 5124 (26 U.S.C. 5121–5123 and 5125); and
- Subpart G relating to general provisions, except for sections 5142, 5143, 5145, and 5146 (26 U.S.C. 5141 and 5147–5149).

Section 11125(a) also did away with the special (occupational) tax on nonbeverage drawback claimants by removing from 26 U.S.C. 5131 the reference to annual payment of a special tax. Finally, section 11125(a) did away with the special (occupational) tax on industrial use of distilled spirits by repealing 26 U.S.C. 5276.

Paragraph (b) of section 11125 made a number of conforming amendments to IRC chapter 51, subchapter A, part II. These amendments involved:

- Redesignating subpart C as subpart A;
- Redesignating subpart F as subpart B (with sections 5131 through 5134 redesignated as sections 5111 through 5114);
- Removing the special tax rate provision from redesignated section 5111; and
- Adding new subparts C (containing new sections 5121 through 5124) and D (containing new sections 5131 and 5132). **Note:** A technical error in the designation of section 5121 was corrected by section 11(a)(31) of the Tax Technical Corrections Act of 2007 (Pub. L. 110–172, 121 Stat. 2487).

New sections 5121, 5122, and 5123 were obtained by redesignating sections 5114, 5124, and 5146, respectively. The text of former section 5112 is included in new section 5121, and the text of former section 5122 is included in new section 5122. New section 5124, titled ''Registration by Dealers,'' is patterned after existing section 7011(a). New section 5131 was obtained by redesignating section 5116, and new section 5132 contains, with a change, the text of former section 5117.

Paragraph (b) of section 11125 made additional conforming amendments elsewhere in the IRC, of which we note the following:

- Chapter 51, subchapter J, part V (section 5691) was repealed (although the terms of section 5691(b) were included in new section 5121(c)(4)); and
- Sections 5142, 5143, and 5145 were redesignated as sections 5732, 5733, and 5734 in subchapter D of chapter 52, relating to the special tax on tobacco occupations, which remains in effect.

## Temporary Rule

Based on the July 1, 2008, effective date of the repeal of certain special (occupational) taxes, as described above, TTB believes that the proper administration of the repeal and the related changes to recordkeeping and registration requirements necessitates immediate adoption of the implementing regulations as a temporary rule.

## Public Participation

To submit comments on the regulatory amendments contained in this temporary rule, please refer to the related notice of proposed rulemaking on this subject published elsewhere in this issue of the **Federal Register**.

## Basic Interpretative Considerations

Based on a careful reading of the amendments set out in section 11125 of the Act and resulting statutory language, TTB has applied the following considerations in preparing the regulatory changes to title 27 of the Code of Federal Regulations (27 CFR) set forth in this document:

1. *Application*. Consistent with the Government's longstanding interpretation of the IRC, liquor dealer recordkeeping and registration requirements apply only to dealers in alcohol fit for beverage use. See, *e.g.*, 26 CFR 194.21 (1960 ed.). ''Alcohol fit for beverage use'' not only includes alcohol beverages but also includes alcoholic products for industrial use, unless the products are unfit for beverage use.

2. *Frequency of registration*. SOT for dealers was an annual tax, and filing of the return and registration was required by regulation on an annual basis. However, the IRC does not, and never did, require annual dealer registration, only that such dealers must ''register with the Secretary.'' We see no reason to continue the annual filing requirement in the absence of annual collection of a tax. Instead, the regulatory changes in this document lessen the dealers' burden by requiring registration upon entering business as a dealer, with subsequent registrations required only for reporting changes in certain information and upon termination of business. On the other hand, Manufacturer of Nonbeverage Products (MNBP) drawback claimant registration is required annually because of the wording of 26 U.S.C. 5112. For persons filing MNBP drawback claims under the IRC, the first claim for the calendar year will satisfy the registration requirement if the claim contains the required registration information; subsequent claims with updated information will be considered amended registrations.

3. *Registration of proprietors of distilled spirits plants, bonded wine cellars, etc*. Since the definition of ''dealer'' in new section 5121(c)(4) of the IRC refers to ''any person who sells, or offers for sale, any distilled spirits, wines, or beer,'' the requirements for recordkeeping and registration by dealers will also apply to proprietors of distilled spirits plants, bonded wine premises, taxpaid wine bottling houses, and breweries, if those proprietors sell their products or offer them for sale. Although these persons previously were generally exempted by 26 U.S.C. 5113 from the registration requirements applicable to liquor and beer dealers, this situation changed when section 11125 of the Act repealed section 5113 of the IRC and thereby deleted the exemption under section 5113.

In order to minimize the resulting regulatory burden, TTB has determined that proprietors of distilled spirits plants, bonded wine premises, and taxpaid wine bottling houses who have qualified under the IRC, and brewers who hold approved brewers' notices under the IRC, will be deemed to have registered as dealers. In other words, the qualification and brewer's notice will serve as the registration required by section 11125. As part of the qualification or notice process, the proprietor must file and maintain in a current status all the information required for dealer registration under section 11125. Required notices of changes to the information required for IRC qualification or the brewer's notice will be considered as amendments to the dealer registration, and notice that the proprietor is going out of business will terminate the dealer registration as well.

4. *Proprietors will be registered as wholesale liquor dealers*. Proprietors of distilled spirits plants, bonded wine premises, and taxpaid wine bottling houses qualified under the IRC, and brewers who hold approved brewers notices under the IRC, will be treated as wholesale liquor dealers for registration purposes. This will allow the proprietor to sell distilled spirits, wine or beer at wholesale or retail from the covered location. For proprietors who have retail operations such as taverns on brewery premises, or who run wholesale or import operations from their premises and sell alcohol beverages other than the ones they produce, this interpretation will give maximum registration flexibility. Because industrial distilled spirits plants are qualified under the IRC, they will be considered as having registered as a wholesale liquor dealer for sales of undenatured alcohol. Even though a proprietor who makes no sales of alcohol fit for beverage use is not required to register, we believe this approach imposes the least overall burden. Since there is no cost to the proprietor, there is no reason to make a distinction in the registration.

5. *Persons who must register on Form 5630.5d*. Persons required to hold a basic permit under the Federal Alcohol Administration (FAA) Act as wholesalers or importers are considered dealers under section 11125, and so must file a registration on Form 5630.5d, as must retail dealers. This registration will remain in effect as long as the required information remains the same. Changes must be reported by filing of an amended Form 5630.5d if any of the required information changes, and the registrations must be terminated when covered operations cease. States, localities, and the District of Columbia are required to register only once as a wholesaler and once as a retailer in order to cover all operations within the jurisdiction in question.

6. *Records*. Required records for wholesale and retail liquor and beer dealers are specified in 27 CFR part 31 and are not significantly changed by this document. Breweries and proprietors of distilled spirits plants, bonded wine premises, and taxpaid wine bottling houses, who keep required records under the applicable IRC regulations, need not generate additional records as dealers for the same transactions.

7. *Transition to new rules*. For persons who were required to register and report changes on TTB Form 5630.5 during the SOT suspension period (July 1, 2005, through June 30, 2008), any registration filed after January 1, 2007, will constitute a valid registration required on or after July 1, 2008, and will continue in effect until the required registration information changes or operations are terminated. Therefore, such existing registrants will not have to re-register to comply with the new registration requirements. However, existing businesses that have not registered on or after January 1, 2007, must file a one-time registration on or before July 1, 2009, using TTB Form 5630.5d. The reasons for these dates are as follows: (1) Technically, the last registration required under the regulations for the 3-year SOT suspension was due on or before July 1, 2007. Most registrants would probably have filed before the deadline, but few, if any, would have filed before January 1, 2007; and (2) since this document was not published before July 1, 2008, the first registration under these new regulations—except for new businesses—will be due July 1, 2009. This transition rule applies to alcohol beverage dealers, breweries, and proprietors of distilled spirits plants, bonded wine premises, and taxpaid wine bottling houses, but not to MNBP drawback claimants. As noted above, MNBPs will be considered registered when they file the first claim for each year.

8. *Effective date*. The amendments made by section 11125 were effective on July 1, 2008. However, these regulations take effect on the date of their publication in the **Federal Register**. For the period between July 1, 2008, and the effective date of the temporary regulations, TTB will not apply or enforce any regulatory provision that is clearly inconsistent with current law, since statutory provisions always take precedence over conflicting regulations. On the other hand, any regulations that are not in conflict with current law (for example, the prior recordkeeping requirements) would remain in effect until superseded by the new temporary regulations. Further, section 11125

specifies, in paragraph (c), that its amendments ''shall not apply to taxes imposed for periods before such date [July 1, 2008].'' Therefore, persons who failed to pay special (occupational) tax when it was in force are not excused from their prior liability by the repeal of this tax.

9. *Employer identification number.* Section 6109(a)(1) of the IRC (26 U.S.C. 6109(a)(1)) states: ''Any person required under the authority of this title to make a return, statement, or other document shall include in such return, statement, or other document such identifying number as may be prescribed for securing proper identification of such person.'' In accordance with this provision and subsection (d) of section 6109, the regulations promulgated by this document require inclusion of the employer identification number (EIN) on registrations for alcohol dealers and manufacturers of nonbeverage products. This requirement is unchanged from prior regulations.

Section 6723 of the IRC imposes a penalty of $50 for each ''failure by any person to comply with a specified information reporting requirement on or before the time prescribed therefor.'' The definition of ''specified information reporting requirement'' in 26 U.S.C. 6724(d)(3) includes ''any requirement contained in the regulations prescribed under section 6109 that a person—(i) include his TIN [taxpayer identification number; see 26 U.S.C. 7701(a)(41)] on any return, statement, or other document * * *.'' The requirement, imposed by these regulations, to include the EIN on the registration is such an information reporting requirement. Because a person who does not submit a registration has failed to include his EIN on the registration, as required, the $50 penalty of 26 U.S.C. 6723 applies. Per 26 U.S.C. 6724(a), this penalty is not imposed when there is reasonable cause for the failure. These principles are reflected in the new temporary regulations at 27 CFR 31.14.

10. *Confidentiality of registration information.* Because registration is required under new section 5112 or 5124 of the IRC, the submitted information is subject to the confidentiality and disclosure requirements of section 6103 of the IRC, even though most alcohol beverage dealers are no longer TTB taxpayers. Accordingly, such registration is held to be an ''information return'' within the intent of 26 U.S.C. 6103. This holding is reflected in the new temporary regulations at 27 CFR 31.15, set forth below.

11. *Tobacco.* Section 11125 did not repeal the special (occupational) tax on any tobacco occupations; therefore, manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and tobacco export warehouse proprietors must continue to register and pay the special (occupational) tax every year.

## Discussion of Specific Regulatory Changes

### *Part 17—Drawback on Taxpaid Distilled Spirits Used in Manufacturing Nonbeverage Products*

The regulations in 27 CFR part 17 govern claims for drawback on taxpaid distilled spirits that are used in manufacturing nonbeverage products. Several subparts and sections within part 17 are amended in this document to conform with the changes made by section 11125 of the Act.

*Subpart C Revised.* Subpart C has been substantially amended by removing all sections relating to special tax and redesignating the subpart as ''Subpart C—Registration''. As noted above, effective July 1, 2008, IRC section 5132 was redesignated as section 5112. As redesignated, this section continues to require that every person who claims drawback for the manufacture of nonbeverage products must register annually as a nonbeverage domestic drawback claimant. Section 5112 does not specify either how registration will be accomplished or the items of information that must be provided as part of the registration process. However, as discussed above, TTB has decided that registration will be accomplished when the claimant submits a claim for drawback along with the supporting information that must be submitted with the claim. Thus, the filing of the claim will satisfy the requirement to register.

The revised subpart now includes a new § 17.21 that explains this registration of nonbeverage drawback claimants. The revised subpart also contains two new sections (§§ 17.22 and 17.23) relating to the use of, and application for, the employer identification number.

*Subpart D Removed.* Subpart D—Special Tax Stamps, consisting of §§ 17.51 through 17.93 and covering the issuance of special tax stamps, their subsequent amendment, and refunds of special tax, has been removed and reserved.

*Location of Records and Recovery Operations.* Several sections relating to records (§§ 17.161, 17.168, and 17.171) have been amended to delete references to the premises covered by the special tax stamp.

*Miscellaneous Amendments.* In addition to the above amendments, TTB has made several minor amendments to the regulations in part 17 by removing references to special tax within various sections. We also amended several legal citations within the regulations to reflect the redesignation of certain sections of law effective July 1, 2008. Finally, § 17.4 is revised to reflect the OMB control numbers that were assigned when the Alcohol and Tobacco Tax and Trade Bureau was created and to remove references to sections that have been removed from part 17.

### *Part 19—Distilled Spirits Plants*

The regulations in 27 CFR part 19 govern operations at distilled spirits plants. Several subparts and sections within part 19 have been revised or otherwise amended.

*Subpart Ca—Dealer Registration.* Subpart Ca has been revised in order to remove all references to special tax, and the subpart heading has been revised to read ''Dealer Registration and Recordkeeping''. Effective July 1, 2008, every proprietor of a distilled spirits plant who sells or offers for sale any distilled spirits, wines, or beer must register as a dealer. As noted above, TTB has determined that proprietors who have registered the distilled spirits plant under the qualification provisions of part 19 will be deemed to have registered as wholesale liquor dealers at the distilled spirits plant premises. The revised subpart Ca includes a new § 19.50 which explains the registration process for proprietors. In addition, the revised subpart contains a new section on amending the registration (§ 19.51) and a new section on dealer records (§ 19.52).

*Dealer Recordkeeping.* Although distilled spirits plants proprietors who sell, or offer for sale, distilled spirits fit for beverage use will be subject to the recordkeeping requirements of 26 U.S.C. 5121, new § 19.52 provides that the records required by subpart W of part 19 will satisfy those requirements, except where the distilled spirits plant engages in dealer operations not already covered by the recordkeeping requirements of part 19.

*Alcohol Fuel Plants.* In general, alcohol fuel plants would not be subject to the requirements applicable to alcohol beverage dealers, because they generally do not produce and sell alcohol fit for beverage use. However, an alcohol fuel plant that sells distilled spirits that have not been rendered unfit for beverage use (for transfer in bond to a distilled spirits plant or another alcohol fuel plant) would meet the definition of a ''dealer.'' Therefore,

§ 19.906 is revised to clarify that such an alcohol fuel plant is subject to the provisions of revised subpart Ca.

*Miscellaneous Amendments.* In addition to the above amendments, TTB has made several minor amendments to the regulations in part 19 to remove references to special tax in various sections. We also amended several legal citations within the regulations to reflect the redesignation of certain sections of law that went into effect on July 1, 2008. For example, a reference to ''26 U.S.C. 5131–5134'' in the definition of ''alcoholic flavoring material'' of § 19.11 has been replaced with a reference to ''26 U.S.C. 5111–5114''.

*Part 20—Distribution and Use of Denatured Alcohol and Rum*

The regulations in 27 CFR part 20 govern the distribution and use of denatured alcohol and rum. Effective July 1, 2008, section 11125(a)(3) of the Act repealed 26 U.S.C. 5276, which imposed a special tax on dealers and users of denatured alcohol and rum. Accordingly, in part 20, subpart Ca—Special (Occupational) Taxes has been removed and reserved. TTB also notes in this regard that dealers and users of denatured alcohol and rum who operate within the requirements of the law and regulations, selling denatured products for nonbeverage purposes only, are not considered to be ''dealers'' under the IRC and therefore will not be required to register as such.

*Part 22—Distribution and Use of Tax-Free Alcohol*

The regulations in 27 CFR part 22 govern the distribution and use of tax-free alcohol. As in the case of part 20 discussed above, the repeal of 26 U.S.C. 5276, which imposed a special tax on users of tax-free alcohol, necessitates the removal from part 22 of subpart Ca—Special (Occupational) Taxes. Similarly, users of tax-free alcohol are generally not considered to be ''dealers'' under the IRC and therefore will not be required to register as such. However, this document also amends § 22.102 to provide that any person who sells tax-free alcohol will become a dealer and therefore will be subject to the provisions of part 31 (since tax-free alcohol is fit for beverage use).

*Part 24—Wine*

The regulations in 27 CFR part 24 govern operations at bonded wine premises and taxpaid wine bottling houses.

*Dealer Registration.* As a result of the changes to the IRC made by section 11125 of the Act, effective July 1, 2008, every proprietor of bonded wine premises and every proprietor of a taxpaid wine bottling house who sells or offers for sale any distilled spirits, wines, or beer must register as a dealer. As noted above, TTB has determined that proprietors who have qualified as a bonded wine premises or taxpaid wine bottling house under part 24 will be deemed to have registered as a wholesale liquor dealer at those premises. Section 24.52 is revised to explain the registration process for these proprietors.

*Dealer Recordkeeping.* Although proprietors of wine premises who sell beverage wine (or who offer it for sale) will be subject to the recordkeeping requirements of 26 U.S.C. 5121, § 24.54 is revised to provide that the records required by subpart O of part 24 will satisfy these requirements, except where the bonded wine cellar or taxpaid wine bottling house engages in dealer operations not covered by the recordkeeping requirements of part 24.

*Miscellaneous Amendments to Part 24.* Several sections in part 24 relating to special tax have been removed. In addition, several sections have been amended by removing all reference to special tax and by replacing those references, where appropriate, with provisions covering the registration of proprietors as dealers. TTB notes that with regard to § 24.146, which covers bonds, although the specific reference to special tax is removed, bonds will still cover liability for unpaid special tax that was due prior to the repeal. Finally, § 24.53 is revised to cover amendment of the dealer registration.

*Part 25—Beer*

The regulations in 27 CFR part 25 govern operations at breweries. Subpart I and several sections in part 25 have been amended.

*Subpart I—Dealer Registration.* Subpart I has been revised in order to remove all sections relating to special tax, and the subpart heading has been revised to read ''Subpart I—Dealer Registration and Recordkeeping.'' As a result of the changes to the IRC made by section 11125 of the Act, effective July 1, 2008, every proprietor of a brewery who sells or offers for sale any distilled spirits, wines, or beer must register as a dealer. As noted above, TTB has determined that registration of the brewery premises will be accomplished when the proprietor files a Brewer's Notice, Form 5130.10, and TTB approves the notice. The revised subpart includes § 25.112, which explains the registration process for proprietors. In addition, the revised subpart contains a section on amending the registration (§ 25.113), which provides that amendments to the brewer's notice serve as amended dealer registrations, and a section on dealer records (§ 25.114—see the description of this section immediately below).

*Dealer Recordkeeping.* Although brewers who sell beverage beer (or offer it for sale) will be subject to the recordkeeping requirements of 26 U.S.C. 5121, the records required by subpart U of part 25 provide similar information. Therefore, § 25.114 provides that the records of subpart U will satisfy the requirements of section 5121 of the IRC, except where the brewer engages in dealer operations not covered by the recordkeeping requirements of part 25.

*Employer Identification Number.* Section 25.168, which concerns employer identification numbers, has been amended to revise a cross reference to instructions regarding the application for an employer identification number. Those instructions were formerly in subpart I and addressed the preparation of the special tax return. Since subpart I now deals with dealer registration, those instructions have been removed from that subpart and added as a new § 25.169, and the cross reference in § 25.168 has been revised accordingly.

*Miscellaneous Amendments.* In addition to the above amendments, TTB has made several minor amendments to the part 25 regulations by removing references to special tax in various sections.

*Part 26—Liquors and Articles From Puerto Rico and the Virgin Islands*

The regulations in 27 CFR part 26 govern operations of persons bringing alcohol beverages and certain other alcoholic products to the United States from Puerto Rico and the Virgin Islands. These persons include brewers, proprietors of distilled spirits plants and bonded wine cellars, dealers in denatured alcohol, and nonbeverage drawback claimants. Accordingly, several sections in part 26 are affected.

*Industrial Alcohol.* Since the special tax provisions on tax-free alcohol users, and on denatured spirits users and dealers, are repealed, § 26.36 is amended by removing references to that tax, and § 26.47 is removed. Because tax-free alcohol is fit for beverage use, persons shipping such alcohol to the United States for sale are subject to registration as alcohol beverage dealers; however, such registration will be accomplished by obtaining a distilled spirits plant permit and complying with the other requirements of 27 CFR part 19. Section 26.36(b) is amended accordingly. Section 26.46, which relates only to special (occupational) tax

on distilled spirits plant proprietors, is removed.

*Nonbeverage drawback claimant registration.* Sections 26.171 and 26.173 (Puerto Rico), and §§ 26.307 and 26.309 (Virgin Islands), are revised or otherwise amended to replace references to the special tax for nonbeverage drawback claimants with a discussion of the new registration requirement for claimants similar to the discussion in part 17 above.

*Dealer registration.* In §§ 26.44 and 26.45 (Puerto Rico) and §§ 26.210 and 26.211 (Virgin Islands), references to the special tax registration and return for alcohol occupations are changed to refer to dealer registration and recordkeeping.

*Miscellaneous Amendments.* We changed a legal citation within the definition of ''eligible flavors'' and several informational citations to reflect the redesignation of certain sections of law affected by section 11125 of the Act. We made some minor technical amendments in §§ 26.173(a) and 26.309(a) relating to the description of the drawback rate and the procedure for filing drawback claims. In §§ 26.173(c) and 26.309(c), we replaced the requirement for entering the control number on the special tax stamp with a requirement for entering the claimant's employer identification number, since the special tax return (which is no longer filed by these claimants) formerly supplied TTB with that information.

*Part 27—Importation of Distilled Spirits, Wines, and Beer*

The regulations in 27 CFR part 27 govern operations of persons importing distilled spirits, wine, and beer into the United States. Several sections of regulations within part 27 have been amended.

*Dealer registration.* In §§ 27.30 and 27.31, references to the special tax registration and return for alcohol occupations are changed to refer to dealer registration.

*Miscellaneous Amendments.* We also changed a legal citation within the definition of ''eligible flavors'' and several informational citations to reflect the redesignation of certain sections of law affected by section 11125 of the Act.

*Part 28—Exportation of Alcohol*

The regulations in 27 CFR part 28 govern operations by persons exporting distilled spirits, wines, and beer to foreign countries and possessions of the United States. Section 28.212, dealing with persons authorized to export wine with benefit of drawback, is revised to replace the reference to payment of special tax as a wholesale liquor dealer with a reference to registration as such a dealer under part 31. Also, the authority citation for part 28 is revised to reflect the repeal or redesignation of certain sections of law by section 11125 of the Act.

*Part 31—Alcohol Beverage Dealers*

The regulations in 27 CFR part 31 govern the operations of alcohol beverage dealers. The principal subject matter of part 31 historically has been the special (occupational) tax. The elimination of that tax makes it necessary to revise the entire part. In general, we have attempted in this document to retain as much of the old part 31 as can be adapted to the IRC provisions as amended by section 11125 of the Act. Nevertheless, the new part 31 set forth in this document is significantly shorter. References to the special (occupational) tax are removed, the part is reorganized, conforming changes are made to cross references, and OMB information collection approval numbers are updated. Several new sections are added to clarify producers' status as dealers (§ 31.48), to describe situations where registration is required (§§ 31.137 and 31.138), to clarify liability for special (occupational) tax for periods prior to its elimination (§ 31.234), and to set forth penalty and disclosure provisions (§§ 31.14 and 31.15). In addition, sections concerning preparation of the special tax return are redrafted to cover preparation of the dealer registration form, and sections concerning exemption from dealer's special tax for persons who registered as producers are removed.

Sections that formerly clarified liability for special tax have been revised to clarify when persons are considered to be dealers subject to the regulations. Some of these clarifications in part 31 were based on specific statutory exemptions formerly contained in 26 U.S.C. 5113 and 5123. Although these two statutory provisions were repealed by section 11125 of the Act, we will continue to apply those exemptions as administrative interpretations.

As noted above, the exemption in repealed section 5113 of the IRC for proprietors of controlled premises (distilled spirits plants, bonded wine cellars, taxpaid wine bottling houses, and breweries) has been retained in effect by allowing qualification documents and records required by part 19, 24, or 25, as applicable, to satisfy the alcohol dealer registration and recordkeeping requirements (§§ 31.48, 31.154). Other exemptions and exceptions in repealed section 5113 that are retained in the revised part 31 texts pertain to: States, political subdivisions, etc. (§§ 31.43, 31.153); creditors, fiduciaries, and officers of court (§§ 31.62(a), (b) and (c)); retiring partners or representatives of deceased partners (§ 31.62(d)); persons returning liquors for credit, refund, or exchange (§ 31.67); dealers making sales on purchaser dealers' premises (§§ 31.52 and 31.53); retail dealers selling in liquidation (§ 31.66); and retail dealers selling to limited retail dealers (§ 31.55(b)).

Exemptions and exceptions contained in repealed section 5123 of the IRC that are retained in the revised part 31 texts pertain to: Wholesale dealers making retail sales (§ 31.51); retail dealers ''at large'' (§ 31.94); dealers on trains, aircraft, or vessels (§§ 31.91 through 31.93); and liquor stores operated by States, political subdivisions, etc. (§§ 31.43, 31.153). The exemption from additional special tax when a wholesale or retail dealer in beer begins to sell other liquors, which was formerly provided for in repealed sections 5113(g) and 5123(c) of the IRC, is not retained in the revised part 31 texts for registration purposes, because section 11125 of the Act requires a dealer to register his or her ''trade or business'' (see new § 31.75).

The table below shows the source of, and extent of the change reflected in, each section in revised part 31:

| New section | Source (action) |
|---|---|
| 31.0 | 31.1 (P) |
| **Subpart A—General Provisions** | |
| 31.1 | 31.11 (P) |
| 31.2 | 31.2 (O) |
| 31.3 | 31.3 (P) |
| 31.4 | 31.4 (P) |
| **Subpart B—Administrative Provisions** | |
| 31.11 | 31.41 (P) |
| 31.12 | 31.42 (O) |
| 31.13 | 31.43 (O) |
| 31.14 | 31.109, 31.111 (C) |
| 31.15 | 26 U.S.C. 6103 (N) |
| **Subpart C—Activities Subject to this Part** | |
| 31.21 | 31.21 (P) |
| 31.22 | 31.22 (O) |
| Dealers Classified | |
| 31.31 | 31.23 (P) |
| 31.32 | 31.24 (P) |
| 31.33 | 31.25 (P) |
| 31.34 | 31.26 (P) |
| 31.35 | 31.27 (O) |
| 31.36 | 31.28 (O) |

| New section | Source (action) |
|---|---|
| Certain Organizations, Agencies, and Persons | |
| 31.41 | 31.29 (P) |
| 31.42 | 31.30 (P) |
| 31.43 | 31.31 (P) |
| 31.44 | 31.32 (P) |
| 31.45 | 31.33 (P) |
| 31.46 | 31.34 (P) |
| 31.47 | 31.35 (P) |
| 31.48 | (N) |
| **Subpart D—Exemptions and Exceptions** | |
| Persons Exempt From Registration and/or Recordkeeping | |
| 31.51 | 31.23(c)(1) and 31.25(c)(1) (C) |
| 31.52 | 31.185 (P) |
| 31.53 | 31.186 (P) |
| 31.54 | 31.187 (P) |
| 31.55 | 31.187a (P) |
| Persons Who Are Not Dealers in Liquors or Beer | |
| 31.61 | 31.181 (C) |
| 31.62 | 31.188 (P) |
| 31.63 | 31.189 (P) |
| 31.64 | 31.190 (P) |
| 31.65 | 31.191 (P) |
| 31.66 | 31.192 (O) |
| 31.67 | 31.193 (P) |
| **Subpart E—Places Subject to Registration** | |
| 31.71 | 31.51 (P) |
| 31.72 | 31.52 (O) |
| 31.73 | 31.53 (P) |
| 31.74 | 31.54 (P) |
| 31.75 | 31.72 (C) |
| Sales in Two or More Areas on the Same Premises | |
| 31.81 | 31.57 (P) |
| 31.82 | 31.58 (P) |
| 31.83 | 31.59 (P) |
| Sales in Multiple Locations | |
| 31.91 | 31.124 (P) |
| 31.92 | 31.125 (P) |
| 31.93 | 31.126 (P) |
| 31.94 | 31.127 (P) |
| 31.95 | 31.55 (P) |
| 31.96 | 31.56 (P) |
| **Subpart F—Partnerships** | |
| 31.101 | 31.91 (P) |
| 31.102 | 31.92 (P) |
| 31.103 | 31.93 (P) |
| 31.104 | 31.94 (P) |
| **Subpart G—Registration Form, TTB F 5630.5d** | |
| 31.111 | 31.102 (C) |
| 31.112 | 31.106(c) (P) |
| 31.113 | 31.104a (P) |
| 31.114 | 31.106 (P) |
| 31.115 | 31.106a (P) |
| 31.116 | 31.107 (P) |
| **Subpart H—Changes in Registration Information** | |
| Changes Requiring Registration as a New Business | |
| 31.121 | 31.161 (P) |
| 31.122 | 31.162 (P) |
| 31.123 | 31.163 (P) |
| 31.124 | 31.164 (P) |
| 31.125 | (N) |
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| 31.132 | 31.165 (P) |
| 31.133 | 31.165 (C) |
| 31.134 | 31.166 (P) |
| 31.135 | 31.167 (P) |
| 31.136 | 31.168 (P) |
| 31.137 | (N) |
| 31.138 | (N) |
| **Subpart I—Restrictions Relating to Purchases of Distilled Spirits** | |
| 31.141 | 31.211 (P) |
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| Wholesale Dealers' Records and Reports | |
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| 31.153 | 31.223 (P) |
| 31.154 | 31.224 (P) |
| 31.155 | 31.225 (P) |
| 31.156 | 31.226 (P) |
| 31.157 | 31.227 (P) |
| 31.158 | 31.228 (P) |
| 31.159 | 31.229 (O) |
| 31.160 | 31.230 (O) |
| 31.161 | 31.231 (P) |
| 31.162 | 31.232 (P) |
| 31.163 | 31.233 (P) |
| Filing of Wholesale Dealer's Records and Reports | |
| 31.171 | 31.235 (P) |
| 31.172 | 31.236 (P) |
| Retail Dealer's Records | |
| 31.181 | 31.234 (O) |
| Retention of Records and Files | |
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| 31.192 | 31.238 (P) |
| **Subpart K—Reuse and Possession of Used Liquor Bottles** | |
| 31.201 | 31.261 (N) |
| 31.202 | 31.262 (P) |
| 31.203 | 31.263 (N) |
| 31.204 | 31.264 (P) |
| **Subpart L—Packaging of Alcohol for Industrial Uses** | |
| 31.211 | 31.271 (P) |
| 31.212 | 31.272 (O) |
| **Subpart M—Distilled Spirits for Export with Benefit of Drawback** | |
| 31.221 | 31.281 (P) |
| 31.223 | 31.283 (P) |
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| 31.232 | 31.292 (O) |
| 31.233 | 31.293 (P) |
| 31.234 | (N) |

* Actions: (C) = Complete revision; (N) = New section; (O) = No revision; (P) = Partial revision.

*Part 40—Manufacture of Tobacco Products and Cigarette Papers and Tubes*

The regulations in 27 CFR part 40 govern manufacturers of tobacco products and cigarette papers and tubes. Although section 11125 of the Act did not do away with the special tax on tobacco occupations, TTB believes that it would be appropriate to have the special tax provisions applicable to tobacco products and cigarette papers and tubes in one place, similar to the approach taken in revised part 31 for alcohol beverage dealer registration. Accordingly, in this document we have removed and reserved a number of part 40 sections and transferred their contents to a new subpart D in part 46, which contains miscellaneous regulations relating to tobacco products and cigarette papers and tubes.

In addition to the transfer of special tax provisions to part 46, this document includes a number of other changes to the part 40 texts. A definition of ''special tax'' is added to § 40.11 to facilitate its use in the part 40 texts in place of ''special (occupational) tax.'' Section 40.31 is amended by removing the 1988 transition rule in paragraph (b), clarifying liability for special tax under a partnership, and updating the informational citation at the end of the section. The informational citation at the end of § 40.371 is also amended to reflect the redesignation of certain IRC sections by section 11125 of the Act. Finally, §§ 40.33 and 40.373 are revised to serve as cross references to the special tax provisions of part 46.

*Part 44—Exportation of Tobacco Products and Cigarette Papers and Tubes, Without Payment of Tax, or With Drawback of Tax*

The regulations in 27 CFR part 44 govern exportation of tobacco products and cigarette papers and tubes. For the same reason stated for part 40 above, we

have transferred the part 44 special tax provisions to new subpart D of part 46.

For the same reason stated for § 40.11 above, a definition of ''special tax'' is added to § 44.11. In addition, § 44.31 is amended by removing the superseded 1988 transition rule in paragraph (b), clarifying liability for special tax under a partnership, and updating the informational citation at the end to reflect the redesignation of certain IRC sections by section 11125 of the Act. Finally, § 44.33 is revised to direct users to part 46 for additional provisions concerning special tax.

*Part 46—Miscellaneous Regulations Relating to Tobacco Products and Cigarette Papers and Tubes*

As discussed above, we are adding a new subpart D to 27 CFR part 46 to set forth provisions related to special tax on tobacco product and related occupations. Certain sections are consolidated from parts 40 and 44, and others are adopted from the liquor dealer regulations in part 31. The regulations adopted for part 46 from part 31 reflect special tax policy positions developed through rulemaking during the time we administered the dealer's tax. Because we would be guided by these positions if similar questions arose concerning regulated entities in the tobacco product and related occupations, we are adopting them for part 46 purposes to preserve the precedents that existed. The table below shows the source of each new subpart D section:

| New section number | Source |
|---|---|
| 46.91 | new |
| 46.92 | new |
| 46.93 | 31.57 and 31.71 |
| 46.94 | 31.4, 31.123 |
| 46.95 | 31.91 |
| **Payment of Special Tax** | |
| 46.101 | 40.33, 40.373, and 44.33 |
| 46.102 | 40.34 and 44.34 |
| 46.103 | 31.104 |
| 46.104 | 31.105 |
| 46.105 | 31.138 |
| 46.106 | 31.122 |
| 46.107 | 31.109 |
| 46.108 | 31.110 |
| 46.109 | 31.111 |
| **Special Tax Stamps** | |
| 46.116 | 40.35, 40.374, and 44.35 |
| 46.117 | 31.132 |
| 46.118 | 31.133 |
| 46.119 | 31.153 |
| 46.120 | 31.134 |
| 46.121 | 31.135 |
| **Changes in Businesses Holding Special Tax Stamps** | |
| 46.126 | 40.36, 40.375, 44.36 and 31.151–31.152 |
| 46.127 | 40.36, 40.375, 44.36, 17.77, and 31.163 |
| **Stamps for Incorrect Period or Incorrect Liability** | |
| 46.131 | 31.136 |
| 46.132 | 31.137–139 |
| **Abatement or Refund of Special Taxes** | |
| 46.136 | 31.201 |
| 46.137 | 31.202 |
| 46.138 | 31.203 |

We did not adopt those provisions of part 31 that dealt with exemptions and exceptions from liquor dealers tax because we do not believe they are relevant to the special tax on tobacco product and related occupations.

*Part 70—Procedure and Administration*

Part 70 of 27 CFR sets forth the procedural and administrative rules of the Alcohol and Tobacco Tax and Trade Bureau. We have amended various sections within part 70 to change references to special tax on alcohol occupations to references to dealer registration or claimant registration while retaining or adding references to special tax on tobacco occupations. We have also removed references to OMB approval after §§ 70.411, 70.412, and 70.414, and 70.431, because those sections are part of the Statement of Procedural Rules. These sections do not impose a recordkeeping requirement but rather only point to regulatory provisions that do impose a recordkeeping requirement. Finally, no changes were made to the title of subpart D or to §§ 70.61, 70.64, 70.433, 70.441, 70.442, or 70.448, because they refer to occupational taxes that are still in effect.

## Regulatory Flexibility Act

We certify that this temporary rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. The relevant collections of information derive directly from the Internal Revenue Code of 1986, as amended, and the regulations in this rule concerning these collections merely implement the statutory requirements. Likewise, any secondary or incidental effects, and any reporting, recordkeeping, or other compliance burdens flow directly from the statute. Pursuant to 26 U.S.C. 7805(f), this temporary regulation will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

## Paperwork Reduction Act

TTB has provided estimates of the burdens that the collections of information contained in these regulations impose, and these estimated burdens have been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned control numbers 1513–0088, 1513–0112, and 1513–0113. Finally, TTB has provided the public with notice of these collections of information and solicited comments on them, with the most recent notices being published in the **Federal Register** on May 2, 2006 (71 FR 25889) for OMB No. 1513–0088, November 21, 2007 (72 FR 65646) for OMB No. 1513–0113, and September 4, 2008 (73 FR 51699) for OMB No. 1513–0112. To date, TTB has not received any comments in response to these notices.

Under the Paperwork Reduction Act of 1995, 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.

Comments concerning suggestions for reducing the burden of the collections of information in this document should be directed to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–927–8525 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

## Executive Order 12866

This is not a significant regulatory action as defined in E.O. 12866. Therefore, it requires no regulatory assessment.

## Inapplicability of Prior Notice and Comment and Delayed Effective Date Procedures

Because this document merely implements a law which was effective on July 1, 2008, and because immediate guidance is necessary to implement the provisions of the law, it is found to be impracticable to issue this Treasury decision with notice and public procedure under 5 U.S.C. 553(b).

Pursuant to the provisions of 5 U.S.C. 553(d)(1), (d)(2), and (d)(3), we are issuing these regulations without a delayed effective date. These temporary regulations recognize an exemption within the meaning of section 553(d)(1)

and (d)(2) because they lessen burdens by recognizing previously filed documents as registration and recognize longstanding agency interpretations in previously published regulations, respectively. Furthermore, TTB has determined that good cause exists to provide industry members with immediate guidance on their utilization of registration procedures in accordance with section 553(d)(3).

**Drafting Information**

Steve Simon, Daniel Hiland, and Marjorie Ruhf of the Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, drafted this document. Other personnel also participated in its development.

**List of Subjects**

*27 CFR Part 17*

Administrative practice and procedure, Claims, Cosmetics, Customs duties and inspection, Drugs, Excise taxes, Exports, Imports, Liquors, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Spices and flavorings, Surety bonds, Virgin Islands.

*27 CFR Part 19*

Administrative practice and procedures, Caribbean Basin Initiative, Claims, Electronic funds transfers, Excise taxes, Exports, Gasohol, Imports, Labeling, Liquors, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Research, Security measures, Surety bonds, Vinegar, Virgin Islands, Warehouses.

*27 CFR Part 20*

Alcohol and alcoholic beverages, Claims, Cosmetics, Excise taxes, Labeling, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Surety bonds.

*27 CFR Part 22*

Administrative practice and procedure, Alcohol and alcoholic beverages, Excise taxes, Reporting and recordkeeping requirements, Surety bonds.

*27 CFR Part 24*

Administrative practice and procedure, Claims, Electronic fund transfers, Excise taxes, Exports, Food additives, Fruit juices, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Scientific equipment, Spices and flavoring, Surety bonds, Vinegar, Warehouses, Wine.

*27 CFR Part 25*

Administrative practice and procedure, Beer, Claims, Electronic funds transfers, Excise taxes, Exports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Research, Surety bonds.

*27 CFR Part 26*

Administrative practice and procedure, Alcohol and alcoholic beverages, Caribbean Basin Initiative, Claims, Customs duties and inspection, Electronic funds transfers, Excise taxes, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Surety bonds, Virgin Islands, Warehouses.

*27 CFR Part 27*

Alcohol and alcoholic beverages, Beer, Cosmetics, Customs duties and inspection, Electronic funds transfers, Excise taxes, Imports, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Wine.

*27 CFR Part 28*

Aircraft, Alcohol and alcoholic beverages, Armed forces, Beer, Claims, Excise taxes, Exports, Foreign trade zones, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Vessels, Warehouses, Wine.

*27 CFR Part 31*

Alcohol and alcoholic beverages, Excise taxes, Exports, Packaging and containers, Reporting and recordkeeping requirements.

*27 CFR Part 40*

Cigars and cigarettes, Claims, Electronic funds transfers, Excise taxes, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco.

*27 CFR Part 44*

Aircraft, Armed forces, Cigars and cigarettes, Claims, Customs duties and inspection, Excise taxes, Exports, Foreign trade zones, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco, Vessels, Warehouses.

*27 CFR Part 46*

Administrative practice and procedure, Cigars and cigarettes, Claims, Excise taxes, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Surety bonds, Tobacco.

*27 CFR Part 70*

Administrative practice and procedure, Claims, Excise taxes, Freedom of information, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surety bonds.

**Authority and Issuance**

■ For the reasons discussed in the preamble, TTB amends 27 CFR parts 17, 19, 20, 22, 24, 25, 26, 27, 28, 31, 40, 44, 46, and 70 as set forth below:

## PART 17—DRAWBACK ON TAXPAID DISTILLED SPIRITS USED IN MANUFACTURING NONBEVERAGE PRODUCTS

■ 1. The authority citation for part 17 is revised to read as follows:

**Authority:** 26 U.S.C. 5010, 5111–5114, 5123, 5206, 5273, 6065, 6091, 6109, 7213, 7652, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

### § 17.1 [Amended]

■ 2. Section 17.1 is amended by removing the words, ''the payment of special (occupational) taxes in order to be eligible to receive drawback;''.

■ 3. Section 17.4 is revised to read as follows:

### § 17.4 OMB control numbers assigned under the Paperwork Reduction Act.

(a) *Purpose.* This section collects and displays the control numbers assigned to the information collection requirements of this part by the Office of Management and Budget under the Paperwork Reduction Act of 1995.

(b) *OMB control number 1513–0013.* OMB control number 1513–0013 is assigned to the following section in this part: § 17.106.

(c) *OMB control number 1513–0014.* OMB control number 1513–0014 is assigned to the following sections in this part: §§ 17.6 and 17.105.

(d) *OMB control number 1513–0021.* OMB control number 1513–0021 is assigned to the following sections in this part: §§ 17.121, 17.126, 17.127, 17.132, and 17.136.

(e) *OMB control number 1513–0130.* OMB control number 1513–0130 is assigned to the following sections in this part: §§ 17.142, 17.145, and 17.146.

(f) *OMB control number 1513–0036.* OMB control number 1513–0036 is assigned to the following section in this part: § 17.6.

(g) *OMB control number 1513–0072.* OMB control number 1513–0072 is assigned to the following sections in this part: §§ 17.3, 17.111, 17.112, 17.122, 17.123, 17.124, 17.125, 17.143, 17.168(a), 17.183, and 17.187.

(h) *OMB control number 1513–0073.* OMB control number 1513–0073 is assigned to the following sections in this part: §§ 17.161, 17.162, 17.163,

17.164, 17.165, 17.166, 17.167, 17.168(b), 17.169, 17.170, 17.182, and 17.186.

(i) *OMB control number 1513–0088.* OMB control number 1513–0088 is assigned to the following section in this part: § 17.23.

(j) *OMB control number 1513–0098.* OMB control number 1513–0098 is assigned to the following sections in this part: §§ 17.147 and 17.182.

**§ 17.11 [Amended]**

■ 4. Section 17.11 is amended by removing the definition of ''Special tax''.

■ 5. Subpart C is revised to read as follows:

**Subpart C—Registration**

Sec.
17.21 Registration.
17.22 Employer identification number.
17.23 Application for employer identification number.

## Subpart C—Registration

**§ 17.21 Registration.**

Every person claiming drawback under this part must register annually as a nonbeverage domestic drawback claimant. Registration will be accomplished when the claimant submits the first drawback claim for each year along with the supporting data required under subpart G of this part. No registration is required for any year in which the claimant does not file a claim for drawback.

**§ 17.22 Employer identification number.**

Every person who claims drawback under this part must enter on each claim for drawback filed on TTB Form 5620.8, Claim—Alcohol, Tobacco, and Firearms Taxes, the employer identification number (EIN) assigned by the Internal Revenue Service.

(26 U.S.C. 6109, 6723)

**§ 17.23 Application for employer identification number.**

(a) *Use Form SS–4.* A claimant must obtain an employer identification number (EIN) by filing an application with the Internal Revenue Service (IRS) on IRS Form SS–4. Form SS–4 is available from the local IRS Service Center, from the IRS District Director, the IRS Web site at *http://www.irs.gov* or from the TTB National Revenue Center. The claimant must file this form with IRS in accordance with the instructions on the form.

(b) *One EIN only.* Each claimant must obtain and use only one EIN, regardless of the number of places of business for which a claim is filed under this part.

(26 U.S.C. 6109)

## Subpart D—[Removed and Reserved]

■ 6. Subpart D is removed and reserved.

■ 7. Section 17.101 is revised to read as follows:

**§ 17.101 Bonds in general.**

(a) *Requirement.* A bond must be filed by each person claiming drawback on a monthly basis. Persons who claim drawback on a quarterly basis are not required to file bonds. The bond requirement of this part may be satisfied either by a bond obtained from an authorized surety company or by deposit of collateral security.

(b) *Bond form.* The bond must be prepared and executed on TTB Form 5154.3, Bond for Drawback Under 26 U.S.C. 5111, in accordance with the provisions of this part and the instructions printed on the form.

(c) *Bonds executed before July 1, 2008.* On and after July 1, 2008, a reference to 26 U.S.C. 5131–5134 in a bond executed on TTB Form 5154.3, Bond for Drawback Under 26 U.S.C. 5131, shall be understood to refer to the sections redesignated as 26 U.S.C. 5111–5114 by section 11125 of Public Law 109–59.

(d) *Approval.* The appropriate TTB officer is authorized to approve all bonds and consents of surety required by this part.

**§ 17.134 [Amended]**

■ 8. In § 17.134, the first sentence is amended by removing the reference ''26 U.S.C. 5131'' and adding, in its place, the reference ''26 U.S.C. 5111''.

**§ 17.141 [Amended]**

■ 9. Section 17.141 is amended:

■ a. In the second sentence, by removing the reference ''26 U.S.C. 5134'' and adding, in its place, the reference ''26 U.S.C. 5114''; and

■ b. By removing the last sentence.

**§ 17.146 [Amended]**

■ 10. In § 17.146, the introductory text is amended by removing the words ''set forth'' and adding, in their place, the word ''show'', and paragraph (a) is removed and reserved.

**§ 17.148 [Amended]**

■ 11. Section 17.148 is amended:

■ a. In paragraph (a), by removing the reference ''26 U.S.C. 5131–5134'' and adding, in its place, the reference ''26 U.S.C. 5111–5114'';

■ b. In the first sentence of paragraph (b), by removing the citation ''26 U.S.C. 5131–5134'' and adding in its place the citation ''26 U.S.C 5111–5114''; and

■ c. At the end of the section, by removing the informational reference ''(Sec. 452, Pub. L. 98–369, 98 Stat. 819 (26 U.S.C.5134(c))'' and adding, in its place, the informational reference ''(26 U.S.C. 5114(c))''.

■ 12. Section 17.161 is amended by revising the last sentence to read as follows:

**§ 17.161 General.**

* * * The records shall be kept complete and current at all times and shall be retained by the manufacturer at the place where the taxpaid distilled spirits are used in the manufacture or production of nonbeverage products, for the period prescribed in § 17.170.

■ 13. In § 17.168, the last sentence of paragraph (a) is revised to read as follows:

**§ 17.168 Recovered spirits.**

(a) * * * Recovery operations may only be conducted on the premises where the recovered spirits were used in the manufacture or production of nonbeverage or intermediate products.

* * * * *

■ 14. Section 17.171 is amended:

■ a. By revising the first sentence to read as set forth below.

■ b. At the end of the section, by removing the informational reference ''(Sec. 5133, 68A Stat. 623 (26 U.S.C. 5133); sec. 201, Pub. L. 85–859, 72 Stat. 1348 (26 U.S.C. 5146))'' and adding, in its place, the informational reference ''(26 U.S.C. 5113, 5123)''.

**§ 17.171 Inspection of records.**

All of the records, forms, and documents required to be retained by § 17.170 shall be kept at the premises where distilled spirits are used in the manufacture or production of nonbeverage products and shall be readily available during the manufacturer's regular business hours for examination and copying by the appropriate TTB officers. * * *

**§ 17.181 [Amended]**

■ 15. In § 17.181, the last sentence is amended by removing the reference ''26 U.S.C. 5134'' and adding, in its place, the reference ''26 U.S.C. 5114''.

■ 16. Section 17.182 is amended by revising the first sentence to read as follows:

**§ 17.182 Drawback claims by druggists.**

Drawback of tax under 26 U.S.C. 5114 is allowable on taxpaid distilled spirits used by druggists in compounding prescriptions. * * *

■ 17. Section 17.187 is amended by revising the second sentence to read as follows:

**§ 17.187 Discontinuance of business.**

* * * Upon discontinuance of business, a manufacturer's entire stock of taxpaid distilled spirits on hand may be sold in a single sale without the necessity of qualifying as a wholesaler under part 1 of this chapter or registering and keeping records as a liquor dealer under part 31 of this chapter. * * *

## PART 19—DISTILLED SPIRITS PLANTS

■ 18. The authority citation for part 19 is revised to read as follows:

**Authority:** 19 U.S.C. 81c, 1311; 26 U.S.C. 5001, 5002, 5004–5006, 5008, 5010, 5041, 5061, 5062, 5066, 5101, 5121, 5122–5124, 5171–5173, 5175, 5176, 5178–5181, 5201–5204, 5206, 5207, 5211–5215, 5221–5223, 5231, 5232, 5235, 5236, 5241–5243, 5271, 5273, 5301, 5311–5313, 5362, 5370, 5373, 5501–5505, 5551–5555, 5559, 5561, 5562, 5601, 5612, 5682, 6001, 6065, 6109, 6302, 6311, 6676, 6806, 7510, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

**§ 19.11 [Amended]**

■ 19. Section 19.11 is amended:

■ a. In the definition of ''Alcoholic flavoring materials'', by removing the reference ''26 U.S.C. 5131–5134'' and adding, in its place, the reference ''26 U.S.C. 5111–5114''.

■ b. In the definition of ''Eligible flavor'', by removing from paragraph (1) the reference ''26 U.S.C. 5134'' and adding, in its place, the reference ''26 U.S.C. 5114''.

■ 20. Subpart Ca is revised to read as follows:

**Subpart Ca—Dealer Registration and Recordkeeping**

Sec.
19.49 Definitions.
19.50 Dealer registration.
19.51 Amending the dealer registration.
19.52 Dealer records.

## Subpart Ca—Dealer Registration and Recordkeeping

**§ 19.49 Definitions.**

For purposes of this subpart, the following terms have the meanings indicated:

*Dealer.* A person who sells, or offers for sale, any alcohol product (distilled spirits, wines, and/or beer) fit for beverage use.

*Retail dealer in liquors.* A dealer who sells, or offers for sale, distilled spirits, wines, or beer to any person other than a dealer.

*Wholesale dealer in liquors.* A dealer who sells, or offers for sale, distilled spirits, wines, or beer to another dealer.

(26 U.S.C. 5121, 5122)

**§ 19.50 Dealer registration.**

Every proprietor who sells or offers for sale any alcoholic product (distilled spirits, wines, or beer) fit for beverage use must register as a dealer under part 31 of this chapter. However, the proprietor's application for registration of a distilled spirits plant filed under subpart G of this part, and approval of that application by the appropriate TTB officer, will constitute the proprietor's registration as a dealer at the distilled spirits plant. Every proprietor registered as a dealer under this subpart will be classified as a wholesale dealer in liquors (see § 31.32 of this chapter) and as such may also operate as a retail dealer in liquors without additional registration. Registration covers all sales from the same location, including sales of wine, beer, or other proprietors' spirits. A proprietor who conducts business as a dealer at a location other than the distilled spirits plant must register and keep records in accordance with part 31 of this chapter.

(26 U.S.C. 5124)

**§ 19.51 Amending the dealer registration.**

Every proprietor registered as a dealer under this subpart must maintain a current and accurate distilled spirits plant registration. Whenever there is a change to any of the information provided in the proprietor's approved notice of registration, the proprietor must amend the registration within the time period specified in subpart G of this part. An amendment of the proprietor's distilled spirits plant registration will also serve as an amendment of the proprietor's dealer registration under this subpart. The proprietor's dealer registration will also terminate when distilled spirits plant operations under the notice of registration terminate.

(26 U.S.C. 5124)

**§ 19.52 Dealer records.**

Every dealer is required to maintain records of transactions. Distilled spirits transactions that appear in the records required by subpart W of this part will meet the proprietor's recordkeeping requirements as a dealer. For other transactions not covered in the distilled spirits plant records, such as retail sales of wine or beer in a restaurant at the distilled spirits plant, or operations as a wholesale dealer in wine or beer, the proprietor must keep the records specified for dealers in part 31 of this chapter.

(26 U.S.C. 5121, 5122)

**§ 19.63 [Amended]**

■ 21. In § 19.63, the last sentence is amended by removing the words '', including special (occupational) tax,''.

**§ 19.65 [Amended]**

■ 22. Section 19.65 is amended by removing the last sentence.

**§ 19.67 [Amended]**

■ 23. Section 19.67 is amended:

■ a. In paragraph (a)(1), by removing the words ''and pay special (occupational) tax''; and

■ b. In paragraph (a)(2), by removing the words ''(except the payment of special (occupational) tax)''.

**§ 19.71 [Amended]**

■ 24. In § 19.71, paragraph (a) is amended by removing the last sentence.

**§ 19.374 [Amended]**

■ 25. In § 19.374, the second sentence is amended by removing the reference ''26 U.S.C. 5131–5134'' and adding, in its place, the reference ''26 U.S.C. 5111–5114''.

■ 26. Section 19.906 is revised to read as follows:

**§ 19.906 Dealer registration and recordkeeping.**

An alcohol fuel plant that sells spirits that have not been rendered unfit for beverage use is subject to the requirements of subpart Ca of this part, except that the references in §§ 19.50 and 19.51 to ''subpart G'' should be taken to refer to §§ 19.910 through 19.950, and the reference in § 19.51 to ''subpart W'' should be taken to refer to §§ 19.980 through 19.988.

## PART 20—DISTRIBUTION AND USE OF DENATURED ALCOHOL AND RUM

■ 27. The authority citation for part 20 continues to read as follows:

**Authority:** 26 U.S.C. 5001, 5206, 5214, 5271–5275, 5311, 5552, 5555, 5607, 6065, 7805.

## Subpart Ca—[Removed and Reserved]

■ 28. Subpart Ca is removed and reserved.

**§ 20.241 [Amended]**

■ 29. Section 20.241 is amended by removing the last sentence.

## PART 22—DISTRIBUTION AND USE OF TAX-FREE ALCOHOL

■ 30. The authority citation for part 22 is revised to read as follows:

**Authority:** 26 U.S.C. 5001, 5121, 5123, 5206, 5214, 5271–5275, 5311, 5552, 5555,

6056, 6061, 6065, 6109, 6151, 6806, 7805; 31 U.S.C. 9304, 9306.

## Subpart Ca—[Removed and Reserved]

■ 31. Subpart Ca is removed and reserved.

■ 32. In § 22.102, the last sentence of paragraph (d) is revised to read as follows:

### § 22.102 Prohibited uses.

* * * * *

(d) * * * Any permittee who sells tax-free alcohol becomes subject to the provisions of part 31 of this chapter.

### § 22.171 [Amended]

■ 33. In § 22.171, the last sentence of paragraph (a) is removed.

## PART 24—WINE

■ 34. The authority citation for part 24 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a); 26 U.S.C. 5001, 5008, 5041, 5042, 5044, 5061, 5062, 5121, 5122–5124, 5173, 5206, 5214, 5215, 5351, 5353, 5354, 5356, 5357, 5361, 5362, 5364–5373, 5381–5388, 5391, 5392, 5511, 5551, 5552, 5661, 5662, 5684, 6065, 6091, 6109, 6301, 6302, 6311, 6651, 6676, 7302, 7342, 7502, 7503, 7606, 7805, 7851; 31 U.S.C. 9301, 9303, 9304, 9306.

■ 35. The undesignated center heading directly above § 24.50 is revised to read, ''DEALER REGISTRATION AND RECORDKEEPING''.

### § 24.50 [Removed and reserved]

■ 36. Section 24.50 is removed and reserved.

■ 37. Sections 24.51 through 24.54 are revised to read as follows:

### § 24.51 Definitions.

For purposes of §§ 24.52 through 24.54 of this part, the following terms have the meanings indicated:

*Dealer.* A person who sells, or offers for sale, any alcohol product (distilled spirits, wines, and/or beer) fit for beverage use.

*Retail dealer in liquors.* A dealer who sells, or offers for sale, distilled spirits, wines, or beer to any person other than a dealer.

*Wholesale dealer in liquors.* A dealer who sells, or offers for sale, distilled spirits, wines, or beer to another dealer.

(26 U.S.C. 5121, 5122)

### § 24.52 Dealer registration.

Every proprietor who sells or offers for sale any alcohol product (distilled spirits, wines, or beer) fit for beverage use must register as a dealer in accordance with part 31 of this chapter. However, the proprietor's application to establish and operate a bonded wine premises or taxpaid wine bottling house filed under subpart D of this part, and approval of that application by the appropriate TTB officer, will constitute the proprietor's registration as a dealer at the approved bonded or taxpaid wine premises. Every proprietor registered as a dealer under this section will be classified as a wholesale dealer in liquors (see § 31.32 of this chapter) and as such may also operate as a retail dealer in liquors without additional registration. Registration covers all sales from the same location, including sales of spirits, beer, or other proprietors' wine. As provided in § 31.52 of this chapter, the proprietor is subject to no additional registration for making sales of wine or beer at the customer's place of business. Otherwise, a proprietor who conducts business as a dealer at a location other than the bonded wine premises or taxpaid wine bottling house must register and keep records in accordance with part 31 of this chapter.

(26 U.S.C. 5124)

### § 24.53 Amending the dealer registration.

Every proprietor registered as a dealer under § 24.52 must maintain a current and accurate application file under subpart D of this part. Whenever there is a change to any of the information provided in the proprietor's approved application, the proprietor must amend the application within the time period specified in subpart D of this part. An amendment of the proprietor's wine premises approved application will also amend the proprietor's dealer registration under § 24.52. The proprietor's dealer registration will also terminate when wine operations authorized under this part terminate.

(26 U.S.C. 5124)

### § 24.54 Dealer records.

Every dealer is required to maintain records of transactions. Wine transactions that appear in the records required by subpart O of this part will meet the proprietor's recordkeeping requirements as a dealer. For other transactions not covered in the wine premises records, such as retail sales of distilled spirits or beer in a restaurant at the wine premises, or operations as a wholesale dealer in distilled spirits or beer, the proprietor must keep the records specified for dealers in part 31 of this chapter.

(26 U.S.C. 5121, 5122, 5123)

### § 24.55 [Removed]

■ 38. Section 24.55 is removed.

### § 24.146 [Amended]

■ 39. In § 24.146, paragraph (a) is amended by removing the second sentence.

## PART 25—BEER

■ 40. The authority citation for part 25 is revised to read as follows:

**Authority:** 19 U.S.C. 81c; 26 U.S.C. 5002, 5051–5054, 5056, 5061, 5121, 5122–5124, 5222, 5401–5403, 5411–5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7342, 7606, 7805; 31 U.S.C. 9301, 9303–9308.

### § 25.24 [Amended]

■ 41. Section 25.24 is amended:

■ a. In paragraph (a)(5) by adding the word ''and'' at the end of the paragraph after the semicolon;

■ b. By removing paragraph (a)(6); and

■ c. By redesignating paragraph (a)(7) as paragraph (a)(6).

■ 42. Subpart I is revised to read as follows:

### Subpart I—Dealer Registration and Recordkeeping

Sec.
25.111 Definitions.
25.112 Dealer registration.
25.113 Amending the dealer registration.
25.114 Dealer records.

## Subpart I—Dealer Registration and Recordkeeping

### § 25.111 Definitions.

For purposes of this subpart, the following terms have the meanings indicated:

*Dealer.* A person who sells, or offers for sale, any alcohol product (distilled spirits, wines, and/or beer) fit for beverage use.

*Retail dealer in liquors.* A dealer who sells, or offers for sale, distilled spirits, wines, or beer to any person other than a dealer.

*Wholesale dealer in liquors.* A dealer who sells, or offers for sale, distilled spirits, wines, or beer to another dealer.

(26 U.S.C. 5121, 5122)

### § 25.112 Dealer registration.

Every brewer who sells, or offers for sale, any alcohol product (distilled spirits, wines, or beer) fit for beverage use must register as a dealer in accordance with part 31 of this chapter. However, the Brewer's Notice, TTB Form 5130.10, filed under subpart G of this part, and approval of that notice by the appropriate TTB officer, will constitute the brewer's registration as a dealer at the brewery. Every brewer registered as a dealer under this subpart will be classified as a wholesale dealer

in liquors (see § 31.32 of this chapter) and as such may also operate as a retail dealer in liquors without additional registration. Registration covers all sales from the same location, including sales of wine, spirits, or other brewers' beer. As provided in § 31.52 of this chapter, the brewer is subject to no additional registration for making sales of wine or beer at the customer's place of business. Otherwise, a brewer who conducts business as a dealer at a location other than the brewery must register and keep records in accordance with part 31 of this chapter.

(26 U.S.C. 5124)

**§ 25.113 Amending the dealer registration.**

Every brewer registered as a dealer under this subpart must maintain a current and accurate Brewer's Notice, TTB Form 5130.10. Whenever there is a change to any of the information provided in the approved Brewer's Notice, the brewer must amend the notice within the time period specified in subpart G of this part. An amendment to the Brewer's Notice, Form 5130.10, will also serve as an amendment of the brewer's dealer registration under this subpart. The brewer's dealer registration will also terminate when brewery operations under the Brewer's Notice terminate.

(26 U.S.C. 5124)

**§ 25.114 Dealer records.**

Every dealer is required to maintain records of transactions. Beer transactions that appear in the records required by subpart U of this part will meet the brewer's recordkeeping requirements as a dealer. For other transactions not covered in the brewery records, such as retail sales of wine or distilled spirits in a restaurant at the brewery, or operations as a wholesale dealer in wine or distilled spirits, the brewer must keep the records specified for dealers in part 31 of this chapter.

(26 U.S.C. 5121, 5122)

**§ 25.168 [Amended]**

■ 43. In § 25.168, the last sentence is amended by removing the reference ''§§ 25.122 and 25.123'' and adding, in its place, the reference ''§ 25.169''.

■ 44. New § 25.169 is added to read as follows:

**§ 25.169 Application for employer identification number.**

(a) *Form SS–4.* The taxpayer must obtain an employer identification number (EIN) by filing an application with the Internal Revenue Service (IRS) on IRS Form SS–4. Form SS–4 is available from the local IRS Service Center, from the IRS District Director, the IRS Web site at *http://www.irs.gov* or from TTB's National Revenue Center. The taxpayer may file this form with IRS by mail, telephone, or fax by following the instructions on the form.

(b) *Time limit.* If the taxpayer has not already received, or applied for, an EIN at the time that the first return on TTB Form 5000.24, Excise Tax Return, is filed, the taxpayer must apply for an EIN not later than seven days from the date of filing the Form 5000.24.

(c) *One EIN only.* Each taxpayer must obtain and use only one EIN, regardless of the number of places of business for which the proprietor is required to file a tax return under this subpart.

(26 U.S.C. 6109)

**§ 25.275 [Removed]**

■ 45. Section 25.275 is removed and reserved.

## PART 26—LIQUORS AND ARTICLES FROM PUERTO RICO AND THE VIRGIN ISLANDS

■ 46. The authority citation for part 26 is revised to read as follows:

**Authority:** 19 U.S.C. 81c; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5061, 5111–5114, 5121, 5122–5124, 5131–5132, 5207, 5232, 5271, 5275, 5301, 5314, 5555, 6001, 6301, 6302, 6804, 7101, 7102, 7651, 7652, 7805; 27 U.S.C. 203, 205; 31 U.S.C. 9301, 9303, 9304, 9306.

**§ 26.11 [Amended]**

■ 47. In § 26.11, the definition of ''Eligible flavor'' is amended by removing from paragraph (1) the reference ''26 U.S.C. 5134'' and adding, in its place, the reference ''26 U.S.C. 5114''.

■ 48. Section 26.36 is amended:

■ a. In paragraph (b), by revising the first sentence;

■ b. In paragraph (c), by revising the first sentence; and

■ c. In paragraph (d)(2)(i), by removing the words '', and pays special (occupational) tax,''.

The revisions read as follows:

**§ 26.36 Products exempt from tax.**

* * * * *

(b) *Industrial spirits.* A distiller of industrial spirits who registers and files a bond as a distilled spirits plant in accordance with part 19 of this chapter may ship industrial spirits to a tax-free alcohol user in the United States who holds a permit issued under part 22 of this chapter. * * *

(c) *Denatured spirits.* A distiller who registers and files a bond as a distilled spirits plant in accordance with part 19 of this chapter and who denatures spirits in accordance with parts 19 and 21 of this chapter may ship completely denatured alcohol to anyone in the United States, and may ship specially denatured spirits to a dealer or user of specially denatured spirits in the United States or Puerto Rico who holds a permit issued under part 20 of this chapter.

* * *

* * * * *

■ 49. The undesignated center heading before § 26.44 is revised to read as follows: ''DEALER REGISTRATION AND RECORDKEEPING''.

■ 50. Sections 26.44 and 26.45 are revised to read as follows:

**§ 26.44 Liquor dealer registration and recordkeeping.**

Every person bringing liquors into the United States from Puerto Rico who sells, or offers for sale, such liquors must register and keep records as a wholesale dealer in liquor or as a retail dealer in liquor in accordance with part 31 of this chapter.

(26 U.S.C. 5121, 5122, 5123, 5124.)

**§ 26.45 Warehouse receipts covering distilled spirits.**

The sale of warehouse receipts for distilled spirits is equivalent to the sale of distilled spirits. Accordingly, every person bringing distilled spirits into the United States from Puerto Rico who sells, or offers for sale, warehouse receipts for distilled spirits stored in warehouses, or elsewhere, must register and keep records as a dealer in liquors at the place where the warehouse receipts are sold, or offered for sale, in accordance with part 31 of this chapter.

(26 U.S.C. 5121, 5122, 5123, 5124)

**§§ 26.46 and 26.47 [Removed and reserved]**

■ 51. Sections 26.46 and 26.47 are removed and reserved.

■ 52. Section 26.171 is revised to read as follows:

**§ 26.171 Claimant registration.**

Any person filing claim for drawback of tax on eligible articles brought into the United States from Puerto Rico must register annually as a nonbeverage domestic drawback claimant. Registration will be accomplished when the claimant submits the first drawback claim for each year, along with the required supporting data for the claim, under subpart G of part 17 of this chapter. For purposes of registration, subpart C part 17 of this chapter shall apply as if the use and tax determination occurred in the United States at the time the article was brought

into the United States, and each business location from which entry of eligible articles is caused or effected shall be treated as a place of manufacture.

■ 53. Section 26.173 is amended:

■ a. In paragraph (a), by removing the second sentence and adding, in its place, two new sentences;

■ b. By removing and reserving paragraph (b)(1); and

■ c. By revising paragraph (c)(1).

The addition and revisions read as follows:

**§ 26.173 Claims for drawback.**

(a) * * * Upon finding that the claimant has satisfied the requirements of this subpart, the appropriate TTB officer will allow the drawback at $1 less than the rate applicable under 26 U.S.C. 7652(f). Claims for products manufactured in Puerto Rico must be filed separately from claims filed under part 17 of this chapter for products manufactured in the United States.

* * * * *

(c) * * *

(1) The claimant's employer identification number, as required by §§ 17.31 and 17.32 of this chapter; and

* * * * *

■ 54. The undesignated center heading before § 26.210 is revised to read as follows: ''DEALER REGISTRATION AND RECORDKEEPING''.

■ 55. Sections 26.210 and 26.211 are revised to read as follows:

**§ 26.210 Liquor dealer registration and recordkeeping.**

Every person bringing liquors into the United States from the Virgin Islands who sells, or offers for sale, such liquors must register and keep records as a wholesale dealer in liquor or as a retail dealer in liquor in accordance with part 31 of this chapter.

(26 U.S.C. 5121, 5122, 5123, 5124)

**§ 26.211 Warehouse receipts covering distilled spirits.**

The sale of warehouse receipts for distilled spirits is equivalent to the sale of distilled spirits. Accordingly, every person bringing distilled spirits into the United States from the Virgin Islands who sells, or offers for sale, warehouse receipts for distilled spirits stored in warehouses, or elsewhere, must register and keep records as a dealer in liquors at the place where the warehouse receipts are sold, or offered for sale, in accordance with part 31 of this chapter.

(26 U.S.C. 5121, 5122, 5123, 5124)

■ 56. Section 26.307 is revised to read as follows:

**§ 26.307 Claimant registration.**

Any person filing claim for drawback of tax on eligible articles brought into the United States from the Virgin Islands must register annually as a nonbeverage domestic drawback claimant. Registration will be accomplished when the claimant submits the first drawback claim for each year, along with the required supporting data for the claim, under subpart G of part 17 of this chapter. For purposes of registration, subpart C of part 17 of this chapter shall apply as if the use and tax determination occurred in the United States at the time the article was brought into the United States, and each business location from which entry of eligible articles is caused or effected shall be treated as a place of manufacture.

■ 57. Section 26.309 is amended:

■ a. In paragraph (a), by removing the second sentence and adding, in its place, two new sentences;

■ b. By removing and reserving paragraph (b)(1); and

■ c. By revising paragraph (c)(1).

The addition and revisions read as follows:

**§ 26.309 Claims for drawback.**

(a) * * * Upon finding that the claimant has satisfied the requirements of this subpart, the appropriate TTB officer will allow the drawback at $1 less than the rate applicable under 26 U.S.C. 7652(f). Claims for products manufactured in the Virgin Islands must be filed separately from claims filed under part 17 of this chapter for products manufactured in the United States.

* * * * *

(c) * * *

(1) The claimant's employer identification number, as required by §§ 17.31 and 17.32 of this chapter; and

* * * * *

## PART 27—IMPORTATION OF DISTILLED SPIRITS, WINES, AND BEER

■ 58. The authority citation for part 27 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a), 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5054, 5061, 5121, 5122–5124, 5201, 5205, 5207, 5232, 5273, 5301, 5313, 5555, 6302, 7805.

**§ 27.1 [Amended]**

■ 59. Section 27.1 is amended by removing the words ''special (occupational) and''.

**§ 27.11 [Amended]**

■ 60. In § 27.11, the definition of ''Eligible flavor'' is amended by removing from paragraph (1) the reference ''26 U.S.C. 5134'' and adding, in its place, the reference ''26 U.S.C. 5114''.

■ 61. Revise subpart C to read as follows:

### Subpart C—Dealer Registration and Recordkeeping

**§ 27.30 Dealer registration and recordkeeping.**

Importers engaged in the business of selling, or offering for sale, distilled spirits, wines, or beer are subject to the provisions of part 31 of this chapter relating to dealer registration and records. Part 31 requires the filing of TTB Form 5630.5d with TTB, in accordance with the instructions on the form, before commencing business and on or before July 1 of each year thereafter if there have been any changes. The dealer must file an amended registration and give notice of termination in accordance with the rules of part 31.

(26 U.S.C. 5121, 5122, 5123, 5124)

**§ 27.31 Warehouse receipts covering distilled spirits.**

The sale of warehouse receipts for distilled spirits is equivalent to the sale of distilled spirits. Accordingly, every person engaged in business as an importer of distilled spirits who sells, or offers for sale, warehouse receipts for distilled spirits stored in customs bonded warehouses, or elsewhere, must register and keep records as a dealer in liquors at the place where the warehouse receipts are sold or offered for sale, in accordance with part 31 of this chapter.

(26 U.S.C. 5121, 5122, 5123, 5124)

## PART 28—EXPORTATION OF ALCOHOL

■ 62. The authority citation for part 28 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a); 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5041, 5051, 5054, 5061, 5121, 5122, 5201, 5205, 5207, 5232, 5273, 5301, 5313, 5555, 6302, 7805; 27 U.S.C. 203, 205; 44 U.S.C. 3504(h).

■ 63. Section 28.212 is revised to read as follows:

**§ 28.212 Persons authorized.**

Persons who have qualified under this chapter as proprietors of distilled spirits plants, bonded wine cellars, or taxpaid wine bottling houses, and persons who are wholesale liquor dealers (as defined

in § 31.32 of this chapter) and have registered as a wholesale liquor dealer in accordance with part 31 of this chapter, are authorized to remove wines under the provisions of this subpart.

(26 U.S.C. 5062)

■ 64. Part 31 is revised to read as follows:

## PART 31—ALCOHOL BEVERAGE DEALERS

Sec.
31.0 Scope.

**Subpart A—General Provisions**

31.1 Definitions.
31.2 Territorial extent.
31.3 Basic permit requirements.
31.4 Relation to State and municipal law.

**Subpart B—Administrative Provisions**

31.11 Forms prescribed.
31.12 Right of entry and examination.
31.13 Delegations of the Administrator.
31.14 Penalties.
31.15 Disclosure of information.

**Subpart C—Activities Subject to This Part**

31.21 Basis of regulation.
31.22 Selling or offering for sale.

**Dealers Classified**

31.31 Retail dealer in liquors.
31.32 Wholesale dealer in liquors.
31.33 Retail dealer in beer.
31.34 Wholesale dealer in beer.
31.35 Limited retail dealer; persons eligible.
31.36 Sales of 20 wine gallons (75.7 liters) or more.

**Certain Organizations, Agencies, and Persons**

31.41 Clubs or similar organizations.
31.42 Restaurants serving liquors with meals.
31.43 States, political subdivisions thereof, or the District of Columbia.
31.44 Sales of denatured spirits or articles.
31.45 Sales of alcoholic compounds, preparations, or mixtures containing distilled spirits, wines, or beer.
31.46 Sales by agencies and instrumentalities of the United States.
31.47 Warehouse receipts covering spirits.
31.48 Alcohol beverage producers, processors, and bonded warehousemen.

**Subpart D—Exemptions and Exceptions**

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31.51 Wholesale dealers making retail sales.
31.52 Wholesale dealers in liquors consummating sales of wines or beer at premises of other dealers.
31.53 Wholesale dealers in beer consummating sales at premises of other dealers.
31.54 Hospitals.
31.55 Limited retail dealers.

**Persons Who Are Not Dealers in Liquors or Beer**

31.61 Single sale of liquors or warehouse receipts.
31.62 Persons making casual sales.
31.63 Agents, auctioneers, brokers, etc., acting on behalf of others.
31.64 Apothecaries or druggists selling medicines and tinctures.
31.65 Persons selling products unfit for beverage use.
31.66 Retail dealer selling entire stock in liquidation.
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**Subpart E—Places Subject to Registration**

31.71 Registration required for each place of business.
31.72 Place of sale.
31.73 Place of offering for sale.
31.74 Places of storage; deliveries therefrom.
31.75 Dealer in beer and dealer in liquors at the same location.

**Sales in Two or More Areas on the Same Premises**

31.81 General.
31.82 Hotels.
31.83 Ball park, race track, etc.; sales throughout the premises.

**Sales in Multiple Locations**

31.91 Passenger trains, aircraft, and vessels.
31.92 Carriers not engaged in passenger service.
31.93 Supply boats or vessels.
31.94 Retail dealers ''At Large.''
31.95 Caterers.
31.96 Peddling.

**Subpart F—Partnerships**

31.101 Registration of partners.
31.102 Addition of partners or incorporation of partnership.
31.103 Formation of a partnership by two dealers.
31.104 Withdrawal of one or more partners.

**Subpart G—Registration Form, TTB F 5630.5d**

31.111 Date registration form is due.
31.112 Registration of multiple locations.
31.113 Place for filing registration form.
31.114 Completion of registration form.
31.115 Employer identification number.
31.116 Execution of registration form.

**Subpart H—Changes in Registration Information**

**Changes Requiring Registration as a New Business**

31.121 Sale of business.
31.122 Incorporation of business.
31.123 New corporation.
31.124 Stockholder continuing business of corporation.
31.125 Cross references.

**Other Changes**

31.131 Change of address.
31.132 Change in name or style of business.
31.133 Change in management.
31.134 Increase in capital stock of a corporation.
31.135 Change in ownership of capital stock.
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31.137 Withdrawal of partner(s).
31.138 Discontinuance of business.

**Subpart I—Restrictions Relating to Purchases of Distilled Spirits**

31.141 Unlawful purchases of distilled spirits.

**Subpart J—Records and Reports**

**Wholesale Dealers' Records and Reports**

31.151 General requirements as to distilled spirits.
31.152 Requirements as to wines and beer.
31.153 Records to be kept by States, political subdivisions of States, or the District of Columbia.
31.154 Records to be kept by alcohol beverage producers, processors, and bonded warehousemen.
31.155 Records of receipt.
31.156 Records of disposition.
31.157 Canceled or corrected records.
31.158 Previously prescribed or approved records of receipt and disposition.
31.159 Variations in format or preparation of records.
31.160 Monthly summary report.
31.161 Conversion between metric and U.S. units.
31.162 Discontinuance of business.
31.163 Requirements when a wholesale dealer in liquors maintains a retail department.

**Filing of Wholesale Dealer's Records and Reports**

31.171 Method of filing.
31.172 Place of filing.

**Retail Dealer's Records**

31.181 Requirements for retail dealers.

**Retention of Records and Files**

31.191 Period of retention.
31.192 Photographic copies of records.

**Subpart K—Reuse and Possession of Used Liquor Bottles**

31.201 Refilling of liquor bottles.
31.202 Possession of refilled liquor bottles.
31.203 Possession of used liquor bottles.
31.204 Mixed cocktails.

**Subpart L—Packaging of Alcohol for Industrial Uses**

31.211 Requirements and procedure.
31.212 Labeling.

**Subpart M—Distilled Spirits for Export With Benefit of Drawback**

31.221 General.
31.223 Records and reports.

**Subpart N—Miscellaneous**

31.231 Destruction of marks and brands on wine containers.
31.232 Wine bottling.
31.233 Mixing cocktails in advance of sale.
31.234 Liability for special (occupational) tax.

**Authority:** 26 U.S.C. 5001, 5002, 5121, 5122–5124, 5131, 5132, 5206, 5207, 5273, 5301, 5352, 5555, 5603, 5613, 5681, 5687, 6061, 6065, 6071, 6091, 6103, 6109, 6723, 6724, 7805.

### § 31.0 Scope.

This part contains the requirements relating to the registration of wholesale and retail dealers in liquors and in beer and to the operations of such dealers, including recordkeeping requirements, prescribed under title 26 of the United States Code. This part also contains provisions relating to entry of dealers' premises and inspection of their records by TTB officers.

## Subpart A—General Provisions

### § 31.1 Definitions.

As used in this part, the following terms shall have the meanings indicated unless either the context in which they are used requires a different meaning, or a different definition is prescribed for a particular subpart, section, or portion of this part:

*Administrator.* The Administrator, Alcohol and Tobacco Tax and Trade Bureau, Department of the Treasury, Washington, DC.

*Appropriate TTB officer.* An officer or employee of the Alcohol and Tobacco Tax and Trade Bureau (TTB) authorized to perform any functions relating to the administration or enforcement of this part by TTB Order 1135.31, Delegation of the Administrator's Authorities in 27 CFR Part 31, Alcohol Beverage Dealers.

*Beer.* Beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefor.

*Beverage use* or *use for beverage purposes.* Use as an alcohol beverage.

*Bonded wine cellar.* An establishment qualified under this chapter for the production, blending, cellar treatment, storage, bottling, and packaging or repackaging of untaxpaid wine.

*Brewery.* An establishment qualified under this chapter for the production of beer.

*CFR.* The Code of Federal Regulations.

*Dealer.* Any person who sells, or offers for sale, any distilled spirits, wines, or beer.

*Denatured spirits* or *denatured alcohol.* Spirits to which denaturants have been added as prescribed under this chapter.

*Distilled spirits* or *spirits.* That substance known as ethyl alcohol, ethanol, or spirits of wine in any form, including all dilutions and mixtures thereof, from whatever source or by whatever process produced.

*Distilled spirits plant.* An establishment qualified under part 19 of this chapter for the production, storage, or processing of distilled spirits.

*Gallon* or *wine gallon.* A United States gallon of liquid measure equivalent to the volume of 231 cubic inches.

*Liquor bottle.* A bottle made of glass or earthenware, or of other suitable material approved by the Food and Drug Administration, which has been designed or is intended for use as a container for distilled spirits for sale for beverage purposes and which has been determined by the appropriate TTB officer to adequately protect the revenue.

*Liquors.* Distilled spirits, wines, or beer.

*Liter.* A metric unit of capacity equal to 1,000 cubic centimeters of alcoholic beverage, and equivalent to 33.814 fluid ounces.

*Person.* An individual, trust, estate, partnership, association or other unincorporated organization, fiduciary, company, or corporation, the District of Columbia, or a State or a political subdivision thereof (including a city, county, or other municipality).

*Place* or *place of business.* The entire office, plant, or area of the business in any one location under the same proprietorship; and passageways, streets, highways, rail crossings, waterways, or partitions dividing the premises shall not be deemed a separation for the purposes of this part, if the various divisions are otherwise contiguous.

*Reclaim.* To grind up a liquor bottle or container and use the ground up material to make products other than liquor bottles or containers.

*Recycle.* To grind up a liquor bottle or container and use the ground up material to make new liquor bottles or containers.

*Sale at retail* or *retail sale.* Sale of liquors to a person other than a dealer.

*Sale at wholesale* or *wholesale sale.* Sale of liquors to a dealer.

*This chapter.* Chapter I of title 27 of the Code of Federal Regulations.

*U.S.C.* The United States Code.

*Wine.* When used without qualification, the term includes every kind (class and type) of product produced on bonded wine premises from grapes, other fruit (including berries), or other suitable agricultural products and containing not more than 24 percent of alcohol by volume. The term includes all imitation, other than standard, or artificial wine and compounds sold as wine. A wine product containing less than one-half of one percent alcohol by volume is not taxable as wine when removed from the bonded wine premises.

(26 U.S.C. 5002, 5041, 5052, 7805)

### § 31.2 Territorial extent.

The provisions of this part shall be applicable in the several States of the United States and the District of Columbia.

### § 31.3 Basic permit requirements.

Every person, except an agency of a State or political subdivision thereof, who intends to engage in the business of purchasing distilled spirits, wines, or beer for sale to other dealers for nonindustrial use, or to engage in the business of importing distilled spirits, wines, or beer for nonindustrial use, is required under part 1 of this chapter to obtain a basic permit authorizing such person to engage in such business.

### § 31.4 Relation to State and municipal law.

Compliance with the requirements of this part shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on any trade or business within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall such compliance be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

## Subpart B—Administrative Provisions

### § 31.11 Forms prescribed.

(a) The appropriate TTB officer is authorized to prescribe all forms required by this part. All of the information called for in each form shall be furnished as indicated by the headings on the form and the instructions on or pertaining to the form. In addition, information called for in each form shall be furnished as required by this part.

(b) Forms prescribed by this part are available for printing through the TTB Web site (*http://www.ttb.gov*) or by mailing a request to the Alcohol and Tobacco Tax and Trade Bureau, National Revenue Center, 550 Main Street, Suite 8002, Cincinnati, OH 45202.

(5 U.S.C. 552(a))

### § 31.12 Right of entry and examination.

Any appropriate TTB officer may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting

or examining any records or other documents required to be kept by such dealer under this part and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

(26 U.S.C. 5123)

**§ 31.13 Delegations of the Administrator.**

The regulatory authorities of the Administrator contained in this part are delegated to appropriate TTB officers. These TTB officers are specified in TTB Order 1135.31, Delegation of the Administrator's Authorities in 27 CFR Part 31, Alcohol Beverage Dealers. You may obtain a copy of this order by accessing the TTB Web site (*http://www.ttb.gov*) or by mailing a request to the Alcohol and Tobacco Tax and Trade Bureau, National Revenue Center, 550 Main Street, Room 1516, Cincinnati, OH 45202.

**§ 31.14 Penalties.**

(a) *Criminal penalties.* Criminal penalties for failure to comply with the requirements of this part are imposed by 26 U.S.C. 5603 and 5687. A failure to register as required by this part may result in a penalty under 26 U.S.C. 5603(b).

(b) *Administrative penalty.* An administrative penalty for failure to supply the required identifying number (employer identification number) in a dealer's registration is imposed by 26 U.S.C. 6723. The penalty is $50 for each such failure, but not more than $100,000 for all such failures during a calendar year. A failure to submit a registration includes a failure to include the identifying number on the registration.

(c) *Reasonable cause.* The administrative penalty described in paragraph (b) of this section is not imposed when it is shown that the failure was due to reasonable cause and not due to willful neglect. A dealer who believes that the circumstances that led to the failure were reasonable and who desires to have the penalty waived shall submit a written statement, under the penalty of perjury, affirmatively showing all of the circumstances alleged as reasonable causes for the failure. If the appropriate TTB officer determines that the failure was due to a reasonable cause and not to willful neglect, the penalty will not be assessed. If the dealer exercised ordinary business care and prudence but was nevertheless unable to comply with the requirement, then the failure was due to reasonable cause. Mere ignorance of the law will not be considered a reasonable cause.

(26 U.S.C. 5603, 5687, 6109, 6723, 6724)

**§ 31.15 Disclosure of information.**

Alcohol dealer registration forms are ''information returns'' as that term is used in 26 U.S.C. 6103 and, as such, are not subject to disclosure except as provided in that law.

(26 U.S.C. 6103)

## Subpart C—Activities Subject to This Part

**§ 31.21 Basis of regulation.**

Persons engaging in or carrying on the business or occupation of selling or offering for sale alcoholic liquors fit for use as a beverage, or any alcoholic liquors sold for use as a beverage, are subject to the provisions of this part. The classes of liquor dealer business and the conditions under which the provisions of this part apply to them are specified in §§ 31.31 through 31.34.

**§ 31.22 Selling or offering for sale.**

Whether the activities of any person constitute engaging in the business of selling or offering for sale is to be determined by the facts in each case. Any manner of selling or offering for sale, even though to a restricted class of persons or without a view to profit, is within the scope of this part.

### Dealers Classified

**§ 31.31 Retail dealer in liquors.**

(a) *General.* Except as otherwise provided in paragraph (b) of this section, every person who sells or offers for sale distilled spirits, wines, or beer to any person other than a dealer is a retail dealer in liquors for purposes of this part. Every retail dealer in liquors must comply with the registration and other requirements of this part, unless the dealer is covered by an applicable exemption under subpart D of this part.

(b) *Persons not deemed to be retail dealers in liquors.* The following persons are not retail dealers in liquors within the meaning of this part:

(1) A retail dealer in beer as described in § 31.33(a),

(2) A limited retail dealer as described in § 31.35, or

(3) A person who sells or offers for sale distilled spirits, wines, or beer only as provided in § 31.61 through § 31.64 or § 31.65(a).

(26 U.S.C. 5122)

**§ 31.32 Wholesale dealer in liquors.**

(a) *General.* Except as otherwise provided in paragraph (b) of this section, every person who sells or offers for sale distilled spirits, wines, or beer to another dealer is a wholesale dealer in liquors for purposes of this part. Every wholesale dealer in liquors must comply with the registration and other requirements of this part, unless the dealer is covered by an applicable exemption under subpart D of this part.

(b) *Persons not deemed to be wholesale dealers in liquors.* The following persons are not wholesale dealers in liquors within the meaning of this part:

(1) A wholesale dealer in beer as described in § 31.34(a);

(2) A person who sells or offers for sale distilled spirits, wines, or beer only as provided in §§ 31.61 through 31.64, § 31.65(a), or § 31.66; or

(3) A person returning liquors for credit, refund, or exchange as provided in § 31.67.

(26 U.S.C. 5121)

**§ 31.33 Retail dealer in beer.**

(a) *General.* Except as otherwise provided in paragraph (b) of this section, every person who sells or offers for sale beer, but not distilled spirits or wines, to any person other than a dealer is a retail dealer in beer for purposes of this part. Every retail dealer in beer must comply with the registration and other requirements of this part, unless the dealer is covered by an applicable exemption under subpart D of this part.

(b) *Persons not deemed to be retail dealers in beer.* The following persons are not retail dealers in beer within the meaning of this part:

(1) A limited retail dealer as described in § 31.35, or

(2) A person who does not sell or offer for sale distilled spirits or wines and sells beer or offers beer for sale only as provided in § 31.61 through § 31.63 or § 31.65(a).

(26 U.S.C. 5122)

**§ 31.34 Wholesale dealer in beer.**

(a) *General.* Except as otherwise provided in paragraph (b) of this section, every person who sells or offers for sale beer, but not distilled spirits or wines, to another dealer is a wholesale dealer in beer for purposes of this part. Every wholesale dealer in beer must comply with the registration and other requirements of this part, unless the dealer is covered by an applicable exemption under subpart D of this part.

(b) *Persons not deemed to be wholesale dealers in beer.* The following persons are not wholesale dealers in beer within the meaning of this part:

(1) A person who does not sell or offer for sale distilled spirits or wines and sells beer or offers beer for sale only as provided in §§ 31.61 through 31.63, § 31.65(a), § 31.66, or § 31.67; or

(2) A person returning beer for credit, refund or exchange as provided in § 31.56.

(26 U.S.C. 5121)

**§ 31.35 Limited retail dealer; persons eligible.**

Any person selling distilled spirits, beer, or wine, or any combination thereof, to members, guests, or patrons of bona fide fairs, reunions, picnics, carnivals, or similar outings, and any fraternal, civic, church, labor, charitable, benevolent, or ex-servicemen's organization selling distilled spirits, beer, or wine, or any combination thereof, on the occasion of any kind of entertainment, dance, picnic, bazaar, or festival held by it, is a ''limited retail dealer'' if the person or organization is not otherwise engaged in business as a dealer.

(26 U.S.C. 5122)

**§ 31.36 Sales of 20 wine gallons (75.7 liters) or more.**

Any person who sells or offers for sale distilled spirits, wines, or beer, in quantities of 20 wine gallons (75.7 liters) or more, to the same person at the same time, shall be presumed and held to be a wholesale dealer in liquors or a wholesale dealer in beer, as the case may be, unless the seller shows by satisfactory evidence that the sale, or offer for sale, was made to a person other than a dealer.

(26 U.S.C. 5121)

### Certain Organizations, Agencies, and Persons

**§ 31.41 Clubs or similar organizations.**

(a) Subject to paragraph (b) of this section, a club or similar organization is a dealer for purposes of this part if the club or organization:

(1) Furnishes liquors to members under conditions constituting a sale (including the acceptance of orders therefor, furnishing the liquors ordered and collecting the price thereof); or

(2) Conducts a bar for the sale of liquors on the occasion of an outing, picnic, or other entertainment, unless the club is a ''limited retail dealer'' described in § 31.35. The registration of the proprietor of the premises where the bar is located will not relieve the club or organization from its own obligation to register; or

(3) Purchases liquors for members without prior agreement concerning payment therefor and such organization subsequently recoups those costs.

(b) Compliance with the registration and other requirements of this part is not required if money is collected in advance from members for the purchase of liquors, or if money is advanced for the purchase of liquors pursuant to an agreement with the members for reimbursement.

(26 U.S.C. 5122)

**§ 31.42 Restaurants serving liquors with meals.**

Proprietors of restaurants and other persons who serve liquors with meals to paying customers, even if no separate or specific charge for the liquors is made, are dealers subject to the provisions of this part.

(26 U.S.C. 5122)

**§ 31.43 States, political subdivisions of States, or the District of Columbia.**

A State, a political subdivision of a State, or the District of Columbia, that engages in the business of selling, or offering for sale, distilled spirits, wines, or beer is not exempt from the requirements of this part. However, no such governmental entity shall be required to register more than once as a retail dealer in liquors regardless of the number of locations at which the entity carries on business as a retail dealer in liquors. Any such governmental entity that has properly registered as a wholesale dealer at its principal office, and that has properly registered once as a retail dealer in liquors or beer, is not required to register again at its retail stores by reason of the sale of distilled spirits, wines, or beer at any of those locations to dealers qualified to do business as a dealer within the jurisdiction of that governmental entity.

(26 U.S.C. 5121)

**§ 31.44 Sales of denatured spirits or articles.**

It is illegal to sell denatured spirits, or any article containing denatured spirits, for beverage purposes. Any person who sells denatured spirits, or any substance or preparation made with or containing denatured spirits, for use, or for sale for use, for beverage purposes, or who sells any such products under circumstances in which it might reasonably appear that it is the intention of the purchaser to procure the same for sale or use for beverage purposes, is subject to the registration and other requirements of this part.

(26 U.S.C. 5273)

**§ 31.45 Sales of alcoholic compounds, preparations, or mixtures containing distilled spirits, wines, or beer.**

(a) *General.* Compliance with the provisions of this part is required with respect to the sale, or offering for sale, of alcoholic compounds, preparations, or mixtures containing distilled spirits, wines, or beer, unless those compounds, preparations, or mixtures are unfit for use for beverage purposes and are sold solely for use for nonbeverage purposes.

(b) *Products unfit for beverage use.* Products described in § 19.58 of this chapter, for which manufacturers are exempt from qualification requirements, shall be deemed to be unfit for beverage purposes for the purposes of this part.

**§ 31.46 Sales by agencies and instrumentalities of the United States.**

Unless specifically exempt by statute, any agency or instrumentality of the United States, including post exchanges, ship's stores, ship's service stores, and commissaries, or any canteen, club, mess, or similar organization operated under regulations of any such agency or instrumentality, that sells, or offers for sale, distilled spirits, wines, or beer must comply with the registration and other requirements of this part as a dealer in liquors or a dealer in beer, as the case may be.

(26 U.S.C. 5121, 5122)

**§ 31.47 Warehouse receipts covering spirits.**

The sale of warehouse receipts for distilled spirits is equivalent to the sale of distilled spirits. Accordingly, every person who sells, or offers for sale, warehouse receipts for distilled spirits held or stored in a distilled spirits plant, customs bonded warehouse, or elsewhere, is required to register and keep records as a wholesale dealer in liquors, or as a retail dealer in liquors, as the case may be, at the place where those warehouse receipts are sold, or offered for sale, unless the person is exempt from those requirements under subpart D of this part.

(26 U.S.C. 5121, 5122)

**§ 31.48 Alcohol beverage producers, processors, and bonded warehousemen.**

Brewers and proprietors of distilled spirits plants, bonded wine cellars, bonded wine warehouses, and taxpaid wine bottling houses who make sales, whether of their own alcohol beverage products or of such products produced by others, are not exempt from registration and recordkeeping as dealers under this part. However, the registration and recordkeeping requirements applicable to such persons are prescribed in parts 19 (Distilled Spirits Plants), 24 (Wine), and 25 (Beer) of this chapter.

## Subpart D—Exemptions and Exceptions

### Persons Exempt From Registration and/or Recordkeeping

**§ 31.51 Wholesale dealers making retail sales.**

A wholesale dealer in liquors who sells, or offers for sale, distilled spirits,

wines, or beer, and a wholesale dealer in beer who sells, or offers for sale, only beer, whether to dealers or to persons other than dealers, at any place where the wholesale dealer in liquors or beer has appropriately registered under this part, is exempt from registration at that place as a retail dealer in liquors or in beer.

**§ 31.52 Wholesale dealers in liquors consummating sales of wines or beer at premises of other dealers.**

(a) *Sales of wines.* Any wholesale dealer in liquors (including the proprietor of a bonded wine cellar) who has registered as a wholesale dealer in liquors for the place from which that dealer conducts selling operations may consummate sales of wines to other wholesale or retail dealers in liquors, or to limited retail dealers, at the purchasers' places of business without having to register again as a wholesale dealer on account of those sales.

(b) *Sales of beer.* Any wholesale dealer in liquors who has already registered as such may also consummate sales of beer to wholesale or retail dealers in beer, to wholesale or retail dealers in liquors, or to limited retail dealers, at the purchasers' place of business without having to register again as a wholesale dealer on account of those sales.

**§ 31.53 Wholesale dealers in beer consummating sales at premises of other dealers.**

Any dealer who has registered as a wholesale dealer in beer for the place from which that dealer conducts selling operations may consummate sales of beer (but not wines or distilled spirits) to other dealers at the purchasers' places of business without having to register again as a wholesale dealer on account of those sales.

**§ 31.54 Hospitals.**

Hospitals and similar institutions furnishing liquors to patients are not required to register or keep records under this part, provided that no specific or additional charge is made for the liquors so furnished.

**§ 31.55 Limited retail dealers.**

(a) *Sales by limited retail dealers.* Limited retail dealers, as described in § 31.35, are not required to register or keep records under this part.

(b) *Sales to limited retail dealers.* Retail dealers in liquors or beer who make sales at their registered places of business to limited retail dealers are not required under this part, solely by virtue of those sales, to register or keep records as wholesale dealers.

**Persons Who Are Not Dealers in Liquors or Beer**

**§ 31.61 Single sale of liquors or warehouse receipts.**

A single sale of distilled spirits, wines, or beer, or a single sale of one or more warehouse receipts for distilled spirits, unattended by circumstances showing the person making the sale to be engaged in that activity as a business, does not subject the vendor to the registration and other requirements of this part.

(26 U.S.C. 5121, 5122)

**§ 31.62 Persons making casual sales.**

Certain persons making casual sales of liquors are not dealers for purposes of this part and therefore are not required to register, keep records, or submit a report as required of dealers under this part. These persons are:

(a) Administrators, executors, receivers, and other fiduciaries who receive liquors in their fiduciary capacities and sell them in one parcel or at public auction in parcels of not less than 20 wine gallons (75.7 liters);

(b) Creditors who receive liquors as security for, or in payment of, debts and sell them in one parcel or at a public auction in parcels of not less than 20 wine gallons (75.7 liters);

(c) Public officers or court officials who levy on liquors under order or process of any court or magistrate and sell them in one parcel or at public auction in parcels of not less than 20 wine gallons (75.7 liters); and

(d) A retiring partner, or representative of a deceased partner, who sells liquors to the incoming or remaining partner, or partners, of a partnership.

**§ 31.63 Agents, auctioneers, brokers, etc., acting on behalf of others.**

Certain persons may sell liquors as agents or employees of others (principals), or may receive and transmit orders therefor to a dealer, without being considered a dealer on account of those activities. Those persons, who have no property rights in the liquors sold, may make collections for their principals and receive commissions for their services, or may guarantee the payment of accounts, without being required to register or keep records under this part. In all such cases, however, the principal is required to register and keep records, as provided in this part, at each place where sales are consummated, unless the principal is exempt from those requirements under the provisions of this subpart. The persons covered by this section are:

(a) Auctioneers who merely sell liquors at auction on behalf of others;

(b) Agents or brokers who solicit orders for liquors in the name of a principal, but who neither stock nor deliver the liquors for which orders are taken;

(c) Employees who merely sell liquors on behalf of their employers; and

(d) Retail dealers in liquors or retail dealers in beer who merely receive and transmit to a wholesale dealer orders for liquors or beer to be billed, charged, and shipped to customers by such wholesale dealers.

**§ 31.64 Apothecaries or druggists selling medicines and tinctures.**

Apothecaries and druggists who use wines or spirituous liquors for compounding medicines and in making tinctures that are unfit for use for beverage purposes are not considered to be dealers by reason of the sale of those compounds or tinctures for nonbeverage purposes.

(26 U.S.C. 5002)

**§ 31.65 Persons selling products unfit for beverage use.**

(a) *Vendors not deemed to be dealers.* No person selling or offering for sale for nonbeverage purposes products qualifying as unfit for use for beverage purposes under § 19.58 of this chapter shall be deemed, solely by reason of such sales, to be a dealer.

(b) *Restrictions.* Any person who sells or offers for sale any nonbeverage products for use, or for sale for use, for beverage purposes, or who sells any of such products under circumstances in which it might reasonably appear that it is the intention of the purchaser to procure the product for sale or use for beverage purposes, must register and keep records as required under this part as a wholesale dealer in liquors, retail dealer in liquors, wholesale dealer in beer, or retail dealer in beer, as appropriate.

**§ 31.66 Retail dealer selling entire stock in liquidation.**

No retail dealer in liquors or retail dealer in beer shall be deemed to be a wholesale dealer in liquors or a wholesale dealer in beer by virtue of selling in liquidation that dealer's entire stock of liquors in one parcel, or in parcels, each of which embraces not less than the entire stock of distilled spirits, of wines, or of beer, which parcels may contain a combination of any or all such liquors, to any other dealer. A retail dealer making such sale or sales is not required to register or to keep records or submit reports of those sales.

**§ 31.67 Persons returning liquors for credit, refund, or exchange.**

No retail dealer in liquors or retail dealer in beer, or other person, shall be deemed to be a wholesale dealer in liquors or a wholesale dealer in beer by virtue of a bona fide return of distilled spirits, wines, or beer to the dealer from whom the distilled spirits, wines, or beer were purchased (or to the successor of such vendor's business or line of merchandise) for credit, refund, or exchange; and the giving of such credit, refund or exchange shall not be deemed to be a purchase within the meaning of § 31.141 of this part. Except in the case of wholesale dealers in liquors required to keep records of their transactions under §§ 31.155 and 31.156, or retail dealers required to keep records under § 31.171, persons returning liquors as provided in this section are not required to keep records or submit reports of such transactions.

(26 U.S.C. 5132)

## Subpart E—Places Subject to Registration

**§ 31.71 Registration required at each place of business.**

Except as otherwise provided in § 31.43 and in subpart D of this part, registration is required under this part for each and every place where distilled spirits, wines, or beer are sold or offered for sale. No person may engage in any business for which registration is required until the place of business has been registered in accordance with this part.

**§ 31.72 Place of sale.**

For purposes of this part, the place at which ownership of liquors is transferred, actually or constructively, is the place of sale.

**§ 31.73 Place of offering for sale.**

Liquors are considered to be offered for sale at the place where they are kept for sale and where a sale could take place, and at any place where sales are in fact consummated. Liquors are not considered to be offered for sale by sending an agent out to take orders, or by establishing an office for the mere purpose of taking orders, so long as in each case the orders received are transmitted to the principal for acceptance at the place where that principal has registered under this part or where the principal is exempt from registration as provided in subpart D of this part.

**§ 31.74 Places of storage; deliveries therefrom.**

Registration is not required under this part for warehouses and similar places that are used by dealers merely for the storage of liquors and that are not places where orders for liquors are accepted. When orders for liquors are received and duly accepted at a place that the dealer has registered under this part, the subsequent actual delivery of the liquors from a place of storage does not require registration at that place of storage. Except as otherwise provided in §§ 31.52 and 31.53, a dealer who registered a given place, and who makes actual delivery of liquors from a warehouse at another place, must register for the place where ownership of the liquors is transferred if there was no prior constructive delivery by the acceptance of an order for the liquors at the place covered by the existing registration.

**§ 31.75 Dealer in beer and dealer in liquors at the same location.**

Any person who registers as a wholesale dealer in beer or retail dealer in beer and who thereafter begins to sell distilled spirits or wine must also register as a wholesale dealer in liquors or retail dealer in liquors before commencing the sale, or offering for sale, of distilled spirits or wine.

(26 U.S.C. 5124)

### Sales in Two or More Areas on the Same Premises

**§ 31.81 General.**

When liquors are sold by a proprietor in two or more areas within the proprietor's place of business, only one registration is required under this part. When the proprietor leases to another person or persons the privilege of selling liquors in two or more areas within the proprietor's place of business, whether the privilege is exercised separately or simultaneously with the proprietor or another concessionaire, each lessee is required to register only once.

**§ 31.82 Hotels.**

The proprietor of a hotel who conducts the sale of liquors throughout the hotel premises is only required to register under this part for one place. For example, different areas operated by the proprietor in the hotel, such as banquet rooms, meeting rooms, and guest rooms, collectively constitute a single place of business. When a concessionaire conducts the sale of liquors at two or more areas in a hotel, those areas are regarded as a single place of business, and the concessionaire is required to register only once.

**§ 31.83 Ball park, race track, etc.; sales throughout the premises.**

The proprietor of a ball park, race track, stadium, pavilion, or other similar enclosure constituting one premises, who engages in the business of selling liquors throughout that enclosure, including sales from baskets or containers by employees on the proprietor's behalf, is required to register only once for the entire enclosure. Each concessionaire having the same privilege throughout the enclosure, whether the privilege is exercised separately or simultaneously with the proprietor or another concessionaire, is required to register only once for the entire enclosure.

### Sales in Multiple Locations

**§ 31.91 Passenger trains, aircraft, and vessels.**

Persons who carry on the business of a retail dealer in liquors or of a retail dealer in beer on trains, aircraft, boats, or other conveyances engaged in the business of carrying passengers may conduct that business throughout the passenger carrying train, aircraft, boat, or other vessel, after filing only one registration under this part. Such persons must specify on the registration form the number of passenger carriers for which registration is being completed.

**§ 31.92 Carriers not engaged in passenger service.**

Except as otherwise provided in § 31.93, the retailing of liquors on any train, aircraft, boat, or other conveyance that is not engaged in the business of carrying passengers is prohibited.

**§ 31.93 Supply boats or vessels.**

Persons may carry on the business of a retail dealer in liquor or of a retail dealer in beer on supply boats or vessels operated by them when those persons operate from a fixed address in a port or harbor and supply exclusively boats or other vessels, or persons thereon, at that port or harbor. Such persons must specify, on an attachment to the registration form, the following: that the business will consist of supplying exclusively boats, vessels, or persons thereon; the name of the port or harbor at which the business is to be carried on; and the fixed address from which operations are to be conducted. When such sales are to be made from two or more supply boats or vessels, the dealer must also specify on the attachment the number of supply boats or vessels for which registration is being made. If the dealer operates from two or more fixed addresses, the dealer must prepare one registration form covering all of those

addresses and must include on the attachment to the registration form the number of supply boats or vessels operating from each address.

**§ 31.94 Retail dealers ''At Large.''**

A retail dealer in liquors or a retail dealer in beer whose business requires the dealer to travel from place to place, such as a dealer who sells at carnivals or circuses, must register ''At Large'' covering the dealer's activities throughout the United States by filing only one registration. A dealer submitting such a registration must state on the registration form, or on an attachment thereto, the nature of the dealer's business and the reason the dealer requires registration ''At Large.''

**§ 31.95 Caterers.**

(a) *General.* When a contract to furnish liquors is made by a caterer at a place of business for which the caterer has registered under this part, no additional registration is required by virtue of the serving of the liquors at a different location.

(b) *Additional registration.* When the contract of a caterer provides for the sale of liquors by the drink at a place, or simultaneously at different places, other than the place of business for which the caterer has registered under this part, a separate registration is required for each such place if the caterer does not keep the records specified in paragraph (c) of this section.

(c) *Records.* Caterers must maintain sufficient commercial records to identify all locations where activities subject to registration occur. These commercial records must indicate the names and addresses of locations where alcoholic beverages have been sold or offered for sale and the dates and times that those activities occurred. These commercial records must be available to an appropriate TTB officer upon request.

(26 U.S.C. 5121, 5122)

**§ 31.96 Peddling.**

No person shall peddle distilled spirits, wines, or beer, except in the circumstances described in §§ 31.52, 31.53, and 31.93. Persons peddling liquors to whom §§ 31.52, 31.53, and 31.93 do not apply are required to register at each place where sales are consummated.

## Subpart F—Partnerships

**§ 31.101 Registration of partners.**

Any number of persons carrying on one business in partnership at any one place must register only once for that business.

**§ 31.102 Addition of partners or incorporation of partnership.**

Where a number of persons who have filed a registration under this part as partners admit one or more new members to the partnership or form a corporation (a separate legal entity) to take over the business, the new partnership or corporation must register as a new dealer before commencing business.

(26 U.S.C. 5121, 5122, 5124)

**§ 31.103 Formation of a partnership by two dealers.**

Where two persons form a partnership after each has registered for a business carried on by himself, the partnership must register as a new dealer to cover the business conducted by the partnership.

(26 U.S.C. 5121, 5122, 5124)

**§ 31.104 Withdrawal of one or more partners.**

When one or more partners withdraw from a partnership that has registered under this part, the remaining partner, or partners, must register the change in control by filing an amended registration form on or before the following July 1.

## Subpart G—Registration Form, TTB F 5630.5d

**§ 31.111 Date registration form is due.**

(a) *General.* Dealers must register by filing the registration form, TTB Form 5630.5d, before engaging in business and on or before July 1 of each year thereafter. However, as long as none of the information specified on the form has changed since the previous registration form was filed, no additional registration is required. If the registration form is received in the mail and the U.S. postmark on the cover shows that it was deposited in the mail in the United States within the time prescribed for filing in an envelope or other appropriate wrapper that was properly addressed with postage prepaid, the form will be considered as timely filed. If the postmark is not legible, the sender has the burden of proving the date when the postmark was made. When registered mail is used, the date of postal registration will be accepted as the postmark date.

(b) *Transition rule.* Dealers already engaged in business prior to July 1, 2008, must register as an ''existing business'' unless they had registered, in accordance with regulations in effect at the time of registration, on or after January 1, 2007. This one-time registration is due on or before July 1, 2009.

(26 U.S.C. 6071)

**§ 31.112 Registration of multiple locations.**

A dealer required to register at two or more locations shall file one registration form, prepared as provided in § 31.114(c), to cover all such locations.

**§ 31.113 Place for filing registration form.**

The registration form, TTB Form 5630.5d, must be filed with TTB in accordance with the instructions on the form.

**§ 31.114 Completion of registration form.**

(a) *General.* Dealers must register by filing the registration form, TTB Form 5630.5d, Alcohol Dealer Registration. The registration form must be filed with TTB in accordance with this subpart and the instructions on the form.

(b) *Preparation of TTB Form 5630.5d.* All of the information called for on TTB Form 5630.5d must be provided. This information includes the following:

(1) The true name of the dealer.

(2) The trade name(s) (if any) of the business(es) subject to the registration requirement.

(3) The employer identification number (see § 31.115).

(4) The mailing address of the dealer's principal place of business (or principal office, in the case of a corporate dealer).

(5) The exact location of each place of business, by name and number of building or street, or if these do not exist, by some specific description in addition to the post office address.

(6) The business telephone number of each place of business.

(7) The class(es) of dealer in which the dealer operates a business.

(8) Ownership and control information. This consists of the name, position, and residence address of every owner of the business and of every person having power to control its management and policies with respect to the activity subject to registration. ''Owner of the business'' includes every partner, if the dealer is a partnership, and every person owning 10 percent or more of its stock, if the dealer is a corporation. However, the ownership and control information required by this paragraph need not be stated if the same information has been previously provided to TTB and that previously provided information is still current.

(c) *Multiple locations and/or classes of dealers.* A dealer required to register at more than one location or for more than one class of dealers must—

(1) File one registration form, TTB Form 5630.5d, to cover all locations and classes of dealers; and

(2) Prepare, on the form, or on an attachment identified with the

taxpayer's name, mailing address (as shown on TTB Form 5630.5d), and employer identification number, a list showing, by States, the trade name, address, telephone number, and dealer class of each location for which registration is being made. The original of the list must be filed with TTB on or with the registration form, and a copy must be retained at the dealer's principal place of business (or principal office, in the case of a corporate dealer) for the period specified in § 31.191.

(26 U.S.C. 7805)

**§ 31.115 Employer identification number.**

(a) *Requirement.* The employer identification number (as defined in 26 CFR 301.7701–12) of a dealer who has been assigned such a number must be shown on each registration form filed under this part. A dealer who does not have such a number must apply for one as provided in paragraph (b) of this section and enter ''number applied for'' in the space for the number on the registration form; then, upon receipt of the number from the Internal Revenue Service, the dealer must provide it to TTB by separate correspondence. Failure of a dealer to include the employer identification number may result in the imposition of the penalty specified in § 31.14(b).

(b) *Application for employer identification number.* Each dealer who files a registration form and who has not already been assigned an employer identification number must file Internal Revenue Service (IRS) Form SS–4 to apply for one. The dealer shall apply for and be assigned only one employer identification number, regardless of the number of places of business for which the dealer is required to file a registration form under this part. The employer identification number shall be applied for no later than 7 days after the filing of the taxpayer's first registration form. IRS Form SS–4 may be obtained from the director of an IRS service center, from any IRS district director, from *http://www.irs.gov/,* or from TTB's National Revenue Center.

(26 U.S.C. 6109)

**§ 31.116 Execution of registration form.**

The registration of an individual proprietor shall be signed by the proprietor, the registration of a partnership shall be signed by a member of the firm, and the registration of a corporation shall be signed by a duly authorized officer thereof; however, any individual, partnership, or corporation that is a proprietor may appoint an agent to sign on the proprietor's behalf. The person signing the registration form must identify his or her signing capacity as ''individual owner,'' ''member of firm,'' ''agent,'' or ''attorney-in-fact,'' as appropriate, or, in the case of a corporation, by the title of the signing officer. A receiver, trustee, assignee, executor, administrator, or other legal representative who continues the business of a dealer by reason of death, insolvency, or other circumstance must indicate the fiduciary capacity in which he or she acts. Registration forms signed by persons as agents or attorneys-in-fact will not be accepted unless, in each instance, the principal named on the form has executed a power of attorney authorizing that person to sign and that power of attorney is filed with the TTB officer with whom the TTB Form 5630.5d is required to be filed. Form 5630.5d must be verified by a written declaration that it has been executed under the penalties of perjury.

(26 U.S.C. 6061, 6065)

## Subpart H—Changes in Registration Information

### Changes Requiring Registration as a New Business

**§ 31.121 Sale of business.**

Under this part, registration is personal to the one who registered and is not transferable from one dealer to another. Where a change occurs in the proprietorship of a business for which registration has been completed, the successor must register as a new business.

(26 U.S.C. 5124)

**§ 31.122 Incorporation of business.**

Where an individual or a firm engaged in business requiring registration under this part forms a corporation to take over and conduct the business, the corporation, as a separate legal entity, must register in its own name as a new business.

(26 U.S.C. 5124)

**§ 31.123 New corporation.**

Where a new corporation is formed to take over and conduct the business of one or more corporations that have registered under this part, the new corporation must register in its own name as a new business.

(26 U.S.C. 5124)

**§ 31.124 Stockholder continuing business of corporation.**

A registration completed by a corporation as a dealer in liquors, or as a dealer in beer, cannot cover the same business carried on by one or more of its stockholders after dissolution of the corporation. The stockholder(s) must register as a new business.

(26 U.S.C. 5124)

**§ 31.125 Cross references.**

See also §§ 31.75, 31.102, and 31.103 for other situations requiring registration as a new dealer.

### Other Changes

**§ 31.131 Change of address.**

(a) *General.* A dealer who removes the business to a place other than that for which the dealer is registered must register the change with TTB by filing an amended registration form, TTB Form 5630.5d, on or before the next July 1 following the change.

(b) *Caterers.* A caterer who sells liquor by the drink at locations other than his or her principal place of business shall not be required to provide the change of location registration prescribed in paragraph (a) of this section for those catering activities, provided that the caterer maintains the records required by § 31.95(c). For a permanent change in location of the principal place of business, the caterer must file an amended registration form in accordance with paragraph (a) of this section.

**§ 31.132 Change in name or style of business.**

A dealer who has registered for a business at a given location must complete an amended registration, and submit it on or before the next July 1, to report a change in the name or style (trade name) under which the dealer conducts that business.

**§ 31.133 Change in management.**

A change in management that involves no change in ownership of the business requires an amended registration only if the change involves a person who is responsible for controlling the management policies or buying or selling practices of the business pertaining to alcohol beverages. The amended registration must be submitted on TTB Form 5630.5d on or before the next July 1 following the change.

(26 U.S.C. 5124)

**§ 31.134 Increase in capital stock of a corporation.**

An amended registration is not required by reason of an increase in the capital stock of a corporation so long as a new corporation is not created under the laws of the State of incorporation and provided that the change does not alter the list of stockholders owning 10 percent or more of the capital stock.

(26 U.S.C. 5121, 5122, 5124)

**§ 31.135 Change in ownership of capital stock.**

Registration as a new business is not required merely by reason of the sale or transfer of all or a controlling interest in the capital stock of a corporation. However, an amended registration is required if the sale or transfer alters the list of stockholders owning 10 percent or more of the capital stock. The amended registration must be filed on or before the next July 1 following the sale or transfer.

**§ 31.136 Change in membership of unincorporated club.**

Registration of an unincorporated club is not required by reason of changes in membership, when those changes do not result in the dissolution of the club and the formation of a new club, unless the changes involve a person with the power to control the management policies or buying or selling practices pertaining to alcohol. In the latter case, the filing of an amended registration is required on or before the next July 1.

**§ 31.137 Withdrawal of partner(s).**

Withdrawal of partner(s) requires an amended registration. See § 31.104.

**§ 31.138 Discontinuance of business.**

A dealer going out of business must register that event within 30 days by filing a registration form, TTB Form 5630.5d, in accordance with instructions on the form.

## Subpart I—Restrictions Relating to Purchases of Distilled Spirits

**§ 31.141 Unlawful purchases of distilled spirits.**

(a) *General.* It is unlawful for any dealer to purchase distilled spirits for resale from any person other than:

(1) A wholesale dealer (including a State, a political subdivision of a State, the District of Columbia, and a distilled spirits plant) who is required to keep records under §§ 31.151 through 31.163 pertaining to the place where the distilled spirits are purchased;

(2) A retail liquor store operated by a State, a political subdivision of a State, or the District of Columbia; or

(3) A person not required to register as a wholesale liquor dealer, as provided in §§ 31.62, 31.63, 31.66, and 31.67.

(b) *Special provision for limited retail dealers.* A limited retail dealer may purchase distilled spirits from a retail dealer in liquors for resale.

(26 U.S.C. 5132)

## Subpart J—Records and Reports

### Wholesale Dealers' Records and Reports

**§ 31.151 General requirements as to distilled spirits.**

Except as otherwise provided in §§ 31.153 and 31.154, every wholesale dealer in liquors must keep daily records of the physical receipt and disposition of distilled spirits in accordance with §§ 31.155 and 31.156. When required in writing by the appropriate TTB officer, a wholesale dealer in liquors must also prepare and file a monthly summary report totaling the daily receipts and disposition of distilled spirits in accordance with § 31.160.

(26 U.S.C. 5121)

**§ 31.152 Requirements as to wines and beer.**

Every wholesale dealer in liquors who receives wines, or wines and beer, and every wholesale dealer in beer must keep at the dealer's place of business a complete record showing the quantities of wine and beer received, from whom the wine and beer were received, and the dates of receipt. This record, which must be kept for a period of not less than three years as prescribed in § 31.191, shall consist of all purchase invoices or bills covering wines and beer received or, at the option of the dealer, a book record containing all of the required information. Wholesale dealers are not required to prepare or submit reports to the appropriate TTB officer of transactions relating to wines and beer.

(Approved by the Office of Management and Budget under control number 1513–0065) (26 U.S.C. 5121)

**§ 31.153 Records to be kept by States, political subdivisions of States, or the District of Columbia.**

The provisions of this subpart regarding the maintenance of records and the submission of reports shall not apply to States, political subdivisions of States, or the District of Columbia, or to any liquor stores operated by such entities that maintain, and make available for inspection by appropriate TTB officers, records that will enable TTB to verify receipts of wines and beer and to trace readily all distilled spirits received and disposed of by those entities. However, States, political subdivisions of States, and the District of Columbia, and liquor stores operated by such entities, must, on request of the appropriate TTB officer, furnish such transcripts, summaries, and copies of records with respect to distilled spirits as that TTB officer may require.

(26 U.S.C. 5121)

**§ 31.154 Records to be kept by alcohol beverage producers, processors, and bonded warehousemen.**

Wholesale liquor dealer operations conducted by brewers and by proprietors of distilled spirits plants, bonded wine cellars, bonded wine warehouses, and taxpaid wine bottling houses must be recorded and reported in accordance with the applicable provisions of parts 19, 24, and 25 of this chapter. To the extent that the same transactions are required to be recorded or reported by this part and by part 19, 24, or 25, the records and reports required by those parts will satisfy the requirements of this part.

(26 U.S.C. 5207, 5367, 5415)

**§ 31.155 Records of receipt.**

(a) *Information required.* Every wholesale dealer in liquors must maintain a daily record of the physical receipt of each individual lot or shipment of distilled spirits. This record must show, at a minimum, the following:

(1) Name and address of consignor;

(2) Date of receipt, including date of inventory for recorded gains;

(3) Brand name;

(4) Name of producer or bottler. However, this may be omitted if the dealer keeps available for inspection a separate list or record identifying the producer or bottler with the brand name;

(5) Kind of spirits. However, this may be omitted if the dealer keeps available for inspection a separate list or record identifying ''kind'' with the brand name;

(6) Quantity actually received, showing number of packages, if any, and number of cases by size of bottle, and explaining any difference from the quantity shown on the commercial papers covering the shipment; and

(7) Package identification numbers of containers of alcohol received for repackaging for industrial use pursuant to subpart L of this part.

(b) *Form of record.* The record required by paragraph (a) of this section must be a part of the accounting system and must consist of consignors' invoices (or, if those invoices are not available on the day the shipment is received, memorandum receiving records prepared on the day of receipt of the distilled spirits, including records of inventory for recorded gains) and credit memorandums covering distilled spirits returned to the dealer.

(Approved by the Office of Management and Budget under control number 1513–0065) (26 U.S.C. 5121)

**§ 31.156 Records of disposition.**

(a) *Information required.* Every wholesale dealer in liquors must prepare a daily record of the physical disposition of each individual lot of distilled spirits. This record must show, at a minimum, the following:

(1) Name and address of consignee;

(2) Date of disposition, including date of discovery in the case of casualty, theft or recorded inventory losses;

(3) Brand name;

(4) Kind of spirits. However, this may be omitted if the dealer keeps available for inspection a separate list or record identifying ''kind'' with the brand name;

(5) Number of packages, if any, and number of cases by size of bottle; and

(6) Package identification numbers of containers of alcohol repackaged for industrial use pursuant to subpart L of this part.

(b) *Form of record.* The record required by paragraph (a) of this section must be part of the accounting system and must consist of wholesale dealer's invoices (or, if those invoices are not available at the time the spirits are removed, memorandum shipping records prepared at the time of removal of the distilled spirits, including date of discovery in the case of casualty, theft or recorded inventory losses).

(Approved by the Office of Management and Budget under control number 1513–0065) (26 U.S.C. 5121)

**§ 31.157 Canceled or corrected records.**

Entries on the records of receipt and disposition prescribed by §§ 31.155 and 31.156 must not be erased or obliterated. Correction or deletion of any entry must be accomplished by drawing a line through the entry and inserting an appropriate correction or explanation. If a wholesale dealer in liquors voids an invoice for any reason, the file copy prescribed in § 31.181 must be marked ''Cancelled'' and must be filed as provided in that section; any remaining copy of the voided invoice must be destroyed or similarly cancelled and filed. If a new invoice is prepared, its serial number must be cross referenced on any retained copies of the cancelled invoice.

(26 U.S.C. 5121)

**§ 31.158 Previously prescribed or approved records of receipt and disposition.**

A wholesale dealer in liquors may continue to use records of receipt and disposition in a format previously prescribed or approved. Those records must show the information required by paragraph (a) of § 31.155 or paragraph (a) of § 31.156, as applicable. The records must be preprinted with the name and address of the wholesale dealer. Each sheet or page must bear a preprinted serial number, or page serial numbers may be affixed in unbroken sequence during the preparation or processing of the records. A serial number must not be duplicated within a period of 6 months.

(26 U.S.C. 5121)

**§ 31.159 Variations in format or preparation of records.**

(a) *Authorization.* The appropriate TTB officer may approve variations in the type and format of records of receipt and disposition required under §§ 31.155 and 31.156, or in the methods of preparing those records, when it is shown that variations from the requirements are necessary in order to use data processing equipment, other business machines, or existing accounting systems, and provided that the variation will not unduly hinder the effective administration of this part, jeopardize the revenue, or be contrary to any provision of law. A dealer who wishes to employ such a variation must submit a written application to the appropriate TTB officer. The application must describe the proposed variation and set forth the need for it. Variations in type and format of records or methods of preparation must not be employed until approval is received from the appropriate TTB officer.

(b) *Requirements.* Any information required by this part to be kept or filed is subject to the provisions of law and this part relating to required records and reports, regardless of the form or manner in which kept or filed.

(Approved by the Office of Management and Budget under control number 1513–0067)

**§ 31.160 Monthly summary report.**

(a) *Requirement.* Every wholesale dealer in liquors must, when required, submit monthly to the appropriate TTB officer a summary report of the total quantities of all distilled spirits received and disposed of daily during the month (including the date of discovery for theft, casualty and inventory losses and inventory gains). This report must be posted by the wholesaler on a daily basis. If there were no receipts or disposals of distilled spirits during the month, the report must be marked ''No Transactions During Month.'' This report must be filed not later than the 15th day of the month following the report period, with a copy retained by the dealer. The appropriate TTB officer may authorize a dealer, upon request, to post the report less frequently until otherwise notified; the appropriate TTB officer's authorization will specify the intervals at which the posting will be accomplished, but not less frequently than monthly.

(b) *Form of report.* When required under paragraph (a) of this section, the monthly summary report may be prepared in a format that is adapted to the dealer's accounting and recordkeeping systems. In addition to any other information shown therein, the report must include:

(1) Daily totals of all bottled spirits received and disposed of, recorded by wine gallons or liters;

(2) Daily totals of all bulk spirits in packages received and disposed of, recorded by proof gallons; and

(3) Entries showing, by date, each disposition caused by an inventory, casualty, or theft loss and each receipt caused by a recorded gain in inventory.

(c) *Declaration.* When required to be filed, the monthly summary report must bear the following declaration signed by the dealer or an authorized agent:

> I declare under the penalties of perjury that I have examined this report and, to the best of my knowledge and belief, it is true, correct, and complete and is supported by true, correct, and complete records which are available for inspection.

(d) *Other records.* Even if the monthly summary report is not required by the appropriate TTB officer, every wholesale dealer in distilled spirits must maintain and make available for review by appropriate TTB officers:

(1) Records of receipt required by § 31.155;

(2) Records of disposition, required by § 31.156; and

(3) Any other supporting information or documents regarding the receipt and disposition of distilled spirits that have a direct role in determining the completeness and accuracy of the receipt and disposition records.

(Approved by the Office of Management and Budget under control number 1513–0065) (26 U.S.C. 5121)

**§ 31.161 Conversion between metric and U.S. units.**

When liters are converted to wine gallons, the quantity in liters must be multiplied by 0.264172 to determine the equivalent quantity in wine gallons. Once converted to wine gallons, the proof gallons of spirits in cases must be determined as provided in § 30.52 of this chapter. Cases containing the same quantity of spirits of the same proof in metric bottles may be converted to U.S. units by multiplying the liters in one case by the number of cases to be converted, as follows:

(a) If the conversion from liters to U.S. units is made before multiplying by the number of cases, the quantity in U.S.

units must be rounded to the sixth decimal; and

(b) If the conversion is made after multiplying by the number of cases, the quantity in U.S. units must be rounded to the nearest hundredth.

(26 U.S.C. 7805; 27 U.S.C. 205)

**§ 31.162 Discontinuance of business.**

When a wholesale dealer in liquors who is required, under § 31.160, to file a monthly summary report discontinues business, a monthly summary report marked ''Final'' must be filed covering transactions through the date of discontinuance.

(26 U.S.C. 5121)

**§ 31.163 Requirements when a wholesale dealer in liquors maintains a retail department.**

(a) *Constructive receipt and sale.* When a wholesale dealer in liquors maintains a separate department on the premises for the retailing of distilled spirits, and the retail sales of distilled spirits normally represent 90 percent or more of the volume of distilled spirits sold, the dealer may ''constructively'' receive all distilled spirits in the retail department. Sales involving a wholesale transaction may be ''constructively'' sold through the wholesale department.

(1) *Receipts.* In lieu of maintaining and preparing the records required by § 31.155, a wholesale dealer may constructively receive all distilled spirits in its retail department. In this case, the receiving document will serve as a receipt for (through) the wholesale department and a disposition (transfer) to the retail department. The receiving document must be maintained by the retail department in accordance with § 31.171.

(2) *Dispositions.* In lieu of maintaining and preparing the records required by § 31.156, a wholesale dealer may constructively sell distilled spirits from its retail department to other dealers. The sales invoice or bill must be filed in the wholesaler's disposition records and will serve as a record of receipt from the retail department and a record of disposition to another dealer.

(b) *Receipt and disposition records.* Except as provided in paragraph (a) of this section, a wholesale dealer must prepare and maintain the required records of receipt and disposition as prescribed in §§ 31.155 and 31.156. Transfers between the wholesale and retail departments will be treated in the same manner as any other transaction involving the wholesale department.

(c) *Monthly summary report.* When required by § 31.160, a wholesale dealer must prepare and file the monthly summary report of actual or constructive receipts and dispositions of all distilled spirits.

(d) *Physical separation.* Wholesale and retail departments need not be physically separated.

(26 U.S.C. 5121)

## Filing of Wholesale Dealers' Records and Reports

**§ 31.171 Method of filing.**

A wholesale dealer may file the records of receipt and disposition required by §§ 31.155 and 31.156 in accordance with the wholesaler's regular accounting and recordkeeping systems. The required records must include the dealer's own file copies of the receiving or shipping invoices and must be filed according to the following rules:

(a) Wholesale dealers may file records of receipt and disposition in accordance with their own filing system as long as the records are filed by transaction or reporting date and the filing system systematically and accurately accounts for all receipts and dispositions of distilled spirits.

(b) The required records of receipt and disposition must be filed not later than one business day following the date the transaction occurred.

(c) Supporting documents for receipts and dispositions, such as delivery receipts and bills of lading, also may be filed in accordance with the wholesaler's regular accounting and recordkeeping practices.

(26 U.S.C. 5121, 5122, 5123)

**§ 31.172 Place of filing.**

Records of receipt and disposition and monthly summary reports required by §§ 31.155, 31.156, and 31.160 must be maintained at the dealer's place of business. The appropriate TTB officer may, upon request, authorize maintenance of files, or an individual file, at another business location under the control of the same wholesale dealer, when it is determined that such maintenance will not cause undue inconvenience to TTB officers desiring to examine those files.

(26 U.S.C. 5123)

## Retail Dealer's Records

**§ 31.181 Requirements for retail dealers.**

(a) *Records of receipt.* All retail dealers must keep at their place of business complete records showing the quantities of all distilled spirits, wines, and beer received, from whom the distilled spirits, wines, and beer were received, and the dates of receipt. However, the appropriate TTB officer may, upon request, authorize the maintenance of records at another business premises also under the control of the same retail dealer when it is determined that such maintenance will not cause undue inconvenience to TTB officers desiring to examine those records. Records of receipts shall consist of all purchase invoices or bills covering distilled spirits, wines, and beer received, or, at the option of the retail dealer, a book record containing all of the required information.

(b) *Records of sales of 20 wine gallons (75.7 liters) or more.* Every retail dealer who makes sales of distilled spirits, of wines, or of beer in quantities of 20 wine gallons (75.7 liters) or more to the same person at the same time must prepare and keep a record of each sale. The record must show the date of sale, the name and address of the purchaser, the kind and quantity of each kind of liquors sold, and the serial numbers of all full cases of distilled spirits included in the sale. Each entry on that record must be supported by a corresponding delivery receipt (which may be executed on a copy of the sales slip) signed by the purchaser or the purchaser's agent.

(Approved by the Office of Management and Budget under control number 1513–0066) (26 U.S.C. 5122, 5123)

## Retention of Records and Files

**§ 31.191 Period of retention.**

All records and files, all documents or copies of documents supporting these records and files, and all file copies of reports, submitted as required by this part, must be retained by the person required to have them, for a period of not less than three years and, during the retention period, must be available, during business hours, for inspection and copying by the appropriate TTB officers. In addition, the appropriate TTB officer may require retention of the documents and other records for an additional period of not more than three years if it is determined that such additional retention is necessary.

(26 U.S.C. 5123)

**§ 31.192 Photographic copies of records.**

(a) *General.* Dealers may record, copy, or reproduce records required by this part. Dealers may use any process that accurately reproduces the original record and that forms a durable medium for preserving the original record.

(b) *Copies of records treated as original records.* Whenever records are reproduced under this section, the reproduced records must be preserved in conveniently accessible files, and provision must be made for examining, viewing, and using the reproduced record in the same manner as if it were

the original record. A reproduced record will be treated and considered for all purposes as though it were the original record. All provisions of law and regulations applicable to the original record are applicable to the reproduced record. As used in this section, ''original record'' means the record required by this part to be maintained or preserved by a dealer, even though it may be an executed duplicate or other copy of the document.

(26 U.S.C. 5555)

## Subpart K—Reuse and Possession of Used Liquor Bottles

### § 31.201 Refilling of liquor bottles.

No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall:

(a) Place in any liquor bottle any distilled spirits whatsoever other than those contained in that bottle at the time of closing under the provisions of 26 U.S.C. chapter 51; or

(b) By the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in that bottle at the time of closing under the provisions of 26 U.S.C. chapter 51.

(26 U.S.C. 5301)

### § 31.202 Possession of refilled liquor bottles.

No person who sells, or offers for sale, distilled spirits, or agent or employee of such person, shall:

(a) Possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of § 31.201; or

(b) Possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of the provisions of § 31.201.

(26 U.S.C. 5301)

### § 31.203 Possession of used liquor bottles.

The possession of used liquor bottles by any person other than the person who empties the contents thereof is prohibited except in the following circumstances:

(a) The owner or occupant of any premises on which the used bottles have been lawfully emptied may assemble the bottles on such premises—

(1) For delivery to a bottler or importer on specific request of that bottler or importer;

(2) For destruction, either on the premises on which the bottles are emptied or elsewhere, including disposition for purposes that will result in the bottles being rendered unusable as bottles; or

(3) In the case of unusual or distinctive bottles, for disposition or sale as collectors' items or for other purposes not involving the packaging of any product for sale;

(b) Any person may possess, offer for sale, or sell unusual or distinctive bottles for purposes not involving the packaging of any product for sale; and

(c) Any person may assemble used liquor bottles for the purpose of recycling or reclaiming the glass or other approved liquor bottle material.

(26 U.S.C. 5301)

### § 31.204 Mixed cocktails.

A retail liquor dealer who mixes cocktails or compounds any alcoholic liquors in advance of sale, as provided in § 31.233, may not use liquor bottles in which distilled spirits have been previously packaged for the storage of the mixture or compound pending that sale.

(26 U.S.C. 5301)

## Subpart L—Packaging of Alcohol for Industrial Uses

### § 31.211 Requirements and procedure.

Upon compliance with the provisions of part 19 of this chapter applicable to persons repackaging distilled spirits, and subject to the requirements of paragraphs (a) through (c) of this section, a dealer engaged in the business of supplying distilled spirits for industrial use may obtain bulk alcohol on which the tax has been paid or determined and repackage the alcohol for sale for industrial use in containers of a capacity in excess of 1 wine gallon and not more than 5 wine gallons.

(a) *Qualification procedure.* An application for registration, TTB Form 5110.41, and an application for an operating permit, TTB Form 5110.25, modified in accordance with instructions of the appropriate TTB officer, must be executed and filed with the appropriate TTB officer. No alcohol shall be repackaged until the approved application for registration and the approved operating permit are received.

(b) *Operations.* Repackaging operations must be conducted in accordance with the bottling and packaging requirements of part 19 of this chapter. Packaging and labeling operations may be carried on without supervision of a TTB officer unless the appropriate TTB officer requires supervision.

(c) *Records.* The dealer must keep daily records showing the bulk alcohol received, dumped for packaging, packaged, and disposed of, including the name and address of each consignor and consignee. The dealer must prepare a monthly report on TTB Form 5110.28 of bulk alcohol received, packaged, and disposed of. Reports on Form 5110.28 must be submitted to the appropriate TTB officer not later than the 15th day of the month following the period covered by the report. Records, documents, or copies of documents supporting the records, and copies of reports submitted to the appropriate TTB officer, must be filed and retained as prescribed in §§ 31.172 and 31.191.

(26 U.S.C. 5131, 5206)

### § 31.212 Labeling.

Every dealer packaging alcohol for industrial use must affix to each package filled a label bearing in conspicuous print the words ''Alcohol'' and ''For Industrial Use,'' the proof of the alcohol, the capacity of the container, and the packaging dealer's name and address. The dealer may incorporate in the label other appropriate statements; however, such statements must not obscure or contradict the data required by this section to be shown on such labels.

(26 U.S.C. 5131, 5206)

## Subpart M—Distilled Spirits for Export with Benefit of Drawback

### § 31.221 General.

A State, a political subdivision of a State, or a person holding a wholesale liquor dealer's basic permit issued under part 1 of this chapter may export bottled taxpaid distilled spirits with benefit of drawback as provided in § 28.171 of this chapter. The marking of cases, the preparation of notice of shipment on TTB Form 5110.30, the removal and exportation of the distilled spirits, and the filing of claims by the processor of the spirits must be in accordance with the applicable provisions of parts 19 and 28 of this chapter.

### § 31.223 Records and reports.

The provisions of subpart J of this part regarding records and reports relating to liquors for domestic use also apply to export transactions permitted under this subpart.

## Subpart N—Miscellaneous

### § 31.231 Destruction of marks and brands on wine containers.

A dealer who empties any cask, barrel, keg, or other bulk container of wine must scrape or obliterate from the empty container all marks, brands, tags, or labels placed thereon under the provisions of part 24 of this chapter as evidence of the payment or determination of the tax on the wine

removed in the container from the bonded wine cellar.

**§ 31.232 Wine bottling.**

Each person desiring to bottle, package, or repackage taxpaid wines must, before carrying on those operations, apply and receive permission from the appropriate TTB officer in accordance with part 24 of this chapter. The decanting of wine by caterers or other retail dealers for table or room service, banquets, and similar purposes shall not be considered as ''bottling,'' if the decanters are not furnished for the purpose of carrying wine away from the area where served.

(26 U.S.C. 5352)

**§ 31.233 Mixing cocktails in advance of sale.**

A retail liquor dealer shall not mix cocktails, or compound any alcoholic liquors in advance of sale, except for the purpose of filling, for immediate consumption on the premises, orders received, or expected to be immediately received, at the bar. See § 31.204 for additional mixed cocktail rules.

(26 U.S.C. 5002)

**§ 31.234 Liability for special (occupational) tax.**

The special (occupational) tax on alcohol beverage dealers was suspended for the period July 1, 2005, through June 30, 2008, and was repealed effective July 1, 2008. Dealers who were engaged in business prior to the suspension period remain liable for payment of the special (occupational) tax in accordance with the laws and regulations in effect at that time. The tax return to be used for payment of any past-due special (occupational) tax is TTB Form 5630.5a.

(Section 11125, Pub. L. 109–59, 119 Stat. 1953)

## PART 40—MANUFACTURE OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

■ 65. The authority citation for part 40 is revised to read as follows:

**Authority:** 26 U.S.C. 448, 5701, 5703–5705, 5711–5713, 5721–5723, 5731–5734, 5741, 5751, 5753, 5761–5763, 6061, 6065, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6404, 6423, 6676, 6806, 7011, 7212, 7325, 7342, 7502, 7503, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

■ 66. Section 40.11 is amended by adding, in alphabetical order, a definition of ''special tax'' to read as follows:

**§ 40.11 Meaning of terms.**

* * * * *

*Special tax.* The special (occupational) tax on manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and export warehouse proprietors, imposed by 26 U.S.C. 5731.

* * * * *

■ 67. Section 40.31 is amended by removing and reserving paragraph (b) and by adding new paragraph (d) and revising the informational reference at the end of the section to read as follows:

**§ 40.31 Liability for special tax.**

* * * * *

(d) *Payment of tax.* Special tax must be paid by return. The prescribed return is TTB Form 5630.5t, Special Tax Registration and Return—Tobacco. Special tax returns, with payment of tax, must be filed with TTB in accordance with the instructions on the form and the requirements of subpart D of part 46 of this chapter.

(26 U.S.C. 5731, 5733)

■ 68. Section 40.33 is revised to read as follows:

**§ 40.33 Cross reference.**

For additional rules pertaining to liability for special tax, filing special tax returns, issuance and examination of special (occupational) tax stamps, and notification of changes to special tax stamps, see subpart D of part 46 of this chapter.

**§§ 40.34, 40.35, and 40.36 [Removed and reserved]**

■ 69. Sections 40.34, 40.35, and 40.36 are removed and reserved.

■ 70. Section 40.371 is amended by adding a new paragraph (c) and revising the informational reference at the end of the section to read as follows:

**§ 40.371 Liability for special tax.**

* * * * *

(c) *Payment of tax.* Special tax must be paid by return. The prescribed return is TTB Form 5630.5t, Special Tax Registration and Return—Tobacco. Special tax returns, with payment of tax, must be filed with TTB in accordance with the instructions on the form and the requirements of subpart D of part 46 of this chapter.

(26 U.S.C. 5731, 5733)

■ 71. Section 40.373 is revised to read as follows:

**§ 40.373 Cross reference.**

For additional rules pertaining to liability for special tax, filing special tax returns, issuance and examination of special tax stamps, and notification of changes to special tax stamps, see subpart D of part 46 of this chapter.

**§§ 40.374 and 40.375 [Removed and reserved]**

■ 72. Sections 40.374 and 40.375 are removed and reserved.

## PART 44—EXPORTATION OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, WITHOUT PAYMENT OF TAX, OR WITH DRAWBACK OF TAX

■ 73. The authority citation for part 44 is revised to read as follows:

**Authority:** 26 U.S.C. 448, 5701, 5703–5705, 5711–5713, 5721–5723, 5731–5734, 5741, 5751, 5754, 6061, 6065, 6151, 6402, 6404, 6806, 7011, 7212, 7342, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

■ 74. Section 44.11 is amended by adding, in alphabetical order, a definition of ''special tax'' to read as follows:

**§ 44.11 Meaning of terms.**

* * * * *

*Special tax.* The special (occupational) tax on manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and export warehouse proprietors, imposed by 26 U.S.C. 5731.

* * * * *

■ 75. Section 44.31 is amended by removing and reserving paragraph (b) and by adding new a paragraph (d) and revising the informational reference at the end of the section to read as follows:

**§ 44.31 Liability for special tax.**

* * * * *

(d) *Payment of tax.* Special tax must be paid by return. The prescribed return is TTB Form 5630.5t, Special Tax Registration and Return—Tobacco. Special tax returns, with payment of tax, must be filed with TTB in accordance with the instructions on the form and the requirements of subpart D of part 46 of this chapter.

(26 U.S.C. 5731, 5733)

■ 76. Section 44.33 is revised to read as follows:

**§ 44.33 Cross reference.**

For additional rules pertaining to liability for special (occupational) tax, filing special tax returns, issuance and examination of special tax stamps, and notification of changes to special tax stamps, see subpart D of part 46 of this chapter.

**§§ 44.34, 44.35, and 44.36 [Removed and reserved]**

■ 77. Sections 44.34, 44.35, and 44.36 are removed and reserved.

## PART 46—MISCELLANEOUS REGULATIONS RELATING TO TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

■ 78. The authority citation for part 46 is revised to read as follows:

**Authority:** 18 U.S.C. 2341–2346, 26 U.S.C. 5061, 5704, 5708, 5731–5734, 5751, 5754, 5761–5763, 6001, 6601, 6621, 6622, 7212, 7342, 7602, 7606, 7805; 44 U.S.C. 3504(h), 49 U.S.C. 782, unless otherwise noted.

■ 79. Part 46 is amended by adding a new subpart D to read as follows:

**Subpart D—Rules for Special (Occupational) Tax**

Sec.
46.91 Scope of subpart.
46.92 Meaning of terms.
46.93 Multiple businesses of same ownership and location.
46.94 Relation to State and municipal law.
46.95 Liability of partners.

**Payment of Special Tax**

46.101 Special tax returns.
46.102 Employer identification number.
46.103 Time for filing return and paying tax.
46.104 Method of payment.
46.105 Receipt for taxes.
46.106 Receipt in lieu of stamp prohibited.
46.107 Penalty for failure to file return or to pay tax.
46.108 Interest on unpaid tax.
46.109 Waiver of penalties.

**Special Tax Stamps**

46.116 Issuance, distribution, and examination of special tax stamps.
46.117 Lost or destroyed stamps.
46.118 Certificate in lieu of lost or destroyed special tax stamp.
46.119 Errors disclosed by taxpayers.
46.120 Errors discovered on inspection.

**Changes in Businesses Holding Special Tax Stamps**

46.126 Change in name or address.
46.127 Change in ownership.

**Stamps for Incorrect Period or Incorrect Liability**

46.131 General.
46.132 Credit for incorrect stamp.

**Abatement or Refund of Special Taxes**

46.136 Claims.
46.137 Time limit on filing of claim for refund.
46.138 Discontinuance of business.

## Subpart D—Rules for Special (Occupational) Tax

### § 46.91 Scope of subpart.

This subpart contains rules relating to special (occupational) taxes that must be paid by manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and export warehouse proprietors.

### § 46.92 Meaning of terms.

As used in this subpart, the following terms shall have the meanings indicated unless either the context in which they are used requires a different meaning, or a different definition is prescribed for a particular section or portion of this subpart:

*Appropriate TTB officer.* An officer or employee of the Alcohol and Tobacco Tax and Trade Bureau (TTB) authorized to perform any functions relating to the administration or enforcement of this part by TTB Order 1135.46, Delegation of the Administrator's Authorities in 27 CFR Part 46, Miscellaneous Regulations Relating to Tobacco Products and Cigarette Papers and Tubes.

*CFR.* The Code of Federal Regulations.

*Cigarette paper.* Paper, or any other material except tobacco, prepared for use as a cigarette wrapper.

*Cigarette tube.* Cigarette paper made into a hollow cylinder for use in making cigarettes.

*Export warehouse.* A bonded internal revenue warehouse for the storage of tobacco products and cigarette papers and tubes, upon which the internal revenue tax has not been paid, for subsequent shipment to a foreign country, Puerto Rico, the Virgin Islands, or a possession of the United States, or for consumption beyond the jurisdiction of the internal revenue laws of the United States.

*Export warehouse proprietor.* Any person who operates an export warehouse.

*Manufacturer of cigarette papers and tubes.* Any person who manufactures cigarette paper, or makes up cigarette paper into tubes, except for his own personal use or consumption.

*Manufacturer of tobacco products.* Any person who manufactures tobacco products.

*Person.* An individual, a trust, estate, partnership, association or other unincorporated organization, fiduciary, company, or corporation, or the District of Columbia, a State, or a political subdivision thereof (including a city, county, or other municipality).

*Special tax.* The special (occupational) tax on manufacturers of tobacco products, manufacturers of cigarette papers and tubes, and export warehouse proprietors, imposed by 26 U.S.C. 5731.

*Tax year.* The period from July 1 of one calendar year through June 30 of the following calendar year.

*This chapter.* Chapter I of title 27 of the Code of Federal Regulations.

*Tobacco products.* Cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco.

*U.S.C.* The United States Code.

### § 46.93 Multiple businesses of same ownership and location.

(a) Where more than one type of taxable business is conducted by the same person at the same place, special tax for each business must be paid at the rates prescribed for each.

(b) Where the same type of taxable business is conducted by the same person in different areas of the same premises, only one special tax payment is required.

(26 U.S.C. 5733)

### § 46.94 Relation to State and municipal law.

(a) *General.* The payment of special (occupational) tax does not exempt any person from any penalty or punishment provided by the laws of any State for carrying on any trade or business within that State, nor does it authorize the commencement or continuance of any trade or business contrary to State law or in places prohibited by county or municipal law. Payment of this tax does not prohibit any State from placing an additional duty or tax on the same trade or business, for State or other purposes.

(b) *Special tax stamps.* TTB officers are without authority to refuse to issue a special tax stamp to a person engaged in business in violation of State law. The stamp is not a Federal permit or license, but is merely a receipt for the tax. The stamp affords the holder no protection against prosecution for violation of State law.

(26 U.S.C. 5734)

### § 46.95 Liability of partners.

Any number of persons carrying on one business in partnership at any one place during any tax year are required to pay only one special tax.

(26 U.S.C. 5733)

## Payment of Special Tax

### § 46.101 Special tax returns.

(a) *Preparation of TTB Form 5630.5t.* Every manufacturer of tobacco products, manufacturer of cigarette papers and tubes, and export warehouse proprietor is required to pay special (occupational) tax and file a return on TTB Form 5630.5t, ''Special Tax Registration and Return—Tobacco.'' TTB Form 5630.5t must be completed in accordance with the instructions on the form, and all of the information called for on the form must be provided, including the following:

(1) Name of the taxpayer.

(2) Trade name(s) (if any) of the business(es) subject to special (occupational) tax.

(3) Employer identification number (see § 46.102).

(4) Exact location of the place of business, by name and number of building or street, or if these do not exist, by some specific description in addition to the post office address. In the case of one return for two or more locations, the address to be shown must be the taxpayer's principal place of business (or principal office, in the case of a corporate taxpayer).

(5) Class(es) of special tax to which the taxpayer is subject.

(6) Ownership and control information. This consists of the name, position, and residence address of every owner of the business and of every person having power to control its management and policies with respect to the activity subject to special tax. ''Owner of the business'' includes every partner, if the taxpayer is a partnership, and every person owning 10 percent or more of its stock, if the taxpayer is a corporation. However, the ownership and control information required by this paragraph need not be stated if the same information has been previously provided to TTB in connection with a permit application and that previously provided information is still current.

(b) *Multiple locations and/or classes of tax.* A taxpayer subject to special tax for the same period at more than one location or for more than one class of tax must—

(1) File one special tax return, TTB Form 5630.5t, with payment of tax, to cover all such locations and classes of tax; and

(2) Prepare, in duplicate, a list identified with the taxpayer's name, address (as shown on TTB Form 5630.5t), employer identification number, and period covered by the return. The list must show, by State, the name, address, and tax class of each location for which special tax is being paid. The original of the list must be filed with TTB as an attachment to TTB Form 5630.5t, and the copy must be retained at the taxpayer's principal place of business (or principal office, in the case of a corporate taxpayer) for a period of three years from the date of the return.

(c) *Signing of TTB Form 5630.5t*—(1) *By principal.* The return of an individual proprietor must be signed by the individual. The return of a partnership must be signed by a general partner. The return of a corporation must be signed by an officer. In each case, the person signing the return must designate his or her capacity as ''individual owner,'' ''member of firm,'' or, in the case of a corporation, the officer's title.

(2) *By fiduciary.* A receiver, trustee, assignee, executor, administrator, or other legal representative who continues the business of a bankrupt, insolvent, deceased, or otherwise incapacitated person must indicate the capacity in which the fiduciary acts.

(3) *By agent or attorney in fact.* If a return is signed by an agent or attorney in fact, the signature must be preceded by the name of the principal and followed by the title of the agent or attorney in fact. A return signed by a person as agent will not be accepted unless there is filed, with the TTB office with which the return is required to be filed, a power of attorney authorizing the agent to perform the act.

(d) *Perjury statement.* Each TTB Form 5630.5t must contain, or be verified by, a written declaration that the return has been executed under the penalties of perjury.

(26 U.S.C. 5732, 6061, 6065, 6151, 7011)
(Approved by the Office of Management and Budget under control number 1513–0112)

**§ 46.102 Employer identification number.**

(a) *Requirement.* The employer identification number (as defined in 26 CFR 301.7701–12) of the taxpayer who has been assigned such a number must be shown on each special tax return, including each amended return, filed under this subpart. Failure of the taxpayer to include the employer identification number may result in the imposition of the penalty specified in § 70.113 of this chapter.

(b) *Application for employer identification number.* Each taxpayer who files a special tax return and who has not already been assigned an employer identification number must file Internal Revenue Service (IRS) Form SS–4 to apply for one. The taxpayer must apply for and be assigned only one employer identification number, regardless of the number of places of business for which the taxpayer is required to file a special tax return. The taxpayer must apply for the employer identification number no later than 7 days after the filing of the taxpayer's first special (occupational) tax return. IRS Form SS–4 may be obtained from the director of an IRS service center, from any IRS district director, or from *http://www.irs.gov/.*

(26 U.S.C. 6109)

**§ 46.103 Time for filing return and paying tax.**

The return, along with remittance of special tax, must be filed on or before the date of commencing business as a manufacturer of tobacco products, manufacturer of cigarette papers or tubes, or export warehouse proprietor, and thereafter every year on or before July 1. If the return and applicable tax are received in the mail and the U.S. postmark on the cover shows that it was deposited in the mail in the United States within the time prescribed for filing in an envelope or other appropriate wrapper which was properly addressed with postage prepaid, the return will be considered as timely filed. If the postmark is not legible, the sender has the burden of proving the date when the postmark was made. When registered mail is used, the date of registration will be accepted as the postmark date. When certified mail is used, the date of the postmark on the sender's receipt of certified mail is treated as the postmark date.

(26 U.S.C. 5732, 6011, 6071)

**§ 46.104 Method of payment.**

Payment of special tax must be made in cash, or by check or money order payable to Alcohol and Tobacco Tax and Trade Bureau. If a check or money order so tendered is not honored when presented for payment, the person who tendered the check or money order will remain liable for the payment of the special tax, and for all penalties and additions, to the same extent as if the check or money order had not been tendered. In addition, unless the person who tendered the check or money order can show that the check or money order was issued in good faith, and with reasonable cause to believe that it would be duly paid, there must be paid as penalty an amount equal to 1 percent of the amount of the check or money order, except that if the amount of the check or money order is less than $500, the penalty will be $5, or the amount of the check or money order, whichever is less.

(26 U.S.C. 6311, 6657)

**§ 46.105 Receipt for taxes.**

Subject to § 46.106, the appropriate TTB officer will issue a receipt to a taxpayer if cash is received as a remittance in payment of special tax (including penalties and interest, if any), or for any type of remittance received if the taxpayer requests a receipt.

**§ 46.106 Receipt in lieu of stamp prohibited.**

No receipt will be issued in lieu of issuance of a special tax stamp under § 46.116. A receipt may be given only pending the issuance of a stamp, or where the tax liability relates to a prior tax year.

(26 U.S.C. 6314)

**§ 46.107 Penalty for failure to file return or to pay tax.**

(a) *Failure to file return.* Any person required by this subpart to file a return on TTB Form 5630.5t who fails to file the return on or before the date for filing prescribed in § 46.103 must pay, in addition to the tax, a delinquency penalty, unless it is shown that such failure is due to reasonable cause and not due to willful neglect (see § 46.109). The delinquency penalty for failure to file the return on or before the last date prescribed will be 5 percent of the amount required to be shown as tax on the return if the failure to file is for not more than one month; with an additional 5 percent for each additional month or fraction thereof during which the delinquency continues, but not more than 25 percent in the aggregate.

(b) *Failure to pay tax.* Any person who files a return on TTB Form 5630.5t under this subpart and who fails to pay the amount shown as tax on the return on or before the date prescribed in § 46.103 for payment of such tax, must pay a penalty, in addition to the tax, unless it is shown that such failure is due to reasonable cause and not due to willful neglect (see § 46.109). The penalty for failure to pay the tax on or before the date prescribed for payment is 0.5 percent of the amount shown as tax on the return if the failure to pay is not for more than one month; with an additional 0.5 percent for each additional month or fraction thereof during which the failure continues, but not more than 25 percent in the aggregate. Any person required to pay the special tax who willfully fails to pay the tax shall be fined not more than $5,000, or imprisoned not more than 2 years, or both, for each such offense.

(c) *Limitations.* With respect to any return on Form 5630.5t, the amount of the addition under paragraph (a) of this section will be reduced by the amount of the addition under paragraph (b) of this section for any month to which an addition to tax applies under both paragraph (a) and paragraph (b) of this section. If the amount of tax required to be shown as tax on the return is less than the amount shown as tax on such return, the penalties prescribed in paragraphs (a) and (b) of this section will be applied by substituting that lower amount.

(26 U.S.C. 5731, 6651)

**§ 46.108 Interest on unpaid tax.**

(a) *General.* Interest is due on unpaid special tax from the date the tax was required to be paid to the date paid. Interest will be charged for each day at the rate prescribed by law in effect on that day. Interest accruing after December 31, 1982, is compounded daily.

(b) *Adjusted interest rates.* Adjusted interest rates, determined in accordance with the procedure prescribed by 26 U.S.C. 6621(b), are announced quarterly by the Commissioner of Internal Revenue. The appropriate TTB officer will provide information, when requested, regarding interest rates applicable to specific time periods.

(26 U.S.C. 6601, 6621)

**§ 46.109 Waiver of penalties.**

In every case where a special tax return is not filed, or the tax is not paid, at the time prescribed in § 46.103, the delinquency penalties specified in § 46.107 for failure to file a return or for failure to pay the amount shown as tax on the return will be asserted and collected unless a reasonable cause for delay in filing the return or payment of the tax is clearly established. A taxpayer who believes the circumstances that delayed such taxpayer's filing of the return or payment of the tax are reasonable, and who desires to have the penalties waived, must submit with the return a written statement under the penalty of perjury, affirmatively showing all of the circumstances alleged as reasonable causes for delay. If the appropriate TTB officer determines that the delinquency was due to a reasonable cause and not to willful neglect or gross negligence, the addition to the tax will be waived. If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, or if the taxpayer made a satisfactory showing that the taxpayer exercised ordinary business care and prudence in providing for payment of the tax liability and was nevertheless either unable to pay the tax or would have suffered an undue hardship if the taxpayer had paid on the due date, then the delay is due to reasonable cause. Mere ignorance of the law will not be considered a reasonable cause.

(26 U.S.C. 6651)

## Special Tax Stamps

**§ 46.116 Issuance, distribution, and examination of special tax stamps.**

(a) *Issuance of special tax stamps.* Upon filing a properly executed return on TTB Form 5630.5t together with the full tax remittance, the taxpayer will be issued an appropriately designated special tax stamp. If the return covers multiple locations, TTB will send to the taxpayer's principal place of business (or principal office in the case of a corporate taxpayer) one appropriately designated stamp for each location listed on the attachment to TTB Form 5630.5t required by § 46.101(b)(2).

(b) *Distribution of special tax stamps for multiple locations.* On receipt of the special tax stamps, the taxpayer must verify that there is one stamp for each location listed on the attachment to TTB Form 5630.5t and that the information on each stamp is correct. The taxpayer must then forward each stamp to the place of business designated on the stamp. Incorrect stamps must be returned to the appropriate TTB officer as provided in § 46.120.

(c) *Examination of special tax stamps.* Each stamp denoting payment of special tax must be kept available for inspection by an appropriate TTB officer during business hours at the location for which the stamp is designated.

(26 U.S.C. 5732)

**§ 46.117 Lost or destroyed stamps.**

If a special tax stamp has been lost or destroyed, the taxpayer must immediately notify the TTB officer who issued the stamp. A ''Certificate in Lieu of Lost or Destroyed Special Tax Stamp'' will be issued to the taxpayer who submits an affidavit explaining to the satisfaction of the appropriate TTB officer that the stamp was lost or destroyed. The certificate must be kept available for inspection in the same manner as prescribed for a special tax stamp in § 46.116(c).

**§ 46.118 Certificate in lieu of lost or destroyed special tax stamp.**

The provisions of this subpart relating to special tax stamps apply as well to certificates in lieu of lost or destroyed special tax stamps issued to taxpayers under § 46.117.

**§ 46.119 Errors disclosed by taxpayers.**

On receipt of a special tax stamp, the taxpayer must examine it to ensure that the name and address are correctly stated; if not, the taxpayer must return the stamp to the TTB officer who issued it, with a statement showing the nature of the error and the correct name or address. The appropriate TTB officer, on receipt of such stamp and statement, will compare the data on the stamp with that of the Form 5630.5t in TTB files, correct the error if made in the TTB office, and return the stamp to the taxpayer. However, if the error was in the taxpayer's preparation of the Form 5630.5t, the appropriate TTB officer will require the taxpayer to file a new Form 5630.5t, designated ''Amended Return,'' setting forth the taxpayer's correct name and address, and a statement explaining the error on the original Form 5630.5t. On receipt of the amended Form 5630.5t and a satisfactory explanation of the

error, the appropriate TTB officer will make the proper correction on the stamp and return it to the taxpayer.

**§ 46.120 Errors discovered on inspection.**

When a TTB officer discovers on a special tax stamp a material error in the name, ownership, or address of the taxpayer, that officer will require the taxpayer to surrender the erroneous tax stamp and prepare a new Form 5630.5t, designated ''Amended Return,'' showing correctly all of the information required in § 46.101 and containing, in the body of the form or in an attachment thereto, a statement of the reason for requesting correction of the stamp. On receipt of the amended return and an acceptable explanation for the error, the officer will make the proper correction on the stamp and return it to the taxpayer. However, if the error found by the TTB officer is on a special tax stamp issued as a result of a return on Form 5630.5t filed under § 46.101(b), that officer will instruct the taxpayer to return the stamp, with a statement showing the nature of the error and the correct data, to the TTB officer who issued the stamp, for correction in accordance with § 46.119.

## Changes in Businesses Holding Special (Occupational) Tax Stamps

**§ 46.126 Change in name or address.**

(a) *Change in name.* If there is a change in the corporate or firm name, or in the trade name, as shown on TTB Form 5630.5t, the taxpayer must file an amended special tax return as soon as practicable after the change, covering the new corporate or firm name, or trade name. No new special tax is required to be paid. The taxpayer must attach the special tax stamp for endorsement of the change in name.

(b) *Change in location*—(1) *General.* If there is a change in location of a taxable place of business, the taxpayer must, within 30 days after the change, file with TTB an amended special tax return covering the new location. The taxpayer must attach the special tax stamp or stamps for endorsement of the change in location. No new special tax is required to be paid. However, if the taxpayer does not file the amended return within 30 days, the taxpayer is required to pay a new special tax and obtain a new special tax stamp.

(2) *Procedure.* If the taxpayer's original return on TTB Form 5630.5t covered only one location, the taxpayer may deliver the amended return and the stamp at any TTB office, or to any TTB officer inspecting the business, in lieu of mailing them to TTB. If the taxpayer's original return covered multiple locations under the provisions of § 46.101(b), he or she must forward with the amended return an attachment showing both the old and new address of any place of business which has been relocated, and the special tax stamp covering the location from which the business was removed. The appropriate TTB officer receiving such return or stamp will, if the return is submitted within the 30-day period, enter the proper endorsement on the stamp and return it to the taxpayer.

(26 U.S.C. 5733, 7011)

**§ 46.127 Change in ownership.**

(a) *General.* A special tax stamp is a receipt for tax, personal to the one to whom issued, and is not transferable from one manufacturer of tobacco products, manufacturer of cigarette papers and tubes, or export warehouse proprietor to another. If there is a change in the ownership of a special-tax payer, the successor must pay a new special (occupational) tax and obtain the required special tax stamp(s). Examples of changes in ownership that require payment of a new special tax include, but are not limited to, the following:

(1) Sale of business;

(2) Formation of a partnership by two persons who have paid special tax;

(3) Addition of a partner;

(4) Incorporation of the business;

(5) Creation of a new corporation to replace one or more corporations that have paid special tax; and

(6) Stockholder continuing the business of a corporation after its dissolution.

(b) *Changes that do not require payment of a new special tax.* The following changes do not require payment of a special tax:

(1) Increase in capital stock of a corporation.

(2) Change in ownership of any or all of the capital stock of a corporation.

(c) *Exemption for certain successors.* Persons identified in paragraph (d) of this section as having the right of succession may carry on the business for the remainder of the tax year for which the special tax was paid, without paying a new special tax, if within 30 days after the date on which the successor begins to carry on the business, the successor files with TTB a special tax return on TTB Form 5630.5t showing the basis of succession. A person who is a successor to a business for which special tax has been paid, and who fails to register the succession, is liable for special tax computed from the first day of the calendar month in which the successor began to carry on the business.

(d) *Persons having right of succession.* The right of succession referred to in paragraph (c) of this section will pass to the identified persons in the following circumstances:

(1) *Death.* The surviving spouse or child, or the executor, administrator, or other legal representative, of a deceased taxpayer;

(2) *Succession of spouse.* A husband or wife succeeding to the business of his or her living spouse;

(3) *Insolvency.* A receiver or trustee in bankruptcy, or an assignee for the benefit of creditors;

(4) *Withdrawal from firm.* The partner or partners remaining after the death or withdrawal of a member of a partnership.

(26 U.S.C. 5733)

## Stamps for Incorrect Period or Incorrect Liability

**§ 46.131 General.**

If a taxpayer through error has filed a return and paid special tax for an incorrect period of liability or for an incorrect class of business, the taxpayer must prepare a corrected TTB Form 5630.5t, designated ''Amended Return,'' for each tax year involved and must submit the amended return, or returns, with remittance for the total applicable tax and additions to the tax (delinquency penalties and interest), to TTB in accordance with the instructions on the Form 5630.5t or, if the error is discovered by a TTB officer inspecting the premises, to that officer. Subject to the limitations imposed by 26 U.S.C. 6511, the incorrectly paid tax (including additions thereto) may be allowed as a credit against the correct tax (including any additions thereto), as provided in § 46.132, on surrender of the incorrect stamp or stamps, with the amended return or returns noted to show that credit is requested. Any incorrectly paid tax (including additions thereto) that is not credited as provided in § 46.132, including any creditable tax and additions thereto in excess of the correct tax (including additions thereto), may be refunded pursuant to §§ 46.136 through 46.138 if the taxpayer files a corrected return on Form 5630.5t with remittance of the correct amount of tax (including any additions thereto). A new stamp will be issued only for a current period of liability.

(26 U.S.C. 6011)

**§ 46.132 Credit for incorrect stamp.**

(a) *General.* The appropriate TTB officer may credit the tax (including additions thereto) paid for an incorrect stamp if the taxpayer has filed an amended return showing the correct tax on TTB Form 5630.5t and has, with the amended return, surrendered the incorrect stamp for credit.

(b) *Underpayment.* Where the correct tax (including any additions thereto) exceeds the incorrect tax paid, the appropriate TTB officer may credit the tax paid against the correct tax upon remittance of the difference between the tax paid and the correct tax plus any additions thereto.

(c) *Overpayment.* Where the tax (and additions thereto) paid for the surrendered incorrect stamp exceeds the amount due, the appropriate TTB officer will advise the taxpayer to file a claim for refund of that excess on TTB Form 5620.8. Sections 46.136 through 46.138 apply to all claims for refund.

(26 U.S.C. 6402, 6511)

### Abatement or Refund of Special Taxes

#### § 46.136 Claims.

Claims for abatement of assessment of special tax (including penalties and interest), or for refund of an overpayment of special tax (including interest and penalties), must be filed on TTB Form 5620.8. The claim must be filed with the appropriate TTB officer. Each claim must set forth in detail each ground on which it is based and must contain facts sufficient to explain to the appropriate TTB officer the exact basis for the claim. If the claim is for refund of special tax for which a stamp was issued, either the stamp must be attached to and be made a part of the claim, or the claimant must include in the claim a satisfactory explanation of the reason why the stamp cannot be submitted.

#### § 46.137 Time limit on filing of claim for refund.

No claim for the refund of a special tax or penalty will be allowed unless presented within 3 years after the filing of the related tax return or within 2 years after the payment of such tax or penalty, whichever of these periods expires later.

(26 U.S.C. 6511)

#### § 46.138 Discontinuance of business.

A dealer who for any reason discontinues business is not entitled to a refund of special tax for the unexpired portion of the tax year for which the special tax stamp was issued.

(26 U.S.C. 5732)

## PART 70—PROCEDURE AND ADMINISTRATION

■ 80. The authority citation for part 70 is revised to read as follows:

**Authority:** 5 U.S.C. 301 and 552; 26 U.S.C. 4181, 4182, 5123, 5203, 5207, 5275, 5367, 5415, 5504, 5555, 5684(a), 5741, 5761(b), 5802, 6020, 6021, 6064, 6102, 6155, 6159, 6201, 6203, 6204, 6301, 6303, 6311, 6313, 6314, 6321, 6323, 6325, 6326, 6331–6343, 6401–6404, 6407, 6416, 6423, 6501–6503, 6511, 6513, 6514, 6532, 6601, 6602, 6611, 6621, 6622, 6651, 6653, 6656–6658, 6665, 6671, 6672, 6701, 6723, 6801, 6862, 6863, 6901, 7011, 7101, 7102, 7121, 7122, 7207, 7209, 7214, 7304, 7401, 7403, 7406, 7423, 7424, 7425, 7426, 7429, 7430, 7432, 7502, 7503, 7505, 7506, 7513, 7601–7606, 7608–7610, 7622, 7623, 7653, 7805.

#### § 70.1 [Amended]

■ 81. In § 70.1, the last sentence of paragraph (a)(3) is amended by adding after ''and firearms taxes,'' the words ''registration of dealers in alcohol fit for beverage use,''.

#### § 70.96 [Amended]

■ 82. In § 70.96, the third sentence of paragraph (c) is amended by removing the words ''of liquor dealers''.

#### § 70.321 [Amended]

■ 83. Section 70.321 is amended:

■ a. In paragraph (a), by removing and reserving paragraphs (a)(1) through (a)(5) and by removing the undesignated concluding text; and

■ b. By removing the OMB justification statement at the end of the section.

■ 84. Section 70.411 is amended:

■ a. In paragraph (a), by removing the second sentence;

■ b. In paragraph (b), by adding, after the first sentence, a new sentence to read as set forth below;

■ c. Also in paragraph (b), in the last sentence, by adding after ''qualification'' the words ''and registration'';

■ d. In paragraph (c)(16), by removing the words ''special (occupational) taxes imposed on wholesale and retail dealers in liquors, wholesale and retail dealers in beer, and limited retail dealers'' and adding, in their place, the words ''registration requirement imposed on wholesale and retail dealers in liquors and wholesale and retail dealers in beer'';

■ e. In paragraph (c)(27), by removing the words ''special (occupational) and''; and

■ f. By removing the OMB justification statement at the end of the section.

#### § 70.411 Imposition of taxes, qualification requirements, and regulations.

* * * * *

(b) * * * Dealers in alcohol products fit for beverage use and manufacturers of nonbeverage products who claim drawback under section 5114 of the Internal Revenue Code must register. * * *

* * * * *

#### § 70.412 [Amended]

■ 85. Section 70.412 is amended:

■ a. In paragraph (a), by removing the sixth sentence and, in the last sentence, by removing the words ''and the payment of occupational taxes''; and

■ b. By removing the OMB justification statement at the end of the section.

#### § 70.414 [Amended]

■ 86. Section 70.414 is amended:

■ a. By removing and reserving paragraph (h);

■ b. In paragraph (j), by removing the words ''and claims for refund of special (occupational) tax,''; and

■ c. By removing the OMB justification statement at the end of the section.

■ 87. New §§ 70.421 and 70.422 are added between the end of the § 70.420 and the undesignated center heading below it, to read as follows:

#### § 70.421 Alcohol dealer registration.

Every person who sells, or offers for sale, any alcohol product (distilled spirits, wines, or beer) fit for beverage use must register with the Alcohol and Tobacco Tax and Trade Bureau. The specific requirements are contained in the following regulations:

(a) For proprietors of distilled spirits plants, parts 19 and 31 of this chapter;

(b) For bonded wineries, bonded wine cellars, bonded wine warehouses, and taxpaid wine bottling houses, parts 24 and 31 of this chapter;

(c) For brewers, parts 25 and 31 of this chapter;

(d) For persons bringing distilled spirits, wines, or beer from Puerto Rico and the Virgin Islands to the United States, parts 26 and 31 of this chapter;

(e) For importers of distilled spirits, wines, or beer, parts 27 and 31 of this chapter; and

(f) For wholesalers and retailers of distilled spirits, wines, or beer, part 31 of this chapter.

#### § 70.422 Registration of manufacturers of nonbeverage products.

For provisions regarding the registration of persons claiming drawback on distilled spirits used in the manufacture of certain nonbeverage products, see part 17 of this chapter.

#### § 70.431 [Amended]

■ 88. Section 70.431 is amended by removing the word ''and'' at the end of paragraph (b)(7)(ii), by removing the period at the end of paragraph (b)(7)(iii) and adding, in its place, a semicolon followed by the word ''and'', and by adding a new paragraph (b)(7)(iv) to read as follows:

#### § 70.431 Imposition of taxes; regulations.

* * * * *

(b) * * *

(7) * * *

(iv) Liability for special (occupational) tax, filing special tax returns, issuance and examination of special tax stamps, and notification of changes to special tax stamps.

* * * * *

Signed: October 17, 2008.

**John J. Manfreda,**

*Administrator.*

Approved: March 20, 2009.

**Timothy E. Skud,**

*Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).*

**Editorial Note:** This document was received in the Office of the Federal Register on July 15, 2009.

[FR Doc. E9–17177 Filed 7–27–09; 8:45 am]

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**DEPARTMENT OF THE TREASURY**

**Alcohol and Tobacco Tax and Trade Bureau**

**27 CFR Parts 17, 19, 20, 22, 24, 25, 26, 27, 28, 31, 40, 44, 46, and 70**

**[Docket No. TTB–2009–0003; Notice No. 96; Re: T.D. TTB–79]**

**RIN 1513–AB63**

## Liquor Dealer Recordkeeping and Registration and Repeal of Certain Special (Occupational) Taxes

**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Elsewhere in this issue of the **Federal Register**, the Alcohol and Tobacco Tax and Trade Bureau is issuing a temporary rule implementing section 11125 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, which repealed certain special (occupational) taxes and which continues to require recordkeeping and registration by dealers in distilled spirits, wines, and beer, and by manufacturers of nonbeverage products. In this notice of proposed rulemaking, we are soliciting comments from all interested parties on the regulatory amendments to implement these changes. The text of the regulations in the temporary rule published elsewhere in this issue of the **Federal Register** serves as the text of the proposed regulations.

**DATES:** Comments must be received on or before September 28, 2009.

**ADDRESSES:** You may send comments on this notice to one of the following addresses:

- *http://www.regulations.gov* (via the online comment form for this notice as posted within Docket No. TTB–2009–0003 at ''Regulations.gov,'' the Federal e-rulemaking portal);
- Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier in Lieu of Mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this notice for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this notice and any comments we receive about this proposal at *http://www.regulations.gov.* A direct link to the appropriate Regulations.gov docket is also available under Notice No. 96 on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml.* You also may view copies of this notice and any comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. To make an appointment, call 202–453–2259.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning dealer registration or occupational tax filing procedures, contact Jackie Feinauer, National Revenue Center, Alcohol and Tobacco Tax and Trade Bureau (800–937–8864); for other questions concerning this document, contact Steve C. Simon, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau (202–453—2164 or *steven.simon@ttb.gov*).

**SUPPLEMENTARY INFORMATION:**

### Background

Elsewhere in this issue of the **Federal Register**, we are publishing a temporary rule setting forth regulatory amendments to implement section 11125 of the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,'' Public Law 109–59, 119 Stat. 1144 (''the Act''), signed by the President on August 10, 2005. Section 11125 of the Act amended various sections of the Internal Revenue Code of 1986 (IRC), 26 U.S.C., to repeal special (occupational) tax (SOT) on alcohol occupations. The Act continued the recordkeeping and registration requirements on liquor dealers (including all persons in the business of selling alcohol products fit for beverage use) and nonbeverage drawback claimants that SOT taxpayers were required to fulfill prior to the SOT repeal. Further, the Act retained the special (occupational) tax and the related registration requirement for certain tobacco occupations (manufacturer of tobacco products, manufacturer of cigarette papers and tubes, and export warehouse proprietor). The Alcohol and Tobacco Tax and Trade Bureau (TTB) is responsible for the administration of the IRC provisions relating to these tax, recordkeeping, and registration requirements.

The temporary regulations published elsewhere in this issue of the **Federal Register** involve amendments to parts 17, 19, 20, 22, 24, 25, 26, 27, 28, 31, 40, 44, 46, and 70 of the TTB regulations (27 CFR parts 17, 19, 20, 22, 24, 25, 26, 27, 28, 31, 40, 44, 46, and 70). The text of the temporary regulations serves as the text of these proposed regulations. The preamble to the temporary regulations explains the regulatory amendments.

### Public Participation

*Comments Invited*

We invite comments from interested members of the public on this proposed rulemaking. Please submit your comments by the closing date shown above in this notice. Your comments must reference Notice No. 96 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. We do not acknowledge receipt of comments, and we consider all comments as originals.

*Submitting Comments*

You may submit comments on this notice by one of the following two methods:

- *Federal e-Rulemaking Portal:* You may electronically submit comments on this notice through ''Regulations.gov,'' the Federal e-rulemaking portal. A direct link to the Regulations.gov docket containing this notice and its related comment submission form is available on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 96. You may also reach this notice and its related comment form via the Regulatons.gov search page at *http://www.regulations.gov.* Supplemental files may be attached to comments submitted via Regulations.gov. For complete instructions on how to use Regulations.gov, visit the site and click on ''User Guide'' under ''How to Use this Site.''
- *Mail:* You may send written comments to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street, NW., Suite 200–E, Washington, DC 20005.

If you are commenting on behalf of an association, business, or other entity, your comment must include the entity's name as well as your name and position title. If you comment via *http://www.regulations.gov,* please enter the entity's name in the ''Organization'' blank of the comment form. If you comment via mail, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment

closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

*Confidentiality*

All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

*Public Disclosure*

On the Federal e-rulemaking portal, Regulations.gov, we will post, and you may view, copies of this notice, selected supporting materials, and any electronic or mailed comments we receive about this proposal. A direct link to the Regulations.gov docket containing this notice, any posted supporting materials, and the comments received on this proposal is available on the TTB Web site at *http://www.ttb.gov/regulations_laws/all_rulemaking.shtml* under Notice No. 96. You may also reach the relevant docket through the Regulations.gov search page at *http://www.regulations.gov.* For instructions on how to use Regulations.gov, visit the site and click on ''User Guide'' under ''How To Use This Site.''

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including e-mail addresses. We may omit voluminous attachments or material that we consider unsuitable for posting.

You also may view copies of this notice, the related petitions, any other supporting materials, and any electronic or mailed comments we receive about this proposal by appointment at the TTB Information Resource Center, 1310 G Street, NW., Washington, DC 20220. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Contact our information specialist at the above address or by telephone at 202–927–2400 to schedule an appointment or to request copies of comments or other materials.

**Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12866**

Since the regulatory text proposed in this notice of proposed rulemaking is identical to that contained in the companion temporary rule, the analyses contained in the preamble of the temporary rule concerning the Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Order 12866 also apply to this proposed rule.

**Drafting Information**

Steve C. Simon, Daniel Hiland, and Marjorie Ruhf of the Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, drafted this document. Other personnel also participated in its development.

**List of Subjects**

*27 CFR Part 17*

Administrative practice and procedure, Claims, Cosmetics, Customs duties and inspection, Drugs, Excise taxes, Exports, Imports, Liquors, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Spices and flavorings, Surety bonds, Virgin Islands.

*27 CFR Part 19*

Administrative practice and procedures, Caribbean Basin Initiative, Claims, Electronic funds transfers, Excise taxes, Exports, Gasohol, Imports, Labeling, Liquors, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Research, Security measures, Surety bonds, Vinegar, Virgin Islands, Warehouses.

*27 CFR Part 20*

Alcohol and alcoholic beverages, Claims, Cosmetics, Excise taxes, Labeling, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Surety bonds.

*27 CFR Part 22*

Administrative practice and procedure, Alcohol and alcoholic beverages, Excise taxes, Reporting and recordkeeping requirements, Surety bonds.

*27 CFR Part 24*

Administrative practice and procedure, Claims, Electronic fund transfers, Excise taxes, Exports, Food additives, Fruit juices, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Research, Scientific equipment, Spices and flavoring, Surety bonds, Vinegar, Warehouses, Wine.

*27 CFR Part 25*

Administrative practice and procedure, Beer, Claims, Electronic funds transfers, Excise taxes, Exports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Research, Surety bonds.

*27 CFR Part 26*

Administrative practice and procedure, Alcohol and alcoholic beverages, Caribbean Basin Initiative, Claims, Customs duties and inspection, Electronic funds transfers, Excise taxes, Packaging and containers, Puerto Rico, Reporting and recordkeeping requirements, Surety bonds, Virgin Islands, Warehouses.

*27 CFR Part 27*

Alcohol and alcoholic beverages, Beer, Cosmetics, Customs duties and inspection, Electronic funds transfers, Excise taxes, Imports, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Wine.

*27 CFR Part 28*

Aircraft, Alcohol and alcoholic beverages, Armed forces, Beer, Claims, Excise taxes, Exports, Foreign trade zones, Labeling, Liquors, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Vessels, Warehouses, Wine.

*27 CFR Part 31*

Alcohol and alcoholic beverages, Claims, Excise taxes, Exports, Packaging and containers, Reporting and recordkeeping requirements.

*27 CFR Part 40*

Cigars and cigarettes, Claims, Electronic funds transfers, Excise taxes, Imports, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco.

*27 CFR Part 44*

Aircraft, Armed forces, Cigars and cigarettes, Claims, Customs duties and inspection, Excise taxes, Exports, Foreign trade zones, Labeling, Packaging and containers, Reporting and recordkeeping requirements, Surety bonds, Tobacco, Vessels, Warehouses.

*27 CFR Part 46*

Administrative practice and procedure, Cigars and cigarettes, Claims, Excise taxes, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Seizures and forfeitures, Surety bonds, Tobacco.

*27 CFR Part 70*

Administrative practice and procedure, Claims, Excise taxes, Freedom of information, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surety bonds.

**Proposed Amendments to the Regulations**

For the reasons discussed in the preamble, TTB proposes to amend 27 CFR parts 17, 19, 20, 22, 24, 25, 26, 27, 28, 31, 40, 44, 46, and 70 as follows:

## PART 17—DRAWBACK ON TAXPAID DISTILLED SPIRITS USED IN MANUFACTURING NONBEVERAGE PRODUCTS

1. The authority citation for part 17 is revised to read as follows:

**Authority:** 26 U.S.C. 5010, 5111–5114, 5123, 5206, 5273, 6011, 6065, 6091, 6109, 6151, 6402, 6511, 7213, 7652, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

2. [The proposed amendatory instructions and the proposed amended regulatory text for part 17 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 19—DISTILLED SPIRITS PLANTS

3. The authority citation for part 19 is revised to read as follows:

**Authority:** 19 U.S.C. 81c, 1311; 26 U.S.C. 5001, 5002, 5004–5006, 5008, 5010, 5041, 5061, 5062, 5066, 5101, 5121–5124, 5171–5173, 5175, 5176, 5178–5181, 5201–5204, 5206, 5207, 5211–5215, 5221–5223, 5231, 5232, 5235, 5236, 5241–5243, 5271, 5273, 5301, 5311–5313, 5362, 5370, 5373, 5501–5505, 5551–5555, 5559, 5561, 5562, 5601, 5612, 5682, 6001, 6065, 6109, 6302, 6311, 6676, 6806, 7510, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

4. [The proposed amendatory instructions and the proposed amended regulatory text for part 19 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 20—DISTRIBUTION AND USE OF DENATURED ALCOHOL AND RUM

5. The authority citation for part 20 continues to read as follows:

**Authority:** 26 U.S.C. 5001, 5206, 5214, 5271–5275, 5311, 5552, 5555, 5607, 6065, 7805.

6. [The proposed amendatory instructions and the proposed amended regulatory text for part 20 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 22—DISTRIBUTION AND USE OF TAX-FREE ALCOHOL

7. The authority citation for part 22 is revised to read as follows:

**Authority:** 26 U.S.C. 5001, 5121, 5123, 5206, 5214, 5271–5275, 5311, 5552, 5555, 6056, 6061, 6065, 6109, 6151, 6806, 7805; 31 U.S.C. 9304, 9306.

8. [The proposed amendatory instructions and the proposed amended regulatory text for part 22 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 24—WINE

9. The authority citation for part 24 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a); 26 U.S.C. 5001, 5008, 5041, 5042, 5044, 5061, 5062, 5121–5124, 5173, 5206, 5214, 5215, 5351, 5353, 5354, 5356, 5357, 5361, 5362, 5364–5373, 5381–5388, 5391, 5392, 5511, 5551, 5552, 5661, 5662, 5684, 6065, 6091, 6109, 6301, 6302, 6311, 6651, 6676, 7302, 7342, 7502, 7503, 7606, 7805, 7851; 31 U.S.C. 9301, 9303, 9304, 9306.

10. [The proposed amendatory instructions and the proposed amended regulatory text for part 24 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 25—BEER

11. The authority citation for part 25 is revised to read as follows:

**Authority:** 19 U.S.C. 81c; 26 U.S.C. 5002, 5051–5054, 5056, 5061, 5121–5124, 5222, 5401–5403, 5411–5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7342, 7606, 7805; 31 U.S.C. 9301, 9303–9308.

12. [The proposed amendatory instructions and the proposed amended regulatory text for part 25 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 26—LIQUORS AND ARTICLES FROM PUERTO RICO AND THE VIRGIN ISLANDS

13. The authority citation for part 26 is revised to read as follows:

**Authority:** 19 U.S.C. 81c; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5061, 5111–5114, 5121–5124, 5131–5132, 5207, 5232, 5271, 5275, 5301, 5314, 5555, 6001, 6301, 6302, 6804, 7101, 7102, 7651, 7652, 7805; 27 U.S.C. 203, 205; 31 U.S.C. 9301, 9303, 9304, 9306.

14. [The proposed amendatory instructions and the proposed amended regulatory text for part 26 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 27—IMPORTATION OF DISTILLED SPIRITS, WINES, AND BEER

15. The authority citation for part 27 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a), 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5010, 5041, 5051, 5054, 5061, 5121–5124, 5201, 5205, 5207, 5232, 5273, 5301, 5313, 5555, 6302, 7805.

16. [The proposed amendatory instructions and the proposed amended regulatory text for part 27 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 28—EXPORTATION OF ALCOHOL

17. The authority citation for part 28 is revised to read as follows:

**Authority:** 5 U.S.C. 552(a); 19 U.S.C. 81c, 1202; 26 U.S.C. 5001, 5007, 5008, 5041, 5051, 5054, 5061, 5121, 5122, 5201, 5205, 5207, 5232, 5273, 5301, 5313, 5555, 6302, 7805; 27 U.S.C. 203, 205; 44 U.S.C. 3504(h).

18. [The proposed amendatory instructions and the proposed amended regulatory text for part 28 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 31—ALCOHOL BEVERAGE DEALERS

19. The authority citation for part 31 is revised to read as follows:

**Authority:** 26 U.S.C. 5001, 5002, 5121–5124, 5131, 5132, 5206, 5207, 5273, 5301, 5352, 5555, 5603, 5613, 5681, 5687, 6061, 6065, 6071, 6091, 6103, 6109, 6723, 6724, 7805.

20. [The proposed amendatory instructions and the proposed amended regulatory text for part 31 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 40—MANUFACTURE OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

21. The authority citation for part 40 is revised to read as follows:

**Authority:** 26 U.S.C. 448, 5701, 5703–5705, 5711–5713, 5721–5723, 5731–5734, 5741, 5751, 5753, 5761–5763, 6061, 6065,

6109, 6151, 6301, 6302, 6311, 6313, 6402, 6404, 6423, 6676, 6806, 7011, 7212, 7325, 7342, 7502, 7503, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

22. [The proposed amendatory instructions and the proposed amended regulatory text for part 40 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 44—EXPORTATION OF TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES, WITHOUT PAYMENT OF TAX, OR WITH DRAWBACK OF TAX

23. The authority citation for part 44 is revised to read as follows:

**Authority:** 26 U.S.C. 448, 5146, 5701, 5703–5705, 5711–5713, 5721–5723, 5731–5734, 5741, 5751, 5754, 6061, 6065, 6151, 6402, 6404, 6806, 7011, 7212, 7342, 7606, 7805; 31 U.S.C. 9301, 9303, 9304, 9306.

24. [The proposed amendatory instructions and the proposed amended regulatory text for part 44 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 46—MISCELLANEOUS REGULATIONS RELATING TO TOBACCO PRODUCTS AND CIGARETTE PAPERS AND TUBES

25. The authority citation for part 46 is amended to read as follows:

**Authority:** 18 U.S.C. 2341–2346, 26 U.S.C. 5061, 5704, 5708, 5731–5734, 5751, 5754, 5761–5763, 6001, 6601, 6621, 6622, 7212, 7342, 7602, 7606, 7805; 44 U.S.C. 3504(h), 49 U.S.C. 782, unless otherwise noted.

26. [The proposed amendatory instructions and the proposed amended regulatory text for part 46 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

## PART 70—PROCEDURE AND ADMINISTRATION

27. The authority citation for part 70 is revised to read as follows:

**Authority:** 5 U.S.C. 301 and 552; 26 U.S.C. 4181, 4182, 5123, 5203, 5207, 5275, 5367, 5415, 5504, 5555, 5684(a), 5741, 5761(b), 5802, 6020, 6021, 6064, 6102, 6155, 6159, 6201, 6203, 6204, 6301, 6303, 6311, 6313, 6314, 6321, 6323, 6325, 6326, 6331–6343, 6401–6404, 6407, 6416, 6423, 6501–6503, 6511, 6513, 6514, 6532, 6601, 6602, 6611, 6621, 6622, 6651, 6653, 6656–6658, 6665, 6671, 6672, 6701, 6723, 6801, 6862, 6863, 6901, 7011, 7101, 7102, 7121, 7122, 7207, 7209, 7214, 7304, 7401, 7403, 7406, 7423, 7424, 7425, 7426, 7429, 7430, 7432, 7502, 7503, 7505, 7506, 7513, 7601–7606, 7608–7610, 7622, 7623, 7653, 7805.

28. [The proposed amendatory instructions and the proposed amended regulatory text for part 70 are the same as the amendatory instructions and the amended regulatory text set forth in the temporary rule on this subject published elsewhere in this issue of the **Federal Register**.]

Signed: October 17, 2008.

**John J. Manfreda,**

*Administrator.*

Approved: March 20, 2009.

**Timothy E. Skud,**

*Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).*

**Editorial Note:** This document was received in the Office of the Federal Register on July 15, 2009.

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# Part IV

# Department of Education

## 34 CFR Parts 601, 668, 674, 682, and 685

## Institutions and Lender Requirements Relating to Education Loans, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program; Proposed Rule

## DEPARTMENT OF EDUCATION

**[Docket ID ED–2009–OPE–0003]**

## 34 CFR Parts 601, 668, 674, 682, and 685

**RIN 1840–AC95**

## Institutions and Lender Requirements Relating to Education Loans, Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program

**AGENCY:** Office of Postsecondary Education, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Secretary proposes to establish new regulations in 34 CFR part 601, Institutions and Lender Requirements Relating to Education Loans, to implement requirements relating to education loans that were added to the Higher Education Act of 1965, as amended (HEA) by the Higher Education Opportunity Act of 2008 (HEOA). The Secretary also proposes to amend the regulations for Student Assistance General Provisions in part 668, the Federal Perkins Loan (Perkins Loan) Program in part 674, the Federal Family Education Loan (FFEL) Program in part 682, and the William D. Ford Federal Direct Loan (Direct Loan) Program in part 685 to implement certain provisions of the HEA that involve school-based loan issues and that were affected by the statutory changes made to the HEA by the HEOA.

**DATES:** We must receive your comments on or before August 27, 2009.

**ADDRESSES:** Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''How To Use This Site.''
- *Postal Mail, Commercial Delivery, or Hand Delivery.* If you mail or deliver your comments about these proposed regulations, address them to Brian Smith, U.S. Department of Education, 1990 K Street, NW., room 8033, Washington, DC 20006–8502.

**Privacy Note:** The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

**FOR FURTHER INFORMATION CONTACT:** Marty Guthrie, U.S. Department of Education, 1990 K Street, NW., Room 8042, Washington, DC 20006–8502. Telephone: (202) 219–7031 or via the Internet at: *Marty.Guthrie@ed.gov,* or Gail McLarnon, U.S. Department of Education, 1990 K Street, NW., room 8026, Washington, DC 20006–8502. Telephone: (202) 219–7048 or via the Internet at: *Gail.McLarnon@ed.gov.*

If you use a telecommunications device for the deaf, call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:**

### Invitation To Comment

As outlined in the section of this notice entitled *Negotiated Rulemaking,* significant public participation, through six public hearings and three negotiated rulemaking sessions, has occurred in developing this notice of proposed rulemaking (NPRM). In accordance with the requirements of the Administrative Procedure Act, the Department invites you to submit comments regarding these proposed regulations on or before August 27, 2009. To ensure that your comments have maximum effect in developing the final regulations, we urge you to identify clearly the specific section or sections of the proposed regulations that each of your comments addresses and to arrange your comments in the same order as the proposed regulations.

We invite you to assist us in complying with the specific requirements of Executive Order 12866, including its overall requirements to assess both the costs and the benefits of the proposed regulations and feasible alternatives, and to make a reasoned determination that the benefits of these proposed regulations justify their costs. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the programs.

As noted elsewhere in this NPRM, two of the Department's negotiated rulemaking committees considered proposed revisions to 34 CFR 674.51 (Special Definitions) in subpart D of part 674 of the Federal Perkins Loan Program regulations. Team I—Loans—Lender General Loan Issues, the negotiating committee responsible for regulations involving issues related to lender and general loan issues, negotiated the proposed definitions of *substantial gainful activity* and *permanent and total disability.* Team II—Loans—School-based Loans Issues negotiated all other changes in this section.

We have included all proposed changes to 34 CFR 674.51 in this NPRM as well as in the notice of proposed rulemaking that we are publishing as a result of the negotiations of Team I—Loans—Lender General Loan Issues. However, we ask that when submitting your comments on the proposed changes to 34 CFR 674.51, you submit any comments on the proposed definitions of *substantial gainful activity* and *total and permanent disability* in the docket (Docket ID ED–2009–OPE–0004) for the Team I notice of proposed rulemaking. Comments on all other provisions in this section should be submitted in the docket (Docket ID ED–2009–OPE–0003) for this NPRM.

In addition, in this NPRM we have included a proposed change to § 668.184(a)(1). As amended by the HEOA, section 498(k) of the HEA states that an institution that conducts a teach-out under certain circumstances is not responsible for any liabilities of the closed institution. As a result of this statutory change, the Department intends to propose, in a separate notice of proposed rulemaking (Docket ID ED–2009–OPE–0005, an amendment to 34 CFR 600.32(d) to provide that the default rate of an institution that establishes an additional location at the site of a closed institution for which it conducted a teach-out would not be affected in any way by the closed institution's cohort default rate. In light of this statutory change and our intended amendment to 34 CFR 600.32(d), the Department also proposes to amend § 668.184(a)(1) to cross-reference 34 CFR 600.32(d) and to include a similar cross-reference to 34 CFR 600.32(d) in new § 668.203(a)(1). We have included the proposed amendment to § 668.184(a)(1) and proposed § 668.203(a)(1) in this NPRM

to enable the public to view all changes to these sections in context. These proposed changes will also be included and discussed in a separate notice of proposed rulemaking based on the negotiations of the negotiating rulemaking committee responsible for regulatory issues involving Title IV general provisions. Accordingly, we ask that when submitting any comments on the proposed changes to §§ 600.32(d) or the proposed cross-references to that section in §§ 668.184(a)(1) and 668.203(a)(1), you submit any comments in the docket for that notice of proposed rulemaking (Docket ID ED–2009–OPE–0005).

During and after the comment period, you may inspect all public comments about these proposed regulations by accessing Regulations.gov. You may also inspect the comments, in person, in room 8031, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for these proposed regulations. If you want to schedule an appointment for this type of aid, please contact one of the persons listed under **FOR FURTHER INFORMATION CONTACT**.

**Negotiated Rulemaking**

Section 492 of the HEA requires the Secretary, before publishing any proposed regulations for programs authorized by Title IV of the HEA, to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from the public, including individuals and representatives of groups involved in the Federal student financial assistance programs, the Secretary must subject the proposed regulations to a negotiated rulemaking process. All proposed regulations that the Department publishes on which the negotiators reached consensus must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process can be found at: *http://www.ed.gov/policy/highered/leg/hea08/index.html.*

On December 31, 2008, the Department published a notice in the **Federal Register** (73 FR 80314) announcing our intent to establish five negotiated rulemaking committees to prepare proposed regulations. One committee would focus on issues related to lender and general loan issues (Team I—Loans—Lender General Loan Issues). A second committee would focus on school-based loan issues (Team II—Loans—School-based Loan Issues). A third committee would focus on accreditation (Team III—Accreditation). A fourth committee would focus on discretionary grants (Team IV—Discretionary Grants). A fifth committee would focus on general and non-loan programmatic issues (Team V—General and Non-Loan Programmatic Issues). The notice requested nominations of individuals for membership on the committees who could represent the interests of key stakeholder constituencies on each committee.

Team II—Loans—School-based Loan Issues (Team II) met to develop proposed regulations during the months of March 2009, April 2009, and May 2009. This NPRM resulted primarily from the work of Team II and, in a couple of instances where the subject matter of the proposed regulations overlapped, the work of Team I—Loans—Lender General Loan Issues (Team I).[1] This NPRM proposes regulations relating to the administration of the Federal student loan programs.

The Department developed a list of proposed regulatory provisions based on the provisions contained in the HEOA and from advice and recommendations submitted by individuals and organizations as testimony to the Department in a series of six public hearings held on:

- September 19, 2008 at Texas Christian University in Fort Worth, Texas;
- September 29, 2008, at the University of Rhode Island, in Providence, Rhode Island;
- October 2, 2008, at Pepperdine University, in Malibu, California;
- October 6, 2008, at Johnson C. Smith University, in Charlotte, North Carolina;
- October 8, 2008, at the U.S. Department of Education in Washington, DC; and
- October 15, 2008, at Cuyahoga Community College, in Cleveland, Ohio.

In addition, the Department accepted written comments on possible regulatory provisions submitted directly to the Department by interested parties and organizations. A summary of all comments received orally and in writing is posted as background material in the docket for this NPRM. Transcripts of the regional meetings can be accessed at *http://www.ed.gov/policy/highered/leg/hea08/index.html.*

Staff within the Department also identified issues for discussion and negotiation.

At its first meeting, Team II reached agreement on its protocols. These protocols provided that for each community of interest identified as having interests that were significantly affected by the subject matter of the negotiations, the non-Federal negotiators would represent the organizations listed after their names in the protocols in the negotiated rulemaking process.

Team II included the following members:

- Angela Peoples, United States Student Association, and Rich Williams (alternate), State Public Interest Research Groups representing students.
- Richard Heath, Anne Arundel Community College, and Pat Hurley (alternate), Glendale Community College representing 2-year public institutions.
- Roberta Johnson, Iowa State University, and Mr. Kim Jenerette (alternate), University of South Carolina-Upstate representing 4-year public institutions.
- Elizabeth Hicks, Columbia University, and Nancy Hoover (alternate), Denison University representing private, nonprofit institutions.
- Mary Dorrell, Career Education Corporation, and Nancy Broff (alternate), Dickstein Shapiro LLP representing private, for-profit institutions.
- Thelma Ross, Lincoln University, and Helga Greenfield (alternate), Spelman College representing minority-serving institutions.
- Justin Draeger, National Association of Student Financial Aid Administrators, and Charles ''Buddy'' Mayfield (alternate), Missouri Valley College representing financial aid administrators.
- Virginia Layton, Miami University, and Anne Gross (alternate), National Association of College and University

[1] As discussed elsewhere in this preamble, Team I—Loans—Lender General Loan Issues was responsible for negotiating the following provisions, which appear in this NPRM: 34 CFR 601.2 (definitions of the terms *lender* and *private education loan*), 34 CFR 601.40 (Disclosure and reporting requirements for lenders), and 34 CFR 674.51 (definitions of the terms *substantial gainful activity* and *total and permanent disability*).

Business Officers representing business officers.

- Mary Lyn Hammer, Champion College Solutions, and James B. Parker (alternate), Panhandle Plains Student Loan Center representing institutional and loan servicers.
- Scot Williams, EdFund/CSAC, and Jacqueline Fairbairn (alternate), Great Lakes Higher Education Guaranty Corp. representing guaranty agencies.
- Jackie Ito-Woo, University of California, and Beth Stack (alternate), University of Pittsburgh representing institutions participating in the Perkins Loan Program.
- J.D. LaRock, Massachusetts Office of Higher Education representing States.
- Gail McLarnon, U.S. Department of Education representing the Federal Government.

These protocols also provided that, unless agreed to otherwise, consensus on all of the amendments in the proposed regulations had to be achieved for consensus to be reached on the entire NPRM. Consensus means that there must be no dissent by any member.

During the meetings, Team II reviewed and discussed drafts of proposed regulations. At the final meeting in May 2009, Team II reached consensus on all of the proposed regulations in this document except:

- The proposed definitions of the terms *lender* and *private education loan* in 34 CFR 601.2 (Definitions).
- The proposed requirements in 34 CFR 601.40 (Disclosure and reporting requirements for lenders).
- The proposed definitions of the terms *substantial gainful employment* and *total and permanent disability* in 34 CFR 674.51 (Special Definitions).

These proposed regulatory provisions were assigned to Team I for negotiated rulemaking purposes because the substance of the provisions fell within the purview of Team I's expertise. Team I reached consensus on all of its proposed regulations, including the provisions identified in this paragraph, in its final meeting in May 2009.

Team I and Team II were advised that, to ensure transparency and ease of use for public commenters, the Department would propose the entirety of 34 CFR part 601 in a single NPRM. Given Team I's consensus, which included consensus on the definitions of the terms *lender* and *private education loan* in proposed § 601.2 as well as the requirements in § 601.40, Team I members were advised that they may not comment negatively on the provisions they negotiated notwithstanding that they would appear in Team II's NPRM. Likewise, Team II members were advised that, while they may not comment negatively on the majority of proposed 34 CFR part 601 as a result of their consensus agreement, they may comment on the definitions of *lender* and *private education loan* as well as proposed § 601.40.

With regard to the proposed changes to 34 CFR 674.51, the Department determined that it would be helpful for the public to be able to view all proposed changes to this special definitions section for the Perkins Program in both Team I's notice of proposed rulemaking and Team II's NPRM. Team I and Team II were advised that the proposed changes to § 674.51 would appear in their entirety in both documents to provide context and enhance understanding of both committees' proposed changes to this section. Each team was advised by its respective Federal negotiator that its consensus agreement did not apply to the definitions negotiated by the other team and that any comments they may have on the definitions negotiated by the other team should be submitted in response to the notice of proposed rulemaking published as a result of the other team's negotiations.

More information on the work of Team II can be found at *http://www.ed.gov/policy/highered/reg/hearulemaking/2009/loans-school-based.html* and more information on the work of Team I can be found at *http://www.ed.gov/policy/highered/reg/hearulemaking/2009/loans-lender.html.*

**Summary of Proposed Changes**

These proposed regulations would implement the school-based loan provisions of the HEA, as amended by the HEOA. These provisions include:

- An increase in the period used to calculate the cohort default rate (CDR) from 2 to 3 years effective for CDRs calculated for fiscal year 2009 and subsequent years, the requirement that an institution whose CDR is greater than or equal to 30 percent for any fiscal year establish a default prevention plan, and an increase from 25 to 30 percent in the threshold default that would render an institution ineligible to participate in the Pell, FFEL, and Direct Loan Programs (see section 435(a) and (m) of the HEA);
- An expansion of exit counseling requirements in the title IV, HEA loan programs (see section 485(b)(1)(A) of the HEA);
- An expansion of entrance counseling requirements in the FFEL and Direct Loan Programs (see section 485(l) of the HEA);
- Additions to the conditions an institution must agree to in its program participation agreement with the Secretary of Education (the agreement between the institution and the Department that enables the institution to participate in the loan programs under Title IV of the HEA). These conditions include: (1) A requirement that an institution develop, publish, administer and enforce a code of conduct with respect to its FFEL Program activities (see section 487(a)(25) of the HEA); (2) a requirement that an institution compile, maintain and make available to students and their families a list of its preferred lenders if it enters into any preferred lender arrangement (see section 487(a)(27) of the HEA); and (3) a requirement that an institution, upon the request of an applicant of a private education loan, provide the applicant with the private education loan certification form developed by the Secretary (see section 487(a)(28) of the HEA);
- The addition of education loan borrower disclosures by institutions of higher education, and institution-affiliated organizations, including definitions (see sections 151 through 155, 487(a) and 487(h) of the HEA);
- The addition of borrower disclosures by covered institutions and institution-affiliated organizations that participate in a preferred lender arrangement (see section 153(c) of the HEA);
- The addition of reporting requirements for covered institutions and institution-affiliated organizations (see section 153(c)(2) of the HEA);
- Dissemination of information to prospective and enrolled students regarding the terms and conditions of title IV, HEA loans (see section 485(a) of the HEA);
- Disclosure to the Secretary of any reimbursements made to employees of an institution of higher education for service on advisory boards (see section 485(m) of the HEA); and
- An expansion of cancellation benefits for Perkins Loan borrowers, including cancellation benefits for teachers in an educational service agency; staff members in a pre-kindergarten or childcare program; attorneys employed in a Federal Public Defender Organization or community Defender Organization; fire fighters, faculty members of a Tribal College or University, librarians with a master's degree employed in an elementary or secondary school or in a public library that serves one or more schools eligible for funding under title I of the Elementary and Secondary Education Act of 1965, as amended; and speech pathologists with a master's degree who

work exclusively with title I-eligible schools (see section 465(a) of the HEA).

**Significant Proposed Regulations**

We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address regulatory changes that are technical or otherwise minor in effect.

**Part 601—Institution and Lender Requirements Relating to Education Loans**

*Subpart A—General*

Scope (§ 601.1)

*Statute:* Sections 120 and 1021(b) of the HEOA added a new part E to title I of the HEA, titled *Lender and Institution Requirements Relating to Education Loans.* Part E, consisting of new sections 151 through 155, requires significant new disclosures to borrowers of education loans and related institutional and lender reporting to the Department. The required borrower disclosures apply to both Title IV student loans and private education loans, and are required of institutions of higher education, institution-affiliated organizations, and lenders.

*Current Regulations:* None.

*Proposed Regulations:* We propose to add a new part 601 to title 34 of the Code of Federal Regulations to implement the statutory provisions of sections 151 through 155 of the HEA. Proposed § 601.1 would briefly summarize the content of the new part 601.

*Reasons:* Proposed § 601.1 would be added to implement part E of title I of the HEA, which was added by the HEOA.

Definitions (§ 601.2)

*Statute:* Section 120 of the HEOA added section 151 to the HEA. Section 151 of the HEA sets forth the definitions for terms used in part E of title I of the HEA. These terms include *covered institution, education loan, institution-affiliated organization, preferred lender arrangement,* and *private education loan.*

The term *covered institution* is defined as an institution of higher education, as defined in section 102 of the HEA, that receives any Federal funding or assistance. Thus, the term *covered institution* includes any institution of higher education that receives any type of Federal funding or assistance, not just any institution of higher education that receives Title IV, HEA funding or assistance.

The term *institution-affiliated organization* is defined as any organization directly or indirectly related to a covered institution, including alumni organizations, foundations, or social organizations, that recommends, promotes, or endorses education loans for students attending the covered institution.

The term *education loan* is defined as a FFEL Loan, a Direct Loan, or a private education loan. Section 151(9) of the HEA defines the term *private education loan* as that term is defined in section 140 of the Truth in Lending Act (TILA) (15 U.S.C. 1631). Under this definition, a private education loan is a non-Title IV loan provided by a private educational lender to a borrower expressly for postsecondary educational expenses, and that is not an extension of credit under an open-end consumer credit plan, or secured by real property or a dwelling.

The term *preferred lender arrangement* is defined as an arrangement or agreement between a lender and a covered institution or an institution-affiliated organization, under which the lender provides or otherwise issues education loans to the covered institution's students or their families, and that relates to the covered institution or institution-affiliated organization recommending, promoting, or endorsing the lender's education loan products. The term *preferred lender arrangement* does *not* include arrangements or agreements with respect to Direct Loan Program loans or loans that originate through the PLUS Loan auction pilot program, authorized under section 499(b) of the HEA.

Section 151 of the HEA also provides definitions for the terms *agent, eligible lender, lender,* and *officer* as those terms are used in title I, part E of the HEA.

Section 151(4) of the HEA states that the term *eligible lender* has the same meaning as provided in section 435(d) of the HEA. The term *lender* is defined in section 151(6) of the HEA as an eligible lender for Federal Family Education Loan (FFEL) Program loans, the Department of Education for William D. Ford Direct Loans, and a *private educational lender* as that term is defined in section 140 of the TILA (15 U.S.C. 1631) for private education loans. The term *lender* includes any other person engaged in the business of securing, making, or extending educational loans on behalf of the lender.

The term *agent* is defined as an officer or employee of a covered institution or an institution-affiliated organization. The definition of the term *officer* includes a director or trustee of a covered institution or institution-affiliated organization, if such individual is treated as an employee of the covered institution or the institution-affiliated organization.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 601.2(b) would set forth the definitions for the terms described in the preceding *Statute* section that apply to new part 601. With one exception, the regulatory definitions do not make substantive changes to the corresponding statutory definitions.

The one exception is for the term *preferred lender arrangement.* The definition for *preferred lender arrangement* in proposed § 601.2(b) would track the statutory definition in section 151(8) of the HEA, except that it would specify that an arrangement or agreement does not exist for private education loans that a covered institution makes to its own students, as long as the private education loan is funded by the covered institution's own funds; is funded by donor-directed contributions; is made under title VII or title VIII of the Public Service Health Act; or is made under an institutional payment plan of the covered institution.

*Reasons:* The proposed regulations in § 601.2(b) were negotiated by two teams during the negotiated rulemaking process. Team I, which covered general and lender loan issues, negotiated the definitions for the terms *eligible lender, lender,* and *private education loan.* Team II, which covered school-based loan issues, negotiated the remaining definitions.

The statutory definitions for the terms that would be used in part 601 are detailed and specific. Therefore, except as noted for the definition of *preferred lender arrangement,* the Department has declined to expand on the statutory definitions in the regulations.

The proposed regulations negotiated by Team I reflect the statutory definitions for the terms *lender* and *private education loan.* The definition of *lender,* as reflected in the proposed regulations, would simply provide a cross reference to the definition of that term in current § 682.200(b). The definition of *private education loan* would mirror the definition provided for *private education loan* in section 140 of the TILA (15 U.S.C. 1631). Use of this TILA definition is required by section 151(9) of the HEA.

The Team I non-Federal negotiators raised some concern over the cross references in our proposed regulations to the requirements in the TILA. Specifically, there was discussion about the regulations implementing the TILA, which will not be published in final form before the conclusion of the negotiation process for these regulations. The Department made clear

that, in terms of the definition of *private education loan,* section 151(9) of the HEA requires the Department to use the TILA definition. Under this requirement, the Department has no authority to negotiate that definition for purposes of these proposed regulations.

For Team II, discussions regarding the proposed definitions focused on two terms: *Agent* and *preferred lender arrangement.*

The meaning of the term *agent* came up as part of the discussion around the code of conduct requirements in proposed § 601.21. This discussion is summarized in the code of conduct section of the preamble.

The meaning of the term *preferred lender arrangement* came up frequently during the negotiated rulemaking sessions, and is discussed in the following paragraphs.

Several of the Team II non-Federal negotiators argued that a preferred lender arrangement can exist only if there is a written or verbal agreement between a lender and a covered institution or institution-affiliated organization. One of the non-Federal negotiators submitted an alternative definition for *preferred lender arrangement* that would have built this written or verbal agreement requirement into the definition, only allowing exceptions to this requirement in cases when a course of conduct evidencing intention by the parties to create an arrangement exists.

The Department declined to adopt this proposed alternative definition because the statutory definition of *preferred lender arrangement* does not address how the arrangement comes about, nor does it specify that a written or verbal agreement must exist. Instead, section 151(8) of the HEA provides that two conditions must be met for a preferred lender arrangement to exist between a lender and a covered institution or an institution-affiliated organization. These conditions are that—

(1) A lender provides or issues education loans to students, or the families of such students, attending a covered institution; and

(2) The covered institution or an institution-affiliated organization recommends, promotes, or endorses the education loan products of the lender.

If both of those conditions are met, a preferred lender arrangement exists, whether or not the covered institution and the lender entered into a formal agreement.

Several non-Federal negotiators asked whether the Department viewed institutional loans—that is, loans made directly by a covered institution to its own students—as being covered by the term *preferred lender arrangement.* These non-Federal negotiators identified several preferred lender arrangement requirements in section 487(e) of the HEA (and proposed § 601.21) that they believed would be impossible or impractical for a covered institution to comply with if the preferred lender arrangement requirements applied to institutional loans (*i.e.,* loans made directly by a covered institution to its own students). For example, non-Federal negotiators noted that a school, in its capacity as a lender, could be prohibited from paying its own employees. They argued that, if we applied the code of conduct requirement that a *lender* not provide gifts to employees of a covered institution's financial aid office to a covered institution that makes loans directly to their students (and, therefore, falls within the definition of ''lender''), these covered institutions would be prohibited from paying the employees in its financial aid office.

To avoid this unintended consequence, some of the Team II non-Federal negotiators recommended that the Department exempt institutional loans from the definition of *private education loan.* As noted earlier in this preamble, the definition of the term *private education loan* is established by the TILA and any regulations the Federal Reserve issues in connection with this statutory definition. The Department has no authority to alter the statutory definition of private education loan.

Furthermore, we do not agree that the Federal Reserve should interpret, through its regulations implementing TILA, that the term *private education loan* does not include institutional loans. If the Federal Reserve did so, such loans would not only be exempt from the preferred lender arrangement requirements in part E, title I of the HEA, and proposed 34 CFR part 601, but they would also be exempt from certain TILA requirements that the Department believes provide beneficial protections to student borrowers (such as requiring private educational lenders to inform a potential private education loan borrower that the borrower may qualify for title IV, HEA student financial assistance in addition to or in lieu of the private education loan, as required under section 128(e)(1)(M) of the TILA).

Recognizing that the Department cannot modify the definition of *private education loan,* non-Federal negotiators asked that institutional loans, and other Federal Loans, be excluded from the definition of *preferred lender arrangement.* As an alternative, if that approach could not be accepted, several non-Federal negotiators offered a proposal in which certain types of institutional loans, with certain types of terms and conditions, would be exempt from some or all of the requirements governing loans made pursuant to a preferred lender arrangement.

After considering the proposals from the non-Federal negotiators, the Department declined to adopt this approach. The term *preferred lender arrangement* defines a relationship between two parties regarding loans offered to student borrowers and their families. Nothing in the statutory definition of the term suggests that the relationship is contingent on the terms and conditions of the loans being provided. The relationship is defined by the actions of the two parties—that is, the lender provides or issues education loans and the covered institution or institution-affiliated organization recommends, promotes or endorses the education loan products of the lender.

The Department believes that these actions must be taken by at least two separate parties for a preferred lender arrangement to exist. The definition of the term *preferred lender arrangement* refers to ''an arrangement or agreement between a lender and a covered institution or institution-affiliated organization.'' Implicit in the definition is the understanding that the lender and the covered institution are not one and the same entity.

The Department responded to the non-Federal negotiators by proposing to expand the regulatory definition for *preferred lender arrangement* in proposed § 601.2(b) by specifying that such an arrangement does not exist for a private education loan made by a covered institution to the covered institution's students.

The proposed definition for *preferred lender arrangement* also would clarify that a preferred lender arrangement does would not exist for a private education loan made by a covered institution to the covered institution's students, but only if the covered institution made the loan using its own funds.

Some non-Federal negotiators requested clarification of the phrase ''own funds'' as used in the proposed definition of *preferred lender arrangement.* For example, they presented a scenario in which a lender provides funds to a covered institution, the covered institution uses the funds to make loans to its students, and then the covered institution sells the loans to the lender (possibly immediately after the loan is made). These non-Federal negotiators requested that funds

provided under these conditions be considered the covered institution's ''own funds'' for purposes of the proposed definition of *preferred lender arrangement.* The Department strongly disagreed with this suggestion. In the current context, the Department does not consider funds obtained by covered institutions under this or similar scenarios in which loans are sold shortly after they are made to be the covered institution's ''own funds'' because the covered institution is merely acting as a pass-through for the lender's funds in these cases. The Department believes that exempting loans made under these conditions from the preferred lender arrangement requirements would open the door to abuse, potentially creating a loophole that covered institutions might use to evade the preferred lender arrangement requirements. The Department has long been concerned about this type of arrangement involving schools which are lenders in the FFEL Program but which use funds provided by FFEL lenders to make the loans and then immediately sell the loans. The Department believes that such arrangements could be a loophole for institutions to avoid the limitation on improper inducements in the FFEL Program. Moreover, these arrangements may be deceptive to students who believe they are making an arrangement with the institution but are quickly dealing with a different lender. The Department does not want to repeat those problems in the area of preferred lender arrangements. As the Department's negotiator emphasized to the negotiated rulemaking committee, the Department intends for the proposed definition of *preferred lender arrangement* to be applied in such a manner as to avoid the masking of the true source of loan funds.

Team II's discussions concerning the definition of the term *preferred lender arrangement* also focused on the requirements surrounding preferred lender lists under section 487(h)of the HEA (and proposed § 668.14(b)(28)). Proposed § 668.14 of the program participation agreement regulations, which would implement changes made to section 487(h) of the HEA by section 493(c) of the HEOA, would specify that for any year in which an institution has a preferred lender arrangement, the institution must compile, maintain, and make available for students attending the institution, and their families, a preferred lender list. The non-Federal negotiators asked for clarification from the Department regarding what constitutes a preferred lender list.

The Department referred non-Federal negotiators to Dear Colleague Letter GEN–08–06 [2] in which we stated that if a school provides to its students a neutral, comprehensive list of lenders who have made loans to students at the covered institution within a set period of time, such as three to five years, and the school provides a clear statement on the list that a borrower can choose to use any FFEL lender, not just the lenders identified on the list, the list is not a preferred lender list.

The Department also clarified for the non-Federal negotiators that if a covered institution provides a list of lenders to students, and the list includes some lenders who lend to students at the school but not others, the Department views the covered institution as inherently showing a preference for the lenders it includes on the list. In this case, therefore, the covered institution would be considered to have created a preferred lender list.

If a covered institution includes certain lenders on the list and leaves other lenders off the list, the Department views the covered institution as recommending, promoting, or endorsing the lenders on the list over the lenders that it has chosen to leave off the list regardless of whether the covered institution includes a disclaimer on the list, asserting that the covered institution does not recommend, promote, or endorse the lenders on its list. Unless the list is a neutral, comprehensive list of lenders who lent to students at the school, the list serves to recommend, promote, or endorse the lenders on the list, despite whatever disclaimers the school may attach to the list.

*Subpart B—Loan Information To Be Disclosed by Covered Institutions and Institution-Affiliated Organizations*

Preferred Lender Arrangement Disclosures (§ 601.10)

*Statute:* Section 152(a)(1)(A)(i) of the HEA, as amended by section 120 of the HEOA, requires a covered institution or an institution-affiliated organization with a preferred lender arrangement to provide on its Web site and in all informational materials including publications, mailings, electronic messages, or materials that are distributed to current or prospective students and that describe or discuss education loans, the following disclosures:

- The maximum amount of Title IV grant and loan aid available to students in an easy to understand format.
- Information on the model disclosure form for each FFEL loan offered pursuant to a preferred lender arrangement, to be determined by the Department of Education in coordination with the Board of Governors of the Federal Reserve System.
- A statement that the institution is required to process documents necessary to obtain a FFEL loan from any eligible lender the student selects.

Section 152(a)(1)(A)(ii) of the HEA also requires a covered institution or institution-affiliated organization's Web site or other information materials, including publications, electronic messages or materials, that describe or discuss private education loans made to students or the families of such students pursuant to a preferred lender arrangement to provide the disclosures specified in the TILA. A covered institution must provide the information required by section 128(e)(11) of the TILA and an institution-affiliated organization must provide the information required by section 128(e)(1) of the TILA.

Section 493(c) of the HEOA amended section 487 of the HEA by adding a new subsection (h). Section 487(h)(1)(A) of the HEA requires that if a covered institution compiles, maintains, and makes available a preferred lender list, the institution must clearly and fully disclose on the preferred lender list (a) at least the information required to be disclosed under Section 153(a)(2)(A) of the HEA; (b) why the institution participates in a preferred lender arrangement with each lender on the preferred lender list, particularly with respect to terms and conditions or provisions favorable to the borrower; and (c) that the students attending the institution, or the families of such students, do not have to borrow from a lender on the preferred lender list.

Section 487(h)(1)(B) of the HEA requires covered institutions to ensure, through the use of the list of lender affiliates provided by the Secretary under Section 487(h)(2) of the HEA, that there are not less than three FFEL lenders that are not affiliates of each other included on the preferred lender list and, for institutions that recommend, promote, or endorse private education loans, that there are not less than two lenders of private education loans that are not affiliates of each other included on the preferred lender list.

The preferred lender list must specifically indicate, for each listed

[2] GEN–08–06 was issued by the Department on May 9, 2008, and can be accessed on *http://www.ifap.ed.gov/dpcletters/GEN0806.html.*

lender, whether the lender is or is not an affiliate of another lender on the preferred lender list; and if a lender is an affiliate of another lender on the preferred lender list, must describe the details of such affiliation.

Section 487(h)(1)(C) of the HEA requires institutions to prominently disclose the method and criteria used by the institution in selecting lenders with which to participate in preferred lender arrangements to ensure that such lenders are selected on the basis of the best interests of the borrowers. These criteria include payment of origination or other fees on behalf of the borrower; highly competitive interest rates, or other terms and conditions or provisions of Title IV, HEA program loans or private education loans; high-quality servicing; or additional benefits beyond the standard terms and conditions or provisions for such loans.

Section 487(h)(1)(D) of the HEA requires institutions to exercise a duty of care and a duty of loyalty to compile the preferred lender list without prejudice and for the sole benefit of the students attending the institution, or the families of such students.

Section 487(h)(1)(E) of the HEA requires institutions to not deny or otherwise impede the borrower's choice of a lender or cause unnecessary delay in certification of a Title IV loan for those borrowers who choose a lender that is not included on the preferred lender list.

*Current Regulations:* None.

*Proposed Regulations:* Under proposed § 601.10(a)(1), a covered institution, or an institution-affiliated organization of a covered institution, that participates in a preferred lender arrangement would be required to disclose to students the maximum amount of Federal grant and loan aid available under Title IV of the HEA; the information identified on the model disclosure form developed by the Secretary for each type of education loan that is offered pursuant to a preferred lender arrangement; and a statement that the institution is required to process the documents required to obtain a loan under the FFEL Program from any eligible lender the student selects.

Consistent with section 152(a)(1)(A)(ii) of the HEA, proposed § 601.10(a) would require that these disclosures be provided on the covered institution's or institution-affiliated organization's Web site and in all informational materials such as publications, mailings, or electronic messages or materials that are distributed to prospective or current students of a covered institution and families of such students and that describe or discuss the financial aid opportunities available to students at an institution of higher education.

Proposed § 601.10(a)(2)(i) would require a covered institution to provide the disclosures required under section 128(e)(11) of the TILA for each type of private education loan offered pursuant to a preferred lender arrangement. For an institution-affiliated organization, proposed § 601.10(a)(2)(ii) would require the institution-affiliated organization to provide the disclosures required under section 128(e)(1) of TILA for each type of private education loan offered pursuant to a preferred lender arrangement.

Proposed § 601.10(c) would require covered institutions and institution-affiliated organizations that participate in a preferred lender arrangement to provide the information described in proposed § 601.10(a)(1)(ii), and the information described in proposed §§ 601.10(a)(2)(i) and (a)(2)(ii), respectively, for each type of education loan offered pursuant to the preferred lender arrangement. Covered institutions and institution-affiliated organizations would be required to provide this information to students attending the covered institution, or the families of such students, as applicable. The information would be provided annually and must be provided in a manner that allows for the students or their families to take the information into account before selecting a lender or applying for an education loan.

Consistent with new section 487(h)(1)(A) of the HEA, proposed § 601.10(d) would require that if a covered institution compiles, maintains, and makes available a preferred lender list, the covered institution clearly and fully disclose on the preferred lender list (a) at least the information required to be disclosed under section 153(a)(2)(A) of the HEA; (b) why the institution participates in a preferred lender arrangement with each lender on the preferred lender list, particularly with respect to terms and conditions or provisions favorable to the borrower; and (c) that the students attending the institution, or the families of such students, do not have to borrow from a lender on the preferred lender list.

Proposed § 601.10(d)(2) would track the statutory requirement reflected in section 487(h)(1)(B)(i) of the HEA, which requires the covered institution to ensure, through the use of the list of lender affiliates provided by the Secretary under section 487(h)(2) of the HEA, that there are not less than three FFEL lenders that are not affiliates of each other included on the preferred lender list and, if the institution recommends, promotes, or endorses private education loans, that there are not less than two lenders of private education loans that are not affiliates of each other included on the preferred lender list.

Proposed § 601.10(d)(2) would incorporate the statutory requirements in section 487(h)(1)(B)(ii) of the HEA that the preferred lender list (a) specifically indicate, for each listed lender, whether the lender is or is not an affiliate of another lender on the preferred lender list, and (b) if a lender is an affiliate of another lender on the preferred lender list, must describe the details of such affiliation.

Proposed § 601.10(d)(3) would incorporate the requirement in section 487(h)(1)(C) of the HEA that requires the preferred lender list to prominently disclose the method and criteria used by the institution in selecting lenders with which to participate in preferred lender arrangements to ensure that such lenders are selected on the basis of the best interests of the borrowers.

Under proposed § 601.10(d)(4) and consistent with section 487(h)(1)(D) of the HEA, covered institutions would be required to exercise a duty of care and a duty of loyalty to compile the preferred lender list without prejudice and for the sole benefit of the students attending the institution, or the families of such students. Proposed § 601.10(d)(5) would incorporate the requirement from section 487(h)(1)(E) of the HEA that requires a covered institution to not deny or otherwise impede the borrower's choice of a lender or cause unnecessary delay in certification of a Title IV loan for those borrowers who choose a lender that is not included on the preferred lender list.

*Reasons:* Proposed § 601.10 would be included in new part 601 in order to implement the provisions relating to preferred lender arrangement disclosures in new part E, title I of the HEA.

Some non-Federal negotiators expressed a concern regarding proposed § 601.10(a)(1)(iii), which would require a covered institution that participates in a preferred lender arrangement to include a statement on its Web site and other informational materials that the covered institution is required to process loan documents from any eligible FFEL Program lender. The non-Federal negotiators pointed out that a Direct Loan school could have a preferred lender arrangement with a private education lender (and, therefore, be covered by the requirements in proposed § 601.10), but that most Direct

Loan schools do not also participate in the FFEL program, and would not be able to process FFEL loans.

The Department responded that the requirement in proposed § 601.10(a)(1)(iii) is not applicable to Direct Loan-only schools, and such schools would not be required to provide this statement on their Web sites or other informational materials.

The non-Federal negotiators asked for clarification regarding the information that a covered institution is required to provide on the informational materials referenced in proposed § 601.10(b)(1). The informational materials are publications, mailings, or electronic materials that the covered institution makes available to prospective and current students and their families. The non-Federal negotiators asked whether a brochure would be required to provide all of the information specified in proposed § 601.10(a), or whether the brochure could provide a link to an institutional Web site with the required information.

The non-Federal negotiators were particularly concerned about ''first touch'' information provided to prospective students, which is intended to provide basic information regarding the institution, and might briefly summarize financial aid opportunities at the school. The non-Federal negotiators were concerned that including the detailed student loan information required by proposed § 601.10(a) in such ''first touch'' materials would be overwhelming to potential students.

The non-Federal negotiators also pointed out that information provided in print publications can quickly become outdated, whereas information provided on a Web site can be updated easily, on an as-needed basis.

The Department responded that a link to a Web site that contains information that meets the requirements in proposed § 601.10(a) would be sufficient for printed materials provided to potential borrowers, as long as the printed materials provide the potential borrower with information for a point of contact at the school where the potential borrower can obtain the information in printed form.

Non-Federal negotiators expressed concerns about proposed § 601.10(c)(2), which would require a covered institution to ''provide'' certain information to students in a manner that allows the students to take that information into account before selecting a lender or applying for an education loan. The non-Federal negotiators requested the Department to change this requirement from ''provide'' to ''make available.''

The Department declined to make this requested change. The purpose of the requirement to provide the described information is to give students current information on education loans available at the school before the student selects a lender or applies for an education loan. The term ''make available'' is more passive than the term ''provide.'' The Department expects schools to be more proactive in providing this information to borrowers than the phrase ''make available'' implies. However, the Department recognizes that, regardless of how proactive a school may be, the school cannot guaranty that every student attending the school will receive the information. A school that makes reasonable efforts to give this information to its students at the appropriate time in the award year would be in compliance with proposed § 601.10(c)(2), even if not all students at the school actually receive the information.

Non-Federal negotiators asked if the requirements for a preferred lender list specified in proposed § 601.10(d) would apply to a neutral, comprehensive list of lenders who lent at the school, as discussed earlier in the preamble discussion regarding proposed § 601.2 (Definitions). The Department responded that a neutral, comprehensive list of lenders that have provided loans to students at a covered institution is not a preferred lender list under the HEA or these proposed regulations. If the covered institution has not made a judgment regarding which lenders to include on the list, it is not using the list to identify the lenders it prefers its students to use. A comprehensive, neutral list of lenders is not a preferred lender list and is not covered by the requirements in proposed § 601.10(c).

Private Education Loan Disclosures and Self-Certification Form (§ 601.11)

*Statute:* Section 152(a)(1)(B) of the HEA, which was added by section 120 of the HEOA, requires a covered institution, or an institution-affiliated organization, that provides information regarding a private education loan from a lender to a prospective borrower, regardless of whether the covered institution or institution-affiliated organization participates in a preferred lender arrangement, to provide the following disclosures:

- The information required by section 128(e)(1) of the TILA.
- Information on the availability of Title IV loans or other assistance.
- That the terms and conditions of Title IV loans or assistance may be more beneficial than the terms and conditions of private education loans.

Section 153(c)(1)(B) of the HEA, which also was added by section 120 of the HEOA, requires covered institutions and institution-affiliated organizations to provide the information described in the previous paragraphs in a manner that allows students or their families to take that information into account before selecting a lender or applying for an education loan.

Section 152(a)(1)(B)(iii) of the HEA specifies that the information regarding private education loans must be presented in a manner that is distinct from information regarding Title IV, HEA program loans.

Covered institutions or institution-affiliated organizations must provide these disclosures whether or not they have a preferred lender arrangement with the lender.

Section 155(a) of the HEA, as amended by section 1021(b) of the HEOA, requires the Department, in consultation with the Board of Governors of the Federal Reserve System, to develop a self-certification form for private education loans. The form must be provided to an applicant for a private education loan by an institution of higher education at the request of the applicant. In addition, the institution of higher education is required to provide to the applicant the information needed to complete the form, if the institution of higher education has that information. Under section 155(a)(4) of the HEA, information required to complete the self-certification form includes the applicant's cost of attendance at the institution, the applicant's expected family contribution, and the applicant's estimated financial assistance.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 601.11(a) would provide that a covered institution, or an institution-affiliated organization of a covered institution, that provides information regarding a private education loan from a lender to a prospective borrower must provide private education loan disclosures to the prospective borrower. These disclosures would need to be provided regardless of whether the covered institution or institution-affiliated organization participates in a preferred lender arrangement.

The private education loan disclosures required under proposed § 601.11(b)(1) and (b)(2) would need to provide the prospective borrower with the information required under section 128(e)(1) of the TILA; and would need

to inform the prospective borrower that he or she may qualify for loans or other assistance under title IV of the HEA; and that the terms and conditions of Title IV, HEA program loans may be more favorable than the provisions of private education loans.

Under proposed § 601.11(c), the covered institution or institution-affiliated organization would need to ensure that information regarding private education loans is presented in such a manner as to be distinct from information regarding Title IV, HEA program loans.

Proposed § 601.11(d) would require that, upon an enrolled or admitted student applicant's request for a private education loan self-certification form, an institution must provide to the applicant, in written or electronic form, the self-certification form for private education loans developed by the Secretary to satisfy the requirements of section 128(e)(3) of the TILA. The institution would also be required to provide the information necessary to complete the form, if the institution possesses that information.

*Reasons:* The Department would include proposed § 601.11 in new part 601 to implement the HEOA provisions relating to private education loan disclosures and the self-certification form the Department is required to develop pursuant to section 155(a) of the HEA.

Non-Federal negotiators questioned the value of requiring a school to provide an applicant with the private education loan self-certification form in cases where the applicant is applying for a private education loan made by the covered institution. Non-Federal negotiators asserted that in these cases the covered institution would simply be providing the private education loan self-certification form to itself.

In the Department's view, the purpose of the private education loan self-certification form is to provide disclosure information to the borrower, not to the lender. In cases where the covered institution is also the lender, the Department believes that the borrower should still receive and complete the private education loan self-certification form before obtaining the institutional loan.

In addition, the TILA requires private education lenders to obtain the completed private education loan self-certification form from a borrower before it makes a private education loan. In that regard, the Department advised the non-Federal negotiators that submitting public comment on the Federal Reserve's TILA proposed regulations may be an appropriate forum for addressing this issue.

Further discussion of the private education loan self-certification form is provided under the program participation agreement section of this preamble.

Use of Institution and Lender Name (§ 601.12)

*Statute:* Section 152(a)(2) of the HEA, added by section 120 of the HEOA, prohibits a covered institution or an institution-affiliated organization from allowing a lender with which it has a preferred lender arrangement to use the name, emblem, mascot, logo, or other identifiable symbol of the covered institution or institution-affiliated organization to market private education loans to students.

Section 152(a)(3) of the HEA, added by section 120 of the HEOA, requires a covered institution or an institution-affiliated organization to ensure that the name of a lender with which it has a preferred lender arrangement is displayed in all information and documentation related to private education loans offered by the lender.

*Current Regulations:* None.

*Proposed Regulations:* Under proposed § 601.12(a), a covered institution, or an institution-affiliated organization of a covered institution, that participates in a preferred lender arrangement regarding private education loans would be prohibited from agreeing to the lender's use of the name, emblem, mascot, or logo of the institution or organization, or other words, pictures, or symbols readily identified with the institution or organization, in the marketing of private education loans to students attending the institution in any way that implies that the loan is offered or made by the institution or organization instead of the lender.

Proposed § 601.12(b) also would require covered institutions or institution-affiliated organizations that participate in preferred lender arrangements regarding private education loans to ensure that the name of the lender is displayed in all information and documentation related to the private education loans.

*Reasons:* We propose to include proposed § 601.12 in new part 601 to implement the provisions relating to the use of institution and lender name in section 152 of the HEA.

During the negotiated rulemaking process, non-Federal negotiators expressed concern about the use of the term ''ensure'' in proposed § 601.12(b). The non-Federal negotiators argued that covered institutions have no direct control over lenders with which they have preferred lender arrangements, particularly if there is no formal agreement between the covered institution and the lender. Therefore, argued the non-Federal negotiators, a covered institution cannot ensure that the lender displays its name in all information and documentation relating to the lender's private education loans.

The Department understands that a covered institution cannot control a lender with which it has a preferred lender arrangement. However, we believe that a covered institution does have leverage over such lenders, and can use that leverage to require the lender to display the lender's own name on information or documentation about private education loans provided by the lender. If a lender refuses to display its own name on private education loan marketing materials that the lender provides to students at the covered institution, and the covered institution cannot convince the lender to do so, the covered institution always has the option to end the preferred lender arrangement with the lender and remove the lender from its preferred lender list.

Non-Federal negotiators asked whether a credit union that shares its name with the name of a covered institution would be prohibited under proposed § 601.12(a) from using its own name in its marketing materials regarding private education loans. The Department responded that if the name of the covered institution is part of the name of the credit union, the prohibition against allowing the lender to use the institution's name would not apply. In these cases, the credit union is using its own name, not the institution's name.

This interpretation is consistent with the Manager's Report for the Higher Education Opportunity Act, which states that ''the Conferees understand that some credit unions share the names of the institutions of higher education whose communities they serve. Nothing in [section 140 of the TILA] is intended to prohibit a credit union whose name includes the name of a covered educational institution from using its own name in marketing its private education loans'' (Joint Explanatory Statement of the Committee of Conference, p. 198).

*Subpart C—Responsibilities of Covered Institutions and Institution-Affiliated Organizations*

Annual Report (§ 601.20)

*Statute:* Section 153(c)(2)(A)(i) of the HEA, added by section 120 of the HEOA, requires a covered institution

and an institution-affiliated organization that has a preferred lender arrangement to submit to the Department of Education an annual report that provides the information described in section 153(c)(1)(A)(i) and (ii) of the HEA. This is the same information required under section 152(a)(1)(A)(i) and (a)(1)(A)(ii) of the HEA, and discussed earlier in the preamble discussion for proposed subpart B of part 601.

Section 153(c)(2)(A)(ii) of the HEA, added by section 120 of the HEOA, requires that the annual report include a detailed explanation of why the covered institution or institution-affiliated organization entered into a preferred lender arrangement with each lender. The explanation must explain how the terms, conditions, and provisions of each type of education loan provided pursuant to the preferred lender arrangement are beneficial to students attending the covered institution.

Section 153(c)(2)(B) of the HEA requires the covered institution and institution-affiliated organization to ensure that the annual report is made available to the public, and is provided to students attending or planning to attend the covered institution.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 601.20(a) would require a covered institution and an institution-affiliated organization that participates in a preferred lender arrangement to prepare and submit to the Secretary an annual report, by a date determined by the Secretary. The annual report would include, for each lender that participates in a preferred lender arrangement with the covered institution or organization, the information described in proposed § 601.10(c); and a detailed explanation of why the covered institution or institution-affiliated organization participates in a preferred lender arrangement with the lender. Under the proposed regulations, this explanation would need to include an explanation of why the terms, conditions, and provisions of each type of education loan provided pursuant to the preferred lender arrangement are beneficial for students attending the institution, or the families of such students, as applicable.

Proposed § 601.20(b) would require a covered institution or institution-affiliated organization to ensure that the annual report is made available to the public and provided to students attending or planning to attend the covered institution and the families of such students.

*Reasons:* Proposed § 601.20 would implement the annual report requirements governing covered institutions and institution-affiliated organizations that have a preferred lender arrangement in section 153(c) of the HEA.

There was significant discussion among the negotiators regarding the timing and content of the annual report required under 153(c)(2) of the HEA. Non-Federal negotiators believed it would be reasonable for the annual report to be due by July 1st each year. However, negotiators decided that determining the due date for the annual report is an operational issue, not a regulatory issue. For this reason, the Department does not propose to specify a due date for the annual report in the regulations.

The non-Federal negotiators also pointed out that in the course of a year, lenders on a preferred lender list can change. Some lenders might drop off the list, or new lenders might be added. The negotiators agreed that the annual report would have most utility for the Department and for potential borrowers if it identified the lenders on the covered institution's preferred lender list at the time the report is submitted to the Department, providing a snapshot of the lenders on its preferred lender list at that time. The Department agreed that covered institutions would not be required to update the annual report during the year as lenders are added or dropped from the preferred lender list. The Department believed that a yearly snapshot would provide it with adequate information to monitor the preferred lender activities of covered institutions.

Code of Conduct (§ 601.21)

*Statute:* Section 153(c)(3)(A) of the HEA, added by Section 120 of the HEOA, requires a covered institution and an institution-affiliated organization that has a preferred lender arrangement to comply with the code of conduct requirements in section 487(a)(25)(A) through (C) of the HEA.

Section 153(c)(3)(B) of the HEA requires an institution-affiliated organization of a covered institution to comply with the code of conduct developed and published by the covered institution; publish the code of conduct prominently on its Web site, if it has one; and administer and enforce the code of conduct. At a minimum, the institution-affiliated organization must require that all of the organization's agents with responsibilities with respect to education loans are annually informed of the provisions of the code of conduct.

In accordance with section 487(e)(1) through (e)(7) of the HEA, as amended by section 493(c) of the HEOA, the code of conduct must ban revenue-sharing arrangements; gifts; consulting or other contracting arrangements; directing borrowers to particular lenders or delaying loan certification; offers of funds for private loans, including opportunity pool loans; staffing assistance; and advisory board compensation, as these terms are defined and further explained in section 487(e) of the HEA.

*Current Regulations:* None.

*Proposed Regulations:* A covered institution that participates in a preferred lender arrangement would be required to comply with the code of conduct requirements described in proposed § 601.21. Under this section, the covered institution would be required to develop a code of conduct with respect to FFEL Program loans and private education loans with which the institution's agents must comply.

Proposed § 601.21(a)(2)(i) would require the code of conduct to prohibit a conflict of interest with the responsibilities of an agent of an institution with respect to FFEL Program loans and private education loans and, at a minimum, include the provisions specified in the following paragraphs. Under proposed § 601.21(a)(2)(ii) and (iii), the institution would be required to publish the code of conduct prominently on the institution's Web site and administer and enforce the code by, at a minimum, requiring that all of the institution's agents with responsibilities with respect to FFEL Program loans or private education loans be annually informed of the provisions of the code of conduct.

Proposed § 601.21(b)(1) and (b)(2) would require any institution-affiliated organization of a covered institution that participates in a preferred lender arrangement to comply with the code of conduct developed and published by the covered institution and, if the institution-affiliated organization has a Web site, publish the code of conduct prominently on the Web site.

Under proposed § 601.21(b)(3), the institution-affiliated organization would be required to administer and enforce the code of conduct by, at a minimum, requiring that all of the institution-affiliated organization's agents with responsibilities with respect to FFEL Program loans or private education loans be annually informed of the provisions of the code of conduct.

Proposed § 601.21(c) would prescribe the minimum requirements of a covered institution's code of conduct. Under this section, an institution's code of conduct would be required to prohibit—

- Revenue-sharing arrangements with any lender;
- Soliciting or accepting gifts from a lender, guarantor, or servicer;
- Accepting any fee, payment, or other financial benefit as compensation for any type of consulting or any contractual relationship with a lender;
- Assigning a first-time borrower's loan to a particular lender or refusing to certify, or delaying certification of, any loan based on a borrower's selection of a particular lender;
- Requesting offers of funds for private education loans, including opportunity pool loans, from a lender in exchange for providing the lender with a specified number or loan volume of FFEL Program loans or private education loans or a preferred lender arrangement;
- Requesting or accepting staffing assistance from a lender; and
- Receipt of compensation for serving on an advisory board, commission, or group established by a lender, guarantor, or group of lenders or guarantors.

Proposed § 601.21(c)(6) would incorporate language from section 487(e)(6) of the HEA and set forth exceptions to the ban on staffing assistance, such as staffing assistance related to professional development or training; providing educational counseling materials, or short-term, nonrecurring staffing assistance during disasters or emergencies.

In addition, the proposed regulations would include the statutory definitions provided for the terms *revenue-sharing arrangement, gift,* and *opportunity pool loan.*

Proposed § 601.21(c)(1) would incorporate the definition of the term *revenue-sharing arrangement* from section 487(e)(1)(B)of the HEA: An arrangement between a covered institution and FFEL lender or a private education loan lender in which the lender pays a fee or provides material benefits in exchange for the covered institution recommending the lender or its loan products to students attending the institution or to the families of such students.

Proposed § 601.21(c)(2)(ii) would incorporate the definition of the term *gift* from section 487(e)(2)(B)of the HEA: As any gratuity, favor, discount, entertainment, hospitality, loan or other item with a monetary value of more than a de minimus amount, including gifts of services, transportation, lodging or meals. Proposed § 601.21(c)(2)(iii)(A) through (F) would identify the items of monetary value that are excluded from the definition of *gift.*

Proposed § 601.21(c)(5)(ii) would incorporate the definition of the term *opportunity pool loan* from section 487(e)(5)(B)of the HEA: As a private education loan made by a lender to a student, or a family member of a student, attending the institution that involves a payment, directly or indirectly, by the institution of points, premiums, additional interest, or financial support to the lender for the purpose of the lender extending credit to the student or the student's family.

*Reasons:* Proposed § 601.21(c) would be included in new part 601 to implement the code of conduct provisions added to section 487(e) of the HEA.

Numerous questions and concerns relating to the code of conduct were discussed during the negotiated rulemaking sessions. For example, non-Federal negotiators asked if the prohibition against revenue-sharing arrangements would apply to a servicer collecting student loans on behalf a school. The Department responded that this is a standard service provided by loan servicers, and that it does not view this service as a revenue-sharing arrangement that is prohibited under section 487(e)(1) of the HEA.

Non-Federal negotiators pointed out that, in some cases, if a borrower selects a lender that the covered institution does not normally do business with, there could be delays in processing the borrower's student loans due to compatibility issues with the computer programs used by the lender and covered institution. These delays would not be due to the school deliberately attempting to impede the borrower's choice of lender, but simply due to processing complications that may occur when a school is working with an unfamiliar lender. The Department agrees that processing delays may occur if a borrower selects a lender with which the school is unaccustomed to doing business. We expect the covered institution to do everything it can to minimize such delays, but it is the Department's view that reasonable delays in situations such as these would not be considered to be a violation of the code of conduct. That said, the Department also points out that the requirement in the code of conduct refers to certifying a loan, not other aspects of processing a loan. Because certification of a loan is an internal school process, we do not believe that choice of a lender would normally affect a school's ability to certify a loan in a timely manner.

Non-Federal negotiators asked about proposed § 601.21(c)(4)(ii), which states that a borrower may choose a particular lender or guaranty agency. The non-Federal negotiators asked about the reference to guaranty agencies, pointing out that the guaranty agency that guarantees a borrower's loan depends on the borrower's choice of lender. They argued that this provision does not make sense because a borrower does not have the ability to select from among different guaranty agencies, except to the extent that a borrower does have the ability to select from among different lenders. The Department clarified that guaranty agencies are included in this proposed provision because they can serve as lenders-of-last-resort. When a borrower is using a guaranty agency as a lender-of-last-resort, the borrower can choose among different guaranty agencies.

Non-Federal negotiators asked about proposed § 601.21(c)(2)(iii)(C), which would exclude from the definition of the term *gift,* favorable terms, conditions, and borrower benefits on a loan provided to students employed at a covered institution, if the terms, conditions, or benefits are comparable to those provided to all students at the institution. The non-Federal negotiators asked the Department to clarify whether the reference to ''all students'' at the institution meant the general student population, or if it meant other similarly situated students. The intent of proposed § 601.21(c)(2)(iii)(C) is to allow student employees of a covered institution's financial aid office to receive favorable terms, conditions, or benefits on a student loan, as long as those favorable terms, conditions, and benefits are comparable to the benefits other students at the school receive. In recognition of the fact that a lender may offer favorable terms, conditions and borrower benefits to certain types of students at an institution—such as students at a particular grade level or in a particular program of study—we believe that it would be acceptable for a school to use benefits offered to similarly situated students as a benchmark, rather than benefits available to all students at the institution.

Non-Federal negotiators asked if recourse loans qualify as *opportunity pool loans,* as defined in proposed § 0601.21(c)(5)(ii). Recourse loan arrangements are arrangements between schools and lenders, in which the school provides funds to a lender to offset the risk of the lender providing loans to students at the school who have a high risk of default. As discussed earlier in this preamble, an *opportunity pool loan* is defined in section 487(e)(5)(B) of the HEA as a private education loan that involves a payment,

either directly or indirectly, from an institution to the lender for the purpose of the lender offering a loan to a borrower at the school. Because the Department sees no real distinction between the meaning of the terms *opportunity pool loan* and *recourse loan,* we believe that recourse loans would be covered by the requirements in proposed § 601.21(c)(5)(i). However, the Department notes that proposed § 601.21(c)(5)(i) would not prohibit opportunity pool loans or recourse loans in all cases. It would only prohibit such loans if the funds for the opportunity pool loan or recourse loan are provided in exchange for concessions or promises regarding providing the lender with a specified number or loan volume of FFEL or private education loans, or a preferred lender arrangement for FFEL or private education loans.

Consistent with section 487(e)(7) of the HEA, proposed § 601.21(c)(7) would prohibit compensation from a lender, guarantor, or group of lenders or guarantors for service on an advisory board established by such group. This provision would, however, allow for reimbursement for reasonable expenses incurred for serving on such an advisory board. The non-Federal negotiators asked that we clarify the meaning of the term *reasonable expenses* for this purpose. We agreed that such clarification would be useful, and added a cross-reference to § 668.16(d)(2)(ii) in proposed § 601.21(c)(7). For further discussion of this topic, see the preamble discussion under ''Standards of administrative capability.''

Non-Federal negotiators asked if the code of conduct covers employees of a covered institution who work on the back end of the student loan process, such as employees who work on default prevention with lenders. In general, it is the view of the Department that the code of conduct regulations apply to agents of a covered institution who are employed in the financial aid office of a covered institution, or who otherwise have responsibilities with respect to FFEL program loans or private education loans. Nothing in the HEA, as amended by the HEOA or these proposed regulations would exempt agents of a covered institution who are involved in the back end of the student loan process. We believe that employees working at this stage of the process have responsibilities with regard to student loans and, therefore, are covered by the code of conduct.

Non-Federal negotiators noted that the term *agent* is defined as an officer or an employee in section 151(1) of the HEA (and proposed § 601.2(b)) and asked whether there is a distinction between the meaning of agents of a covered institution and officers or employees of a covered institution.

The Department agreed that, when coupled with the terms ''officer'' and ''employee'', the term *agent* is redundant. The Department also agreed that use of all three terms in the code of conduct section of the regulations could potentially be confusing, given that use of all three terms implies that the term *agent* is intended to include individuals who are not officers or employees of a covered institution, but have some other connection to the covered institution. To avoid this confusion, the Department agreed to remove the terms ''officer'' and ''employee'' from those sections of the code of conduct regulations where the term agent is sufficient.

Further discussion of the code of conduct requirements is provided in the program participation agreement section of this preamble.

Duties of Institutions Participating in the William D. Ford Direct Loan Program (§ 601.30)

*Statute:* Section 154(a) of the HEA, as amended by section 120 of the HEOA, requires a school participating in the William D. Ford Direct Loan Program (Direct Loan Program) to provide the information on a Direct Loan model disclosure form developed by the Department to students attending or planning to attend the school, or to their families. If the Direct Loan school provides information regarding a private education loan to a prospective borrower, it must provide the information from the Direct Loan model disclosure form at the same time.

The Direct Loan school may use the Direct Loan model disclosure form for this purpose, or may use a comparable form designed by the school.

*Current Regulations:* None.

*Proposed Regulations:* Under proposed § 601.30(a), a covered institution participating in the Direct Loan Program would be required to make the information identified in a model disclosure form developed by the Secretary available to students attending or planning to attend the institution, or the families of such students. If the institution provides information regarding a private education loan to a prospective borrower, the institution would concurrently provide the borrower with the information identified on the model disclosure form. Proposed § 601.30(b) would allow a covered institution to use a comparable form designed by the institution to provide this information, instead of the model disclosure form.

*Reasons:* We would include proposed § 601.30(b) in new part 601 to implement the requirements in section 154(a) of the HEA.

*Subpart E—Lender Responsibilities*

*Statute:* Section 152 of the HEA requires lenders to disclose certain information to borrowers of a FFEL or Federal Direct Loan. These disclosures include the information described in section 433(a) and (c) of the HEA. In addition, for each lender's private education loans, the lender must comply with the disclosure requirements of section 128(e) of the TILA.

Section 152 of the HEA also requires lenders to report certain information about its FFEL Program preferred lender arrangements to the Secretary. This report must include information about expenses paid or provided by the lender to any agent of a covered institution employed in the financial aid office of that institution or who otherwise has responsibility with respect to education loan or other financial aid of the institution for service by that employee on an advisory board, commission or group established by a lender or group of lenders. The lender must also report this information for expenses paid or provided to any agent of an institution-affiliated organization involved in recommending, promoting or endorsing education loans.

Section 153 of the HEA also requires FFEL lenders that participate in one or more preferred lender arrangements, to certify annually to the Secretary, that they are in compliance with the requirements of the HEA. If the lender submits an audit under section 428(b)(1)(U)(iii) of the HEA, the auditor may provide this certification as part of that audit. If the lender is not required to submit an audit, it must provide the certification separately.

Section 153 of the HEA requires lenders to provide an annual report to covered institutions or a covered institution's affiliated organization and to the Secretary, disclosing certain information about its loans. The Secretary, in consultation with the Federal Reserve will determine the information to be disclosed. The information will have to address each type of FFEL loan the lender plans to offer pursuant to the preferred lender arrangement to the students or families of students attending that institution for the next award year.

*Current Regulations:* None.

*Proposed Regulations:* Proposed § 601.40(a) would require FFEL lenders to provide FFEL borrowers the disclosures required under current

§ 682.205(a) and (b). Proposed § 601.40(a) would require that a lender offering private education loans comply with the disclosures required under section 128(e) of TILA for each type of private loan.

Proposed § 601.40(b) would set forth the information the lenders will have to provide to the Secretary on an annual basis regarding any reasonable expenses paid or provided to any agent of a covered institution who is employed in the financial aid office or has responsibilities with respect to education loans or other financial aid of the institution for service by the employee on an advisory board, commission or group established by a lender or a group of lenders. Under proposed § 601.40(b), lenders would be required to report this information for expenses paid or provided to any agent of an institution-affiliated organization involved in recommending, promoting or endorsing education loans. Lenders would be required to report the amount of the expenses paid and the specific instances for which it was paid; the names of the agent to whom expenses were paid; and the date and description of each activity for which expenses were paid.

Proposed § 601.40(c) would also require the lender to submit a certification of compliance to the Secretary.

Proposed § 601.40(c) would require any FFEL lender participating in one or more preferred lender arrangements to annually certify to the Secretary its compliance with the HEA. Under this proposed provision, lenders required to file an audit under § 682.305(c) would need to include the certification as part of the audit and lenders that are not required to submit an audit would be required to provide the certification separately.

Proposed § 601.40(d) would require FFEL lenders with a preferred lender arrangement with a covered institution or an institution-affiliated organization to annually provide to the institution, institution-affiliated organization, and the Secretary information regarding the FFEL loans the lender will provide to students and families pursuant to the preferred lender arrangement for the next award year. The information that would be provided will be prescribed by the Secretary, after consultation with the Federal Reserve, pursuant to section 153(a)(2)(A)(i) of the HEA.

*Reasons:* These regulations are provided to implement statutory requirements.

During the negotiations, some negotiators raised a question as to the lender certification requirements proposed as part of § 601.40. In particular, a negotiator asked the Department to clarify the application of the certification requirements to holders of FFEL Program loans who make private education loans. The Department explained that the certification requirements apply to any lender who holds FFEL loans and has a preferred lender arrangement that relates to FFEL loans or to private education loans. A lender who holds FFEL Program loans and has a preferred lender arrangement relating to private education loans has to provide the required certifications even if the lender is not actively making new FFEL loans and does not have a preferred lender arrangement for FFEL loans.

Under section 152(b)(2) of the HEA, a FFEL loan holder that has a preferred lender arrangement for FFEL or private education loans has to annually certify that it is in compliance with the HEA, whether or not the lender is actively making FFEL Program loans. A lender that is required to have an independent financial and compliance audit can provide the certification through that process. The HEA requires a lender to provide two specific certifications about its private education loans: (1) A certification that it is in compliance with the disclosure requirements under section 128(e) of the Truth in Lending Act (reflected in section 152(b)(1)(A)(ii) of the HEA); and (2) that it has provided the required annual report to the Secretary on any reasonable expenses paid or provided to any agent of a covered institution who is employed in the institution's financial aid office or who otherwise has responsibilities with respect to education loans or other financial aid of the institution and any similar expenses paid or provided to any agent of an institution-affiliated organization who is involved in the practice of recommending, promoting or endorsing education loans (see section 152(b)(1)(B) of the HEA). The specific requirements for these certifications will be addressed in audit guides issued by the Department.

Program Participation Agreement (§ 668.14)

*Statute:* Section 493(e) of the HEOA amended section 487(a)(25) of the HEA by adding to the program participation agreement (PPA) requirements a requirement that an institution participating in a Title IV loan program develop, publish, administer, and enforce a code of conduct that prohibits a conflict of interest with the responsibilities of an officer, employee or agent of the institution with respect to any Title IV loan and that contains, at a minimum, the provisions described in section 487(e) of the HEA. Under section 487(a)(25)(B) and (C), the institution must publish the code of conduct prominently on its Web site and annually inform its officers, employees, and agents with responsibilities for loans made, insured, or guaranteed under Title IV loan programs of the provisions of the code of conduct.

*Current Regulations:* The Department's current regulations governing PPA requirements appear in § 668.14.

*Proposed Regulations:* Consistent with section 487(a)(25) of the HEA, we propose to amend § 668.14 (Program participation agreement) by adding a new paragraph (b)(27) that would reflect the requirement that institutions agree, as part of their PPA, to develop, publish, administer, and enforce a code of conduct with respect to loans made, insured, or guaranteed under Title IV loan programs.

*Reason:* We propose to add paragraph (b)(27) to § 668.14 in order to implement the new statutory requirement in section 487(a)(25) of the HEA.

*Statute:* Section 493(a)(1)(A) of the HEOA amended section 487(a)(28)(A) of the HEA by adding to the PPA requirements a requirement that an institution will, at the request of an applicant for a private education loan, provide the applicant with the self-certification form required under section 128(e)(3) of the TILA (15 U.S.C. 1638(e)(3)). This section also requires the institution to provide the applicant with the specific information needed to complete the form, to the extent that the institution possesses the information.

Section 487(a)(28)(B) of the HEA states that the term ''private education loan'' has the meaning given to the term in section 140(a)(7) of the TILA. That statute defines ''private education loan'' as a loan provided by a private educational lender that is not made, insured, or guaranteed under Title IV of the HEA and is issued expressly for postsecondary educational expenses to a borrower. It does not include an extension of credit under an open end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan secured by real property or a dwelling.

Under section 155(a)(4) of the HEA, the information to be supplied to the applicant by the institution (if available) includes cost of attendance and resource information regarding the applicant.

*Current Regulations:* The Department's current regulations governing PPA requirements appear in § 668.14.

*Proposed Regulations:* Proposed § 668.14(b)(29) would incorporate the requirement for an institution participating in the Title IV, HEA programs to agree as part of its PPA to provide, upon request, an enrolled or admitted applicant for a private education loan with the self-certification form and the information to complete it, to the extent the institution possesses that information.

In addition, proposed § 668.14(b)(29)(ii) would require the institution, at the request of the applicant for a private education loan, to discuss with the applicant the Federal, State, and institutional student aid that may be available.

*Reasons:* This section implements the new statutory requirement in section 487(a)(25) of the HEA that an institution provide a private education loan applicant with a self-certification form, and the information required to complete the form to the extent the institution possesses such information, in order to participate in the Title IV, HEA programs.

The non-Federal negotiators engaged in considerable discussion about the information items to be supplied to the applicant for a private education loan. Negotiators were concerned about several aspects, including how an institution should provide the information to an applicant, how an applicant might use the information provided by the institution, and how the institution could ensure that an applicant would complete the self-certification form accurately using the information the institution supplies. In addition, non-Federal negotiators were concerned about whether the self-certification information would need to be updated if the institution received additional information after initially providing the self-certification information to the applicant.

The Department explained during negotiations that it is bound by the specific items and processes required in the HEA. We believe that the intent of the self-certification form is to prevent over-borrowing and provide for a more educated private education loan consumer by ensuring the provision of disclosures, through the institution, regarding the availability of Federal student aid, information on the cost of attendance, expected family contribution and the applicant's estimated financial assistance so that the applicant will be aware of the amount that must be borrowed to cover any gaps before consummating a private education loan. New section 487(a)(28) of the HEA requires that the institution provide the form and the required information to the applicant. As we discussed during negotiations, an institution may post the self-certification form on its Web site for the applicant to download or it may provide the self-certification form directly through its financial aid or other designated office. While the Department believes that contact between the institution and the applicant is an essential component of this process, once the form and information has been disseminated to the applicant, nothing in the HEA or the proposed regulations require institutions to track the status of private education loans. A non-Federal negotiator asked whether updates to the information provided to the applicant would be needed if the applicant subsequently filed or updated an application. The Department responded that when an institution is asked for the self-certification form and the required information, it should supply the form and information available to the institution at that time. There is no requirement to update it.

In response to concerns about the potential for fraudulent use of the self-certification form, the negotiating committee agreed to specify in the proposed regulations that the required self-certification form and information that must be provided to an applicant for a private education loan must be provided only to an applicant who is ''enrolled or admitted'' to the institution rather than to any student who requests the information. The non-Federal negotiators believed that this modification would minimize the possibility that a student who is not enrolled or admitted to the institution may request the form and the requisite information—which, if the student has not completed a Free Application for Federal Student Aid (FAFSA), may be limited to the cost of attendance only—and receive a private education loan for which the student is not eligible.

The committee also agreed to add a provision to the proposed regulations requiring an institution to discuss the availability of Federal, State, and institutional aid with the applicant, at the request of the applicant. The addition of this requirement (reflected in proposed § 668.14(b)(29)(ii)) addressed the concerns of several non-Federal negotiators who wanted to assure that an applicant for a private education loan could receive as much information as possible regarding available aid options.

The Department agrees that it is important to call attention to the availability of other more favorable types of aid and believes that the addition of the requirement in § 668.14(b)(29)(ii) will support this purpose. A request by the applicant for a private education loan will initiate the discussion about other aid options, permit the financial aid administrator to counsel the applicant about such options, and offer the applicant the opportunity to ask any questions he or she may have about the aid options or how to apply for the aid.

*Statute:* The HEOA amended section 487(h) of the HEA by adding a new paragraph (27) to require any institution that enters into a preferred lender arrangement to agree, as a condition of program participation under the PPA, to compile, maintain, and make available to students and their families a list of the specific lenders for loans made under a Title IV program and for private education loans the institution recommends or promotes in accordance with its lender arrangement. New section 487(h)(27) of the HEA also requires that the institution must, at least annually, compile and make the list available in print or other medium.

*Current Regulations:* While current § 668.14(b) does not include any information related to preferred lender arrangements, current § 682.212(h) contains, consistent with our authority under sections 432(m)(1)(B)(ii) and 479A(c) of the HEA, the Department's restrictions on the development and content of a preferred lender list.

*Proposed Regulations:* Proposed § 668.14(b)(28) would add the requirements reflected in section 487(h)(27) of the HEA to the Department's regulations governing the PPA requirements. In conjunction with this proposed addition, we also propose to amend § 682.212(h) to remove information about the preferred lender list restrictions and instead provide a cross-reference to the requirements in proposed § 602.10. We propose to include the preferred lender list requirements in new § 602.10, rather than part 682, because, under section 152(a)(1)(A) of the HEA, as amended by the HEOA, all covered institutions (as defined in section 151(2) of the HEA) that have preferred lender arrangements must comply with these requirements. Part 682 only covers the FFEL program.

*Reasons:* Proposed § 668.14(b)(28) would implement the new statutory requirements any institution that has established a preferred lender arrangement must meet in order to participate in the Title IV, HEA programs. Please refer to the preamble discussions regarding proposed §§ 601.2 and 601.10 for more information on the definition of a *preferred lender arrangement* and the requirements

associated with such an arrangement and preferred lender lists.

Standards of Administrative Capability (§ 668.16)

*Statute:* The HEOA amended section 485(m) of the HEA by adding a requirement that an institution participating in any Title IV program must report annually to the Secretary, any reasonable reimbursements paid or provided by a private educational lender or group of such lenders for service on an advisory board, commission, or group established by such lenders.

Under section 485(m) of the HEA, the reports must include, among other items, the amount for each specific instance of reasonable expenses paid or provided and a brief description of the activity for which the expenses were paid or provided.

*Current Regulations:* None.

*Proposed Regulations:* We propose to amend § 668.16 (Standards of administrative capability) to incorporate the requirement from section 485(m) of the HEA that institutions participating in the Title IV, HEA Program report annually to the Secretary any reasonable expenses paid or provided to any employee of the financial aid office, or any employee who otherwise has responsibilities with respect to education loans or other financial aid at the institution, for service on an advisory board, commission, or group established by a private educational lender or group of lenders. Consistent with section 485(m)(1)(A) through (D) of the HEA, the information to be reported pursuant to proposed § 668.16(d)(2)(i) would consist of: (1) The amount for each specific instance of reasonable expenses paid or provided; (2) The name of the individual to whom the expenses were paid or provided; (3) The dates of the activity for which the expenses were paid or provided; and (4) A brief description of the activity for which the expenses were paid or provided.

Under proposed § 668.16(d)(2)(ii), expenses would be considered ''reasonable'' if the expenses meet the standards of and are paid in accordance with an applicable State government reimbursement policy or, if no applicable State policy exists, in accordance with applicable Federal cost principles. In addition, for purposes of determining whether expenses are ''reasonable'' under this provision, the applicable policy would need to be consistently applied to an institution's employees being reimbursed.

*Reasons:* Proposed § 668.16(d)(2)(i) would implement the changes made to section 485(m) of the HEA by the HEOA. We propose to include the requirements from section 485(m) of the HEA in current § 668.16, because this section identifies standards of administrative capability applicable to all institutions that participate in any Title IV program and includes similar requirements not specified in the PPA.

Proposed § 668.16(d)(2)(ii) would clarify how to determine whether expenses are ''reasonable expenses'' under section 485(m) of the HEA and proposed § 668.16(d)(2)(i). Many negotiators asked for clarification about what constitutes a ''reasonable'' expense. While the Department declined to define the term ''reasonable,'' the Department developed language loosely modeled after the language included in § 682.418(b)(10). The language reflected in proposed § 668.16(d)(2)(ii) describes reasonable expenses as those paid in accordance with an applicable State government reimbursement policy or with applicable Federal cost principles. Federal cost principles would include those contained in the Office of Management and Budget (OMB) circulars A–21 and A–122.

We propose to tie ''reasonable expenses'' to State policies or the applicable Federal cost principles because we envision that a public institution generally would use the State government reimbursement policy of the State in which the institution is located and that a private institution generally would use the applicable Federal cost principles contained in either OMB Circular A–21 or Circular A–122.

In addition, we understand that there may be circumstances under which a private institution receives funding from a State and may therefore use the State government reimbursement policy. In such cases, private schools may choose whether to use a State policy or the Federal cost principles. Proposed § 668.16(d)(2)(ii) would not specify which policy or principles must be used, but rather would provide institutions with some flexibility as long as the policy or principle is consistently applied to an institution's employees.

The non-Federal negotiators also had concerns regarding how an institution is to determine the correct amount to report for each expense. The Department believes that an institution can rely on information provided by a third party (in this case, the lender or lenders) in reporting the amount of reasonable expenses.

Lastly, non-Federal negotiators requested clarification on whether an annual report must be filed with the Secretary if no employee has received reimbursements. After the required form is developed, the Department will provide clarification on this issue through the **Federal Register** notice that announces and describes the reporting process.

Financial Assistance Information (§ 668.42)

*Statute:* The HEOA amended section 485(a)(1)(M) of the HEA by adding a requirement that institutions that participate in the Title IV programs describe—for prospective and enrolled students—the terms and conditions of the loans students receive under the FFEL, Direct Loan and Perkins Loan programs.

The HEOA removed from section 485(a)(1)(M) of the HEA the requirement that institutions provide information about the terms and conditions under which FFEL and Perkins Loans could be deferred or partially cancelled for service under the Peace Corps Act or the Domestic Volunteer Service Act.

*Current Regulations:* Current § 668.42(a)(1) requires that an institution provide a description of all student financial assistance programs to prospective and enrolled students.

For students receiving financial assistance, current § 668.42(c)(4) requires an institution to provide specific information about any loan received by the student as part of the aid package.

*Proposed Regulations:* Proposed § 668.42(a)(4) would require institutions to describe for prospective and enrolled students the terms and conditions of loans students receive under the FFEL, Direct Loan, and Perkins Loan programs in addition to a general description of the programs.

The proposed regulations also would remove the requirement, reflected in current § 668.42(c)(7), to describe the terms and conditions under which FFEL and Perkins Loans could be deferred for service under the Peace Corps Act or the Domestic Volunteer Service Act.

*Reason:* We propose to amend § 668.42 to incorporate the expanded information dissemination requirement for prospective and enrolled students reflected in the new statutory language and to remove the description of the Peace Corps Act and Domestic Volunteer Service Act deferments and partial cancellations in accordance with changes made to section 485(a)(1)(M) of the HEA by the HEOA.

*Cohort Default Rates*

Three-Year Cohort Default Rate (§§ 668.200 Through 668.217)

*Statute:* The HEOA amended section 435(m) of the HEA by increasing the period used to calculate the cohort default rate from two to three years. Under the new three-year method, the cohort default rate is the percentage of borrowers who default on their FFEL or Direct Loans before the end of the second fiscal year (instead of the first fiscal year) following the fiscal year in which the borrowers entered repayment. The three-year method is effective for cohort default rates calculated for fiscal year 2009 and subsequent years. However, section 436(e)(2) of the HEA provides for a transition period during which sanctions will continue to be imposed based on the two-year cohort default rates until rates based on the three-year method are calculated for three consecutive years.

*Current Regulations:* Current § 668.183 under subpart M of part 668 provides for a two-year cohort default rate. The two-year rate is the percentage of borrowers who default on their loans by the end of the fiscal year following the year those borrowers entered repayment.

*Proposed Regulations:* We propose to add a new subpart N to part 668 to provide for regulations for calculating the three-year cohort default rate. Proposed § 668.202 would describe the four steps that the Department follows to calculate and apply the three-year cohort default rate for a fiscal year. With regard to the transition period, proposed §§ 668.181 and 668.200(b) would specify that the Department will issue annually two sets of draft and official cohort default rates for fiscal years 2009, 2010, and 2011. For each of these years, an institution would receive one set of draft and official rates under proposed subpart N and another set under subpart M, and could take administrative appeals as outlined in those subparts from the two-year rates, the three-year rates, or both. For consistency with the HEOA's transition provision, proposed § 668.206(a)(1) would specify that institutions would not lose eligibility based on one three-year rate of 40 percent or higher until the Department's issuance of official three-year rates for the fiscal year 2011 cohort (i.e., in 2014).

*Reasons:* Proposed subpart N would include the three-year calculation as well as all of the statutory and regulatory changes relating to the three-year default rates. In most other respects, the provisions in proposed subpart N would parallel the two-year provisions in current subpart M. We believe that having two subparts for the two cohort default rates provides the best solution for dealing with the transition period during which some provisions from both subparts would apply. After the transition period, an institution would rely solely on the provisions in subpart N because the Department would no longer be calculating or issuing two-year cohort default rates.

Institutional Eligibility and Appeals (§ 668.16(m))

*Statute:* For three-year cohort default rates, issued beginning in fiscal year 2012 with the three-year rate for fiscal year 2009, section 435(a)(2)(B) of the HEA imposes a threshold default rate of 30 percent (an increase from the 25 percent rate applicable to the two-year default rates under the transition provision in section 436(e)(2) of the HEOA). Under section 435(a)(2)(B) of the HEA, an institution may lose its eligibility to participate in the Pell Grant, FFEL, and Direct Loan programs if its three-year default rate is equal to or greater than 30 percent for three consecutive years. However, section 435(a)(3) of the HEA allows an institution whose three-year default rate is 30 percent or more for two consecutive years to file an appeal demonstrating exceptional mitigating circumstances as described in section 435(a)(5) of the HEA (this appeal is referred to as the ''economically disadvantaged'' appeal in the regulations). The institution must file the appeal no later than 30 days after it receives a notice from the Department regarding its second successive three-year default rate that exceeds the 30 percent threshold. If the Department determines that the institution satisfies the requirements specified for the appeal, the Department will not place the institution on provisional certification based solely on its default rate.

In addition, the HEOA increased the participation rate index, as reflected in section 435(a)(8) of the HEA, from 0.0375 to 0.0625. Under this section, an institution may avoid sanctions based on three consecutive years of three-year default rates that are 30 percent or higher if its participation rate index for any of the three years is equal to or lower than 0.0625.

*Current Regulations:* Under current §§ 668.16(m) and 668.187, an institution is subject to loss of eligibility if its three most recent cohort default rates are 25 percent but less than 40 percent, or if its most recent cohort default rate is 40 percent or more, and it is subject to provisional certification if any of its three most recent two-year cohort default rates are 25 percent or more. The threshold for a participation rate index appeal under current § 668.195(a)(2) is 0.0375.

*Proposed Regulations:* Proposed § 668.16(m)(1)(ii) would apply the current rules for administrative capability based on two-year cohort default rates during the transition period. Thereafter, a school would be administratively capable if two of its three most recent three-year rates are less than 30 percent. Under proposed § 668.16(m)(2), the current rules for provisional certification based on two-year cohort default rates of 25 percent or more but less than 40 percent would continue to apply during the transition period. Thereafter, an institution whose three-year default rates are 30 percent or more, but less than 40 percent, for two years would not be provisionally certified based solely on its default rates under the following circumstances:

(1) The institution files timely a request for adjustment or appeal from the second such rate under proposed §§ 668.209 (Uncorrected data adjustments), 668.210 (New data adjustments), or 668.212 (Loan servicing appeals) and the request or appeal is pending or succeeds in reducing the institution's three-year rate below 30 percent.

(2) The institution files timely an appeal under proposed § 668.213 (Economically disadvantaged appeals) from the second such rate and the appeal is pending or successful. Proposed § 668.213 provides that the two rates of 30 percent or more must be successive to permit the appeal.

(3) The institution files a timely participation rate index appeal under § 668.214 and the appeal is pending or successful.

(4) The institution had 30 or fewer borrowers in the three most recent cohorts of borrowers used to calculate the institution's rates.

(5) A three-year rate that would otherwise potentially subject the institution to provisional certification was calculated as an average rate.

To avoid provisional certification by invoking exceptions (1), (2) or (3), the institution would file a request for adjustment or appeal in response to a notice from the Department that the institution's second three-year cohort default rate, or second successive three-year default rate for an economically disadvantaged appeal, is 30 percent or more, but less than 40 percent.

Under proposed § 668.214, a participation rate index appeal could be taken from a loss of eligibility, or

potential placement on provisional certification, based on three-year cohort default rates if the participation rate index for any of the excessive rates was .0625 or less. The appeal would be taken within 30 days of receiving the most recent excessive official rate.

In addition, under proposed § 668.204(c)(1)(iii), an institution would be allowed to challenge a potential placement on provisional certification because its three-year cohort default rates for two of the most recent three years would be 30 percent or more, but less than 40 percent, even though the second such rate was available only as a draft rate, if its participation rate index was equal to or less than 0.0625 for either its draft rate, or its most recent official rate equaling or exceeding 30 percent but less than 40 percent. The challenge would be taken following notice to the school of its draft rate.

*Reasons:* The proposed amendments to § 668.16(m) would incorporate into the Department's cohort default rate regulations the statutory requirements relating to appeals for extenuating circumstances and raising the ceiling for the participation rate index appeal.

The proposed regulations would also allow data appeals to ensure that schools are not provisionally certified based on incorrect data.

In addition, the Department proposes to exempt from provisional certification based solely on cohort default rates any school that has thirty or fewer borrowers included in its most recent three cohort default rates, or had its excessive rates calculated by the ''average rates'' method, or that qualifies for a successful participation rate challenge or appeal. The Department believes that two relatively high cohort default rates that are average rates, or that pertain to very small schools, or to schools that certify loans for only a very small portion of their enrollment, are not necessarily indicative of a lack of administrative capability necessitating provisional certification.

Default Prevention Plans (§ 668.217)

*Statute:* Section 435(a)(7) of the HEA requires an institution whose 3-year cohort default rate for a fiscal year is 30 percent or more to establish a default prevention task force to prepare a default prevention plan to (1) identify the factors causing the institution's rate to be 30 percent or more, (2) establish measurable objectives and steps to improve its default rate, and (3) specify actions that can be taken to improve student loan repayment, including counseling regarding loan repayment options. The institution must submit the plan to the Department, and, after reviewing the plan, the Department offers technical assistance to the institution to help improve the default rate.

In cases where the institution's default rate is 30 percent or more for two consecutive fiscal years, the institution's default prevention task force must review and revise its plan. The institution must send the revised plan to the Department, and, after reviewing the plan, we may require the institution to take actions that promote student loan repayment.

*Current Regulations:* The Department's current regulations do not address default prevention plans. However, current Appendix B to subpart M provides guidance to an institution on strategies it may employ or measures it may use in developing a default management plan.

*Proposed Regulations:* Proposed § 668.217 would incorporate the statutory requirements from section 435(a)(7) of the HEA, and would apply to all 3-year rates published, beginning with the 3-year rate to be published in 2012, that would cover borrowers who entered repayment in FY 2009. The guidance in current Appendix B to subpart M would be slightly modified and reorganized and included as Appendix A to new subpart N.

*Reasons:* The statute provides flexibility to an institution to develop a default prevention plan pertinent to its circumstances, and the Department does not wish to specify in regulations what the institution may or may not include in its default prevention plan. The Department already has the authority, under the statutory provisions for reviewing the plan, to require institutions to take actions on a case by case basis. For this reason, the Department elected not to specify detailed requirements for the default prevention plan.

Electronic Processes (§§ 668.186, 668.190(b), 668.191(b), 668.209, 668.210, 668.211, and 668.212)

*Statute:* Section 435(a)(2) of the HEA requires the Department to provide institutions that are subject to loss of eligibility based on cohort default rates with an opportunity to appeal within 30 days of their receipt of notice of the impending loss of eligibility.

*Current Regulations:* Under current § 668.186(c), an institution whose cohort default rate is less than 10 percent receives a copy of a loan record detail report that lists the loans included in its default rate calculation only on request. If the institution is requesting an adjustment to, or appealing, its default rate under current subpart M, and does not have a copy of its loan record detail report, current § 668.190(b)(1) (Uncorrected data adjustments), § 668.191(b) (New data adjustments), § 668.192(b)(1) (Erroneous data appeals) and § 668.193(c) (Loan servicing appeals) require the institution to request the report within 15 days after it receives notice from the Department of its official cohort default rate.

*Proposed Regulations:* Proposed § 668.186 would eliminate the need to request a loan record detail report, and the associated 15-day deadline, by providing that the report will be sent electronically to the institution as part of a package notifying the institution of its official cohort default rate. The institution would have five business days, from the transmission date of the package as posted on the Department's Web site, to report any problem with receiving that transmission. If the institution reports a problem within the five-day period, and the Department agrees that the institution did not cause the problem, the Department would extend the adjustment, challenge, and appeal deadlines and timeframes to account for retransmitting the package after the problem is resolved. If no problems are reported by the institution, the timeframe associated with filing or requesting the adjustment, challenge, or appeal would begin on the sixth day following the transmission date of the package that is posted on the Department's Web site. The timeframes for the adjustments, challenges, and appeals, and eliminating the fifteen-day deadlines for requesting the loan record detail reports are reflected in §§ 668.190(b), 668.191(b), 668.192(b), and 668.193(c).

The provisions in proposed § 668.186 regarding electronic delivery of the loan detail report, and the proposed elimination, from subpart M provisions regarding adjustments, challenges and appeals, of the fifteen-day deadline for requesting a copy of the report, would also be reflected in the following parallel provisions in subpart N: §§ 668.209, 668.210, 668.211, and 668.212.

*Reasons:* These proposed changes merely update the regulations to reflect the shift from paper to electronic processes, as established by a notice published in the **Federal Register** on February 25, 2003 (68 FR 8746).

*Conforming Changes*

*Statute:* Section 428G(a)(4) and (b)(3) of the HEA provide that beginning October 1, 2011, an institution whose cohort default rate for each of the three most recent fiscal years is less than 15

percent (1) may disburse a FFEL loan in one installment for a period of enrollment that is no longer than one semester, trimester, quarter, or 4 months; and (2) does not have to delay for 30 days disbursing a FFEL loan to a first year, first time borrower. These disbursement provisions currently apply only to an institution whose default rate is less than 10 percent. The HEOA added section 428G(a)(4) and (b)(3) to the HEA and, in doing so, substituted the 15 percent default rate for the 10 percent rate beginning on October 1, 2011.

*Current regulations:* The FFEL regulations in § 682.604(c)(5) and (c)(8), and the corresponding Direct Loan regulations in §§ 685.301(b)(6) and 685.303(b)(4), make the HEA's disbursement benefits available only to institutions whose cohort default rate is less than 10 percent.

*Proposed regulations:* We propose to amend § 668.604(c)(5) and (c)(8), 668.301(b)(6), and 685.303(b)(4) to use the new 15 percent default threshold for FFEL and Direct Loans first disbursed on or after October 1, 2011. These proposed amendments would provide the disbursement benefits to an institution whose default rate, as calculated under either subpart M or subpart N, was less than 15 percent.

*Reasons:* Because the Department will issue cohort default rates for fiscal years 2009, 2010, and 2011 under both subpart M and subpart N, we believe it is reasonable to allow an institution to use the default rates under either subpart for its three most recent fiscal years to qualify for the disbursement benefits. For this reason, we have drafted proposed § 668.604(c)(5) and (c)(8), 668.301(b)(6), and 685.303(b)(4) to permit institutions to use either default rate.

*Statute:* As amended by the HEOA, sections 487(f) and 498(k) of the HEA provide, in part, that an institution that conducts a teach-out at a site of a closed institution may have that site approved as an additional location if—

(1) The closed institution ceased operations as a result of an emergency action or other action initiated by the Department to limit, suspend, or terminate the institution's participation in the Title IV, HEA programs; and

(2) The closed institution submitted a teach-out plan that was approved by its accrediting agency.

Under section 498(k) of the HEA, as amended, an institution that conducts a teach-out under these circumstances is not responsible for any liabilities of the closed institution.

*Current Regulations:* Current § 668.184 describes how cohort default rates are calculated or determined for institutions that undergo a change in status. A change in status occurs whenever an institution acquires or merges with another institution, acquires a branch or location of another institution, or whenever a branch or location of an institution becomes a separate institution. For these cases, current § 668.184 describes how the default rate of the merged or acquired institution is blended with or used to determine the institution's default rate before and after the change in status.

*Proposed Regulations:* In a separate notice of proposed rulemaking and consistent with sections 487(f) and 498(k) of the HEA, the Department intends to propose to amend 34 CFR 600.32(d) to provide that the default rate of an institution that establishes an additional location at the site of a closed institution for which it conducted a teach-out would not be affected in any way by the closed institution's cohort default rate. In light of the statutory changes and our intended amendment to 34 CFR 600.32(d), we propose to amend §§ 668.184(a)(1) and 668.203(a)(1) to cross-reference 34 CFR 600.32(d).

*Reasons:* In keeping with the statutory intent to encourage an institution to conduct a teach-out of a closed institution, we view the cohort default rate of a closed institution as a non-monetary liability that could dissuade an institution from conducting the teach-out if its cohort default rate would be adversely affected by the closed institution's cohort default rate. For this reason, we believe that it is appropriate to ensure that the default rate of an institution that establishes an additional location at the site of a closed institution for which it conducted a teach-out would not be affected in any way by the closed institution's cohort default rate.

*Entrance Counseling*

Counseling Borrowers (§§ 682.604 and 685.304)

*Statute:* Section 488(g) of the HEOA modified the entrance counseling that institutions are required to provide to first-time borrowers of FFEL or Direct Loan Program loans at or prior to the first disbursement of such loans. The HEOA added these requirements to new section 485(l) of the HEA. Prior to the enactment of the HEOA, the Department's entrance counseling requirements were purely regulatory. Section 485(l) of the HEA modifies and expands on the Department's current regulatory entrance counseling requirements in §§ 682.604 and 685.304.

Under section 485(l) of the HEA, entrance counseling may be conducted during an in-person session, provided to a borrower in a separate notice that the borrower signs and returns to the institution, or provided to a borrower online or by interactive electronic means, with the borrower acknowledging receipt of the information.

The entrance counseling required under section 485(l) of the HEA must include the following information:

- To the extent practicable, the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student aid;
- An explanation of the use of the master promissory note;
- Information on how interest accrues and is capitalized during periods when the interest is not paid by the borrower or the Secretary;
- For Unsubsidized Stafford Loans or PLUS Loans made under the FFEL or Direct Loan programs, the option of the borrower to pay the interest while in school;
- The definition of half-time enrollment at the institution, during regular terms and summer school, and the consequences of not maintaining half-time enrollment;

An explanation of the importance of contacting the appropriate offices at the institution if the borrower withdraws prior to completing the program of study so the institution can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

- Examples of monthly repayment amounts based on a range of level of indebtedness of borrowers of Stafford Loans and, as appropriate, graduate borrowers of Stafford or PLUS loans, or the average cumulative indebtedness of other borrowers in the same programs as the borrower at the same institution;
- The obligation of the borrower to repay the full amount of the loan, regardless of whether the borrower completes the program in which the borrower is enrolled within the regular time for completion;
- The likely consequences of default on the loan, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;
- Information on the National Student Loan Data System (NSLDS) and how the borrower may access his or her records; and
- The name and contact information of the individual a borrower can contact with questions regarding the borrower's rights and responsibilities or the terms and conditions of the loan.

When providing entrance counseling, institutions are encouraged to use interactive programs to test the borrower's understanding of the terms and conditions of their student loans.

*Current Regulations:* For the FFEL Program, current § 682.604(f) requires a school to conduct initial counseling with each Stafford Loan borrower prior to its release of the first disbursement, unless the borrower has received a prior Stafford, SLS, or Direct Subsidized or Unsubsidized loan. Current §§ 682.604(f)(1) and 682.604(f)(5) describe what must be included in the initial counseling for Stafford Loan borrowers (*e.g.*, an explanation of the use of a Master Promissory Note; the seriousness and importance of the repayment obligation the student borrower is assuming; and the likely consequences of default, including adverse credit reports, Federal offset, and litigation).

Current § 682.604(f)(2) requires a school to ensure that initial counseling is conducted with each graduate or professional student PLUS loan borrower prior to its release of the first disbursement of the PLUS Loan, unless the student has received a prior FFEL PLUS loan or Direct PLUS loan. Current § 682.604(f)(2) also specifies what must be included in the initial counseling for graduate or professional student PLUS Loan borrowers (*e.g.*, sample monthly repayment amounts based on a range of student levels of indebtedness or on the average indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained, at the same school or in the same program of study at the same school).

For both Stafford and PLUS loan borrowers, current § 682.604(f)(3) requires schools to conduct initial counseling either in person, by audiovisual presentation, or by interactive electronic means. Under current § 682.604(f)(6), if initial counseling is conducted through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials and participates in and completes the initial counseling.

Current § 682.604(f)(4) requires a school to ensure that an individual with expertise in the Title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions regarding those programs. As an alternative, prior to releasing the proceeds of a loan in the case of a student borrower enrolled in a correspondence program or a student borrower enrolled in a study-abroad program that the home institution approves for credit, the counseling may be provided through written materials.

Current § 682.604(f)(7) requires a school to maintain documentation substantiating the school's compliance with the entrance counseling requirements for each student borrower.

For the Direct Loan program, current § 685.304(a) requires schools to ensure that initial counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized, Direct Unsubsidized, FFEL Stafford, or Federal SLS Loan.

Current § 685.304(b) requires schools to conduct initial counseling with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior Direct PLUS Loan or FFEL PLUS Loan.

The entrance counseling requirements specified in current §§ 685.304(a) and 685.304(b) of the Direct Loan Program regulations correspond to the entrance counseling requirements in the FFEL program, except that, as provided for in current § 685.304(a)(5), a Direct Loan school may adopt an alternative approach for initial counseling as part of the school's quality assurance plan.

*Proposed Regulations:* The Department has restructured and modified § 682.604(f) of the FFEL regulations to align the regulations with section 485(l) of the HEA. Under proposed § 682.604(f)(3), initial counseling for Stafford and graduate or professional student PLUS Loan borrowers must provide comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information would be provided to the borrower during an entrance counseling session conducted in person; on a separate written form provided to the borrower that the borrower signs and returns to the school; or online or by interactive electronic means, with the borrower acknowledging receipt of the information.

Proposed § 682.604(f)(4) would largely mirror current § 682.604(f)(6) by requiring a school that conducts initial counseling online or through interactive electronic means to take reasonable steps to ensure that each student borrower receives the counseling materials and participates in and completes the initial counseling. Consistent with new section 485(l)(1)(B) of the HEA, proposed § 682.604(f)(4) would also provide that such reasonable steps may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

Proposed § 682.604(f)(5), which provides that a school must ensure that an individual with expertise in the Title IV programs is reasonably available shortly after the counseling to answer questions regarding those programs, would mirror current § 682.604(f)(4).

The content of the initial counseling, which appears in current § 682.604(f)(1) and 682.604(f)(5), would be included, with modifications aligning the regulatory language with new section 485(l) of the HEA, in proposed § 682.604(f)(6) (for Stafford Loan borrowers) and § 682.604(f)(7) (for graduate and professional student PLUS Loan borrowers). Under proposed § 682.604(f)(6), initial counseling for Stafford Loan borrowers must—

- Explain the use of a Master Promissory Note;
- Emphasize to the student borrower the seriousness and importance of the repayment obligation the student borrower is assuming;
- Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;
- In the case of a student borrower (for other than a loan made or originated by the school), emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;
- Inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness of Stafford loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained; or the average indebtedness of other borrowers in the same program at the same school as the borrower;
- To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;
- Provide information on how interest accrues and is capitalized during periods when the interest is not

paid by either the borrower or the Secretary;

• Inform the borrower of the option to pay the interest on an unsubsidized Stafford Loan while the borrower is in school;

• Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

• Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

• Provide information on NSLDS and how the borrower can access the borrower's records; and

• Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan.

Under proposed § 682.604(f)(7), initial counseling for graduate or professional student PLUS Loan borrowers must—

• Inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained; or the average indebtedness of other borrowers in the same program at the same school as the borrower;

• Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

• For a graduate or professional student PLUS Loan borrower who has received a prior FFEL Stafford or Direct Subsidized or Unsubsidized loan, provide the information, specified in § 682.603(d)(1)(i) through § 682.603(d)(1)(iii), that compares Stafford and PLUS Loan interest rates, interest accrual periods, and repayment period begin dates; and

• For a graduate or professional student PLUS Loan borrower who has not received a prior FFEL Stafford, or Direct Subsidized or Unsubsidized loan, provide the Stafford Loan initial counseling information specified in proposed § 682.604(f)(6)(i) through § 682.604(f)(6)(xii).

Corresponding initial counseling requirements for Direct Subsidized, Direct Unsubsidized, and Direct PLUS loan borrowers are included in proposed § 685.304(a)(1) through § 685.304(a)(9) of the Direct Loan regulations.

*Reasons:* These proposed amendments to §§ 682.694(f) and 685.304(a) are intended to implement the changes made to section 485(l) of the HEA. The HEOA incorporated into the HEA many of the entrance counseling requirements already reflected in current §§ 682.694(f) and 685.304(a) and also added several new requirements. In cases where the statutory language in the HEA is similar to current regulatory language, the Department modified the current regulations to track more closely the new statutory language. In cases where no current regulatory requirements exist, we propose to incorporate—with a few minor changes—the statutory language regarding the requirements into our regulations. To this end, the proposed regulations closely follow the language of section 485(l) of the HEA. For this reason, only a few issues generated extensive discussion during the negotiated rulemaking sessions.

Initially, the Department proposed language that would allow schools to provide entrance counseling ''online by interactive electronic means.'' The non-Federal negotiators pointed out that the term ''online'' does not necessarily mean the same thing as ''interactive.'' The Department agreed with the non-Federal negotiators, and changed the wording of the proposed regulations to read ''online or through interactive electronic means.''

The draft language initially proposed by the Department for § 682.604(f)(6)(v)(B) of the Stafford Loan entrance counseling requirements would have given schools the option to provide information on the ''average cumulative indebtedness of other borrowers in the same program at the same school as the borrower'' during Stafford Loan entrance counseling. The Department proposed similar language in proposed § 682.604(f)(7)(i)(B) for PLUS Loan entrance counseling. When presented with this draft language, the non-Federal negotiators expressed concern that requiring the provision of ''cumulative'' indebtedness information could be misleading, especially in the case of graduate or professional student PLUS Loan borrowers, whose level of undergraduate indebtedness could vary significantly by the time the student enters a graduate or professional program.

The Department agreed that the information on indebtedness provided to students would be more useful if it were limited to the average indebtedness incurred by the borrowers while they are in the program of study. For this reason, we agreed not to include the word ''cumulative'' in proposed §§ 682.604(f)(6)(v)(B) and 682.604(f)(7)(i)(B), and to make corresponding changes in proposed §§ 685.304(a)(6)(v)(B) and 685.304(a)(7)(i)(B) of the Direct Loan regulations.

Some non-Federal negotiators raised questions about the scope of proposed § 682.604(f)(6)(iv), which would require schools to inform borrowers that the borrower is responsible for repaying the loan, even if the borrower does not complete the program within the regular time for completion. The negotiators questioned how this requirement would affect requests for in-school deferments for borrowers who are attending less than full time. The Department responded that this requirement is unrelated to a borrower's eligibility for an in-school deferment and that it merely would require that borrowers be informed that they are still obligated to repay the loan, even if it takes them a longer time to complete the program than is normally expected (as might be the case with a borrower attending less than full time).

*Exit Counseling*

Counseling Borrowers (§§ 674.42(b), 682.604(g) and 685.304(b))

*Statute:* Section 488(b) of the HEOA modified section 485(b)(1)(A) of the HEA to require each eligible institution, through financial aid offices or otherwise, to conduct exit counseling for borrowers receiving loans made, insured or guaranteed under the FFEL Program (except for Consolidation Loans or Federal PLUS loans made to parent borrowers) or loans made under the Direct Loan Program (other than Federal Direct Consolidation Loans or Federal Direct PLUS loans made to parent borrowers) or made under the Perkins Loan Program prior to the completion of the borrower's course of study or the borrower's departure from the institution. Many of the exit counseling requirements in section 485(b)(1)(A) of the HEA are similar to the exit counseling requirements in current 34 CFR §§ 674.42(b), 682.604(g), and 685.304(b).

Section 485(b)(1)(A) of the HEA, as amended by the HEOA, requires exit counseling to include:

• Information on repayment plans, including a description of the different features of each plan and samples showing average anticipated monthly payments with the difference in interest paid and total payments shown with each plan.

• Debt management strategies to assist the borrower in repaying the debt.

• Options the borrower has to prepay each loan or pay each loan on a shorter schedule or to change repayment plans.

• Information on loan forgiveness and cancellation provisions and the conditions under which the borrower may obtain full or partial forgiveness or cancellation of principal and interest.

• Information on forbearance provisions and a general description of terms and conditions under which the borrower may defer repayment of principal or interest or be granted forbearance.

• Information on the consequences of default on a loan, including adverse credit reports and delinquent debt collection procedures under Federal law and litigation.

• Information with respect to Consolidation Loans to discharge FFEL, Direct Loan, and Perkins Loan program loans, which includes—

(1) The effects of the consolidation on total interest to be paid, fees, and length of repayment;

(2) The effect on a borrower's underlying loan benefits, which includes grace periods, loan forgiveness, cancellation and deferment;

(3) The option the borrower has to prepay the loan or to change repayment plans; and

(4) That borrower benefit programs may vary depending on the lender.

• A general description of the types of tax benefits that might be available to borrowers.

• Information on how a borrower can use NSLDS to get information on the status of his or her loans.

*Current Regulations:* Under current §§ 674.42(b), 682.604(g), and 685.304(b), schools must ensure that exit counseling is conducted with Perkins, FFEL Stafford, and Direct Subsidized and Unsubsidized Loan borrowers. These regulations provide that (a) the exit counseling must be conducted with each borrower either in person, by audiovisual presentation, or by interactive electronic means; (b) exit counseling must be conducted shortly before the student borrower ceases at least half-time study at the school; and (c) an individual with expertise in the Title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. Current §§ 674.42(b)(1), 682.604(g)(1), and 685.304(b)(2) also provide that, in the case of a student borrower enrolled in a correspondence program or a study-abroad program that the home institution approves for credit, written counseling materials may be provided by mail within 30 days after the student borrower completes the program. Under §§ 674.42(b)(1), 682.604(g)(1), and 685.304(b)(3), if a student borrower withdraws from school without the school's prior knowledge or fails to complete an exit counseling session as required, the school must ensure that exit counseling is provided through either interactive electronic means or by mailing written counseling materials to the student borrower at the student borrower's last known address within 30 days after learning that the student borrower has withdrawn from school or failed to complete the exit counseling as required.

If exit counseling is conducted by electronic interactive means, under current §§ 674.42(b)(3), 682.604(g)(3), and 685.304(b)(6), the school must take reasonable steps to ensure that each Perkins, FFEL Stafford and Direct Subsidized and Unsubsidized Loan student borrower receives the counseling materials, and participates in and completes the counseling.

Under current §§ 674.42(b)(4), 682.604(g)(4), and 685.304(b)(7), the school must maintain documentation substantiating the school's compliance with the exit counseling requirements for each Perkins, FFEL Stafford, and Direct Subsidized and Unsubsidized Loan student borrower.

As specified in current §§ 674.42(b)(2), 682.604(g)(2), and 685.304(b)(4), the exit counseling for Perkins, FFEL Stafford, and Direct Subsidized and Unsubsidized Loan borrowers must—

• Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained the same types of Title IV loans the student borrower has obtained for attendance at the same school or in the same program of study at the same school;

• Review loan consolidation for the student borrower;

• Suggest to the student borrower debt-management strategies that would facilitate repayment;

• Include the entrance counseling topics described in the FFEL regulations in § 682.604(f)(2)(i) (use of the Master Promissory Note), § 682.604(f)(2)(ii) (seriousness of the repayment obligation), § 682.604(f)(2)(iii) (consequences of default), and § 682.604(f)(2)(iv) (obligation to repay despite the failure of a borrower to complete the program);

• Review for the student borrower the conditions under which the student borrower may defer or forbear repayment or obtain a full or partial forgiveness, discharge or cancellation of a loan;

• Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known);

• Review for the student borrower information on the availability of the Student Loan Ombudsman's office; and

• Inform the student borrower of the availability of Title IV loan information in the National Student Loan Data System (NSLDS).

In addition, current § 685.304(b)(4)(iv) of the Direct Subsidized and Unsubsidized Loan regulations requires that exit counseling for a Direct Subsidized and Unsubsidized Loan borrower must explain to the borrower how to contact the party servicing the borrower's Direct Loan. For FFEL Stafford and Direct Subsidized and Unsubsidized Loan borrowers, the exit counseling must review available repayment plan options (see current §§ 682.604(g)(2)(ii) and 685.304(b)(4)(ii)) and explain the use of the Master Promissory Note (see current §§ 682.604(g)(2)(iv) and 685.304(b)(4)(v)).

*Proposed Regulations:* Because the HEA incorporated the majority of the exit counseling requirements from the Department's current regulations, proposed § 674.42(b) (Perkins Loan exit counseling), § 682.604(g) (FFEL Stafford Loan exit counseling), and § 685.304(b) (Direct Subsidized and Unsubsidized Loan exit counseling) would continue to include the substantive requirements from current §§ 674.42(b), 682.604(g) and 685.304(b). The major proposed changes would be as follows:

Exit Counseling for Perkins Loan Borrowers (§ 674.42(b))

• The addition of § 674.42(b)(2)(ii), which would require that exit counseling explain the options the borrower has to prepay each loan and pay each loan on a shorter schedule.

• The redesignation of current § 674.42(b)(2)(ii) as proposed § 674.42(b)(2)(iii) and revision of the section to focus on reviewing for the borrower the option to consolidate a Federal Perkins Loan and the consequences of doing so.

• The addition of a new § 674.42(b)(2)(v), which would require that exit counseling explain the use of a master promissory note.

• The redesignation of current § 674.42(b)(2)(v) as proposed § 674.42(b)(2)(vii) and revision of the section to include, in the required description of the likely consequences of default, delinquent debt collection procedures under Federal law.

• The redesignation of current § 674.42(b)(2)(vi) as proposed § 674.42(b)(2)(viii) and revision of the section to include, as part of Perkins Loan exit counseling, information about the borrower's obligation to repay the full amount of the loan even if the borrower has not completed the program within the regular time for completion.

• The redesignation of current § 674.42(b)(2)(vii) as proposed § 674.42(b)(2)(ix) and revision of the section to require that exit counseling provide a general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or cancellation of principal and interest, defer repayment of principal or interest, or be granted an extension of the repayment period or a forbearance on a Title IV loan; and a copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d)of the HEA.

• The addition of language in proposed § 674.42(b)(2)(xi) (current § 674.42(b)(2)(viii)) to clarify that exit counseling must not only inform the student borrower of the availability of information in the National Student Loan Data System (NSLDS), but also how the NSLDS can be used to obtain title IV loan status information.

• The addition of new § 674.42(b)(2)(xii), which would require exit counseling to include a general description of the types of tax benefits that may be available to borrowers.

Exit Counseling for FFEL Stafford Loan Borrowers (§ 682.604(g))

• The revision of current § 682.604(g)(2)(i) to include borrowers who have only obtained PLUS Loans, in addition to borrowers who have obtained both PLUS and Stafford Loans.

• The revision of current § 682.604(g)(2)(ii) to include, as part of the review of borrower repayment plans, a description of the different features of each repayment plan and sample information showing the average anticipated monthly payments, and the difference in interest paid under each plan.

• The addition of a new § 682.604(g)(2)(iii), which would require that exit counseling explain the options the borrower has to prepay each loan, pay each loan on a shorter schedule, and change repayment plans.

• The addition of a new 682.604(g)(2)(iv), which would require exit counseling to provide information on the effects of loan consolidation.

• The redesignation of current § 682.604(g)(2)(iii) as § 682.604(g)(2)(v), and the revision of the section to require that exit counseling ''include'' debt-management strategies rather than ''suggest'' debt-management strategies.

• The redesignation of current § 682.604(g)(2)(iv) as § 682.604(g)(2)(vi), with no other changes except to update the cross-references.

• The addition of new § 682.604(g)(2)(vii) to describe the likely consequences of default, including the delinquent debt collection procedures under Federal law and litigation.

• The redesignation of current § 682.604(g)(2)(v) as § 682.604(g)(2)(viii), and revision of the section to require that exit counseling provide a general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or cancellation of principal and interest, defer repayment of principal or interest, or be granted an extension of the repayment period or a forbearance on a title IV loan; and a copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d)of the HEA.

• The redesignation of current § 682.604(g)(2)(vi) as § 682.604(g)(2)(ix), with no other revisions.

• The redesignation of current § 682.604(g)(2)(vii) as § 682.604(g)(2)(x), with no other revisions.

• The redesignation of current § 682.604(g)(2)(viii) as § 682.604(g)(2)(xi), and the addition of language to clarify that exit counseling must not only inform the student borrower of the availability of information in the National Student Loan Data System (NSLDS), but also how the NSLDS can be used to obtain title IV loan status information.

• The addition of new § 682.604(g)(2)(xii), which would require exit counseling to include a general description of the types of tax benefits that may be available to borrowers.

Exit Counseling for Direct Subsidized and Unsubsidized Loan Borrowers (§ 685.304(b))

• The revision of current § 685.304(b)(4)(i) to include borrowers who have only obtained PLUS Loans, in addition to borrowers who have obtained both PLUS and Stafford Loans.

• The revision of current § 685.304(b)(4)(ii) to include, as part of the review of borrower repayment plans, a description of the different features of each repayment plan and sample information showing the average anticipated monthly payments, and the difference in interest paid under each plan.

• The addition of a new § 685.304(b)(4)(iii), which would require that exit counseling explain the options the borrower has to prepay each loan, pay each loan on a shorter schedule, and change repayment plans.

• The addition of a new § 685.304(b)(4)(iv), which would require exit counseling to provide information on the effects of loan consolidation.

• The redesignation of current § 685.304(b)(4)(iii) as § 685.304(b)(4)(v), and the revision of the section to require that exit counseling ''include'' debt-management strategies rather than ''suggest'' debt-management strategies.

• The redesignation of current § 685.304(b)(4)(iv) as § 685.304(b)(4)(vi), with no other changes.

• The redesignation of current § 685.304(b)(4)(v) as § 685.304(b)(4)(vii), with no other changes except to update the cross-references.

• The addition of new § 685.304(b)(4)(viii) to describe the likely consequences of default, delinquent debt collection procedures under Federal law and litigation.

• The redesignation of current § 685.304(b)(4)(vii) as § 685.304(b)(4)(ix) and revision of the section to require that exit counseling provide a general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or cancellation of principal and interest, defer repayment of principal or interest, or be granted an extension of the repayment period or a forbearance on a title IV loan; and a copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA.

• The redesignation of current § 685.304(b)(4)(vii) as § 685.304(b)(4)(x), with no other revisions.

• The redesignation of current § 685.304(b)(4)(viii) as § 685.304(b)(4)(xi) and the addition of language to clarify that exit counseling must not only inform the student borrower of the availability of information in the National Student Loan Data System (NSLDS), but also how the NSLDS can be used to obtain title IV loan status information.

• The addition of new § 685.304(b)(4)(xii), which would require exit counseling to include a general description of the types of tax benefits that may be available to borrowers.

• The redesignation of current § 685.304(b)(4)(ix) as § 685.304(b)(4)(xiii), with no other revisions.

*Reasons:* These proposed amendments to §§ 674.42(b), 682.604(g), and 685.304(b) are intended to align the Department's exit counseling requirements for its Perkins Loan, FFEL Stafford, and Direct Subsidized and Unsubsidized Loan programs with the exit counseling requirements added to section 485(b)(1)(A) of the HEA by section 488(b) of the HEOA.

For the most part, we were able to simply incorporate the statutory language from section 485(b)(1)(A) of the HEA into our current regulations. One exception includes the requirement that exit counseling include reviewing with the borrower different repayment plan options. Perkins Loan borrowers, unlike FFEL Stafford and Direct Subsidized and Unsubsidized Loan borrowers, do not have the option to choose among different repayment plans. For this reason, we did not include this requirement in the Perkins Loan regulations.

In addition to implementing the statutory changes made by the HEOA, we also propose to amend the Perkins Loan exit counseling requirements to include explaining the use of a Master Promissory Note (MPN). The MPN has been in use for the Perkins Loan program since August 2003, and the Department believes it is appropriate to require schools to explain the use of the MPN as part of Perkins Loan exit counseling, just as we do for FFEL and Direct Loan exit counseling.

Several questions and concerns relating to the exit counseling requirements in the proposed regulations were discussed at the negotiated rulemaking sessions.

Although explaining the use of the Master Promissory Note (MPN) during exit counseling has been a long-standing requirement in the FFEL Stafford and Direct Subsidized and Unsubsidized Loan programs, non-Federal negotiators questioned the value of explaining how the MPN works during exit counseling, at a time when the borrower has already received his or her student loans and is about to leave the school. The Department responded that an MPN may be used for up to ten years after a borrower initially signs it. Therefore, we believe that it would be helpful to remind the borrower—during exit counseling—that the borrower may continue to use the MPN to borrow Title IV loans if the borrower returns to school before the 10-year period expires.

Non-Federal negotiators asked the Department to clarify the meaning of the term ''delinquent debt collection procedures under Federal law.'' The Department responded that these procedures refer to debt collection procedures under the Fair Debt Collection Act. During this discussion, the Department also noted that the exit counseling session would be an appropriate time for schools to advise FFEL Stafford and Perkins Loan borrowers that defaulted FFEL Stafford and Perkins Loans may be assigned to the Department of Education. In cases where the Department accepts the loan assignment, borrowers who have defaulted on these loans are subject to Federal income tax offset.

Non-Federal negotiators also asked if providing borrowers with the information relating to forbearance, deferment, forgiveness, discharge and cancellation that appears on the borrower's MPN would be sufficient to meet the requirement of providing a description of the terms and conditions for obtaining these benefits under proposed §§ 674.42(b)(2)(ix)(A), 682.604(g)(2)(viii)(A), and 685.304(b)(4)(ix)(A). The Department responded that the information relating to these benefits available on the MPNs is necessarily limited. For this reason, we expect schools to provide more detailed and comprehensive information on these benefits during exit counseling.

Non-Federal negotiators asked about the information relating to Consolidation Loans that schools are required to provide, particularly with regard to changing repayment plans. Non-Federal negotiators pointed out that the Perkins Loan Program does not have different repayment plans, and that Perkins borrowers do not have this option. The Department clarified that the reference to changing repayment plans in proposed § 674.42(b)(2)(iii)(C) refers to the Consolidation Loan, not the Perkins Loan. If a borrower consolidates his or her Perkins Loan into a FFEL or Direct Consolidation Loan, the terms and conditions of the Perkins Loan are replaced by the terms and conditions of the Consolidation Loan. Borrowers with Consolidation Loans have the option to change repayment plans on the Consolidation Loan.

Special Definitions (§ 674.51)

*Statute:* The HEOA amended section 465(a) of the HEA by expanding the existing teacher, Head Start, and law enforcement cancellation categories to include:

• A teacher in a designated low-income elementary or secondary school who is employed by, or working in a school operated by, an educational service agency (see new section 465(a)(2)(A) of the HEA).

• Full-time special education teacher, including teachers of infants, toddlers, children, or youth with disabilities, in a public or other nonprofit elementary or secondary school system administered by an educational service agency (see new section 465(a)(2)(C) of the HEA).

• Full-time staff members in a pre-kindergarten or childcare program that is licensed or regulated by the State (see new section 465(a)(2)(B) of the HEA).

• Full-time attorneys employed in Federal Public Defender Organizations or Community Defender Organizations, established in accordance with section 3006A(g)(2) of title 18, U.S.C. (see new section 465(a)(2)(F) of the HEA).

Section 465(a) of the HEA also was amended to allow for cancellation benefits for the following additional categories of borrowers:

• Full-time fire fighters with a local, State, or Federal fire department or fire district (see new section 465(a)(2)(J) of the HEA).

• Full-time faculty members at a Tribal College or University, as defined in section 316 of the HEA (see new section 465(a)(2)(K) of the HEA).

• Librarians with a master's degree in library science who are employed in an elementary or secondary school that qualifies for funding under title I of the Elementary and Secondary Education Act of 1965, as amended, or in a public library that serves a geographic area that includes one or more Title I schools (see new section 465(a)(2)(L) of the HEA).

• Full-time speech-language pathologists with a master's degree who are working exclusively with Title I eligible schools (see new section 465(a)(2)(M) of the HEA).

*Current regulations:* Current § 674.51 contains the definitions of key terms in the Federal Perkins Loan program regulations.

*Proposed regulations:* With the statutory expansion of the categories of borrowers eligible for cancellation benefits under the Perkins program, it is necessary to make several amendments to § 674.51.

For purposes of determining cancellation benefits under § 674.53 (Teacher cancellation—Federal Perkins, NDSL and Defense loans), we propose to define the term *education service agency* as a regional multi-service agency authorized by State law to develop, manage, and provide services or programs to local educational agencies as defined in section 9101 of the Elementary and Secondary Education Act of 1965, as amended (see proposed § 674.51(g)).

For purposes of determining cancellation benefits under § 674.57 (Cancellation for law enforcement or corrections officer service—Federal Perkins, NDSL and Defense loans), the Secretary proposes to define the term *Community Defender Organizations* as defender organizations established in accordance with section 3006A(g)(2)(B) of title 18, United States Code (see proposed § 674.51(e)), and the term *Federal Public Defender Organization* as defender organizations established in accordance with section 3006A(g)(2)(A) of title 18, United States Code (see proposed § 674.51(j)).

For purposes of implementing the cancellation benefits for full-time faculty members at a Tribal College or University, full-time firefighters, librarians with a master's degree, and full-time speech pathologists with a master's degree under § 674.56 (employment cancellation—Federal Perkins, NDSL and Defense loans), the Secretary proposes to add the following definitions to § 674.51:

A *faculty member at a Tribal College or University* is an educator or tenured individual who is employed by a Tribal College or University, as that term is defined in section 316 of the HEA, to teach, research, or perform administrative functions. For purposes of this definition an educator may be an instructor, lecturer, lab faculty, assistant professor, associate professor, or full professor, dean, or academic department head (see proposed § 674.51(i)).

A *Tribal College or University* is an institution that qualifies for funding under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 et seq.), or the Navajo Community College Assistance Act of 1978 (25 U.S.C. 640a note), or is cited in section 532 of the Equity in Education Land Grant Status Act of 1994 (7 U.S.C. 301 note) (see proposed § 674.51(bb)).

A *firefighter* is an individual who is employed by a Federal, State, or local firefighting agency to extinguish destructive fires or provides firefighting related services such as (a) providing community disaster support and, as a first responder, emergency medical services; (b) conducting search and rescue; or (c) providing hazardous material mitigation (HAZMAT) (see proposed § 674.51(k)).

A *librarian with a master's degree* is an information professional trained in library or information science who has obtained a postgraduate academic degree awarded after the completion of an academic program in library science of up to six years in duration, excluding a doctorate or professional degree (see proposed § 674.51(o)).

A *speech language pathologist with a master's degree* is an individual who evaluates or treat disorders that affect a person's speech, language, cognition, voice, swallowing and the rehabilitative or corrective treatment of physical or cognitive deficits/disorders resulting in difficulty with communication, swallowing, or both and has obtained a postgraduate academic degree awarded after the completion of an academic program of up to six years in duration, excluding a doctorate or professional degree.

Finally, as noted earlier in this preamble, Team I, the negotiating committee responsible for regulations involving issues related to lender and general loan issues, negotiated proposed definitions for the terms *substantial gainful activity* and *total and permanent disability,* as those terms are used in the Perkins Loan Program regulations. In proposed § 674.51(x), the term *substantial gainful activity* is defined as a level of work performed for pay or profit that involves doing significant physical or mental activities, or a combination of both. Proposed § 674.51(aa) would define *total and permanent disability* as the condition of an individual who (a) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death, has lasted for a continuous period of not less than 60 months, or can be expected to last for a continuous period of not less than 60 months; or (b) has been determined by the Secretary of Veteran Affairs to be unemployable due to a service-connected disability. In addition to incorporating new definitions to implement the expanded cancellation benefits provided by the HEOA, we propose to update a few of the longstanding definitions in § 674.51 that are based on the Individuals with Disabilities Education Act (IDEA), which was reauthorized in 2004. Specifically, we propose to replace the current definition of the term *children and youth with disabilities* with the definition of the term *child with a disability* and the definition of the term *infants and toddlers with disabilities* with the definition of the term *infant or toddler with a disability.* These proposed definitions align with the definitions of these terms in the IDEA.

*Reasons:* We propose to revise § 674.51 to incorporate the definitions of key terms that are used in section 465(a) of the HEA, as amended by the HEOA. Definitions of the terms *Community Defender Organizations, education service agency, Federal Public Defender Organization*, and *Tribal College or University* would be based on the statutory language referencing their definitions in the HEA.

The Department developed definitions for the terms *faculty member at a Tribal College or University, firefighter, librarian with a master's degree,* and *speech language pathologist with a master's degree* by considering the generally accepted meaning of these terms as well as the discussion of these terms during the negotiated rulemaking sessions. During the sessions, there was much discussion about how broad these definitions should be. The general consensus was that the definitions should be written to incorporate as many eligible borrowers as possible for the expanded cancellation benefits. The proposed definitions reflect the consensus of Team II.

Expansion of Teacher, Head Start, and Law Enforcement Cancellation Categories (§§ 674.53, 674.57, 674.58)

*Statute:* Effective August 14, 2008, section 465 of the HEOA expanded the existing teacher, Head Start, and law enforcement cancellation provisions in section 465(a) of the HEA.

The cancellation for borrowers who teach in a designated low-income elementary or secondary school authorized by section 465(a)(2)(A) of the HEA has been expanded to include borrowers who are employed by an educational service agency as that term is defined section 481(f) of the HEA. The cancellation for full-time staff members in a Head Start preschool program authorized by section 465(a)(2)(B) of the HEA has been expanded to include borrowers who are full-time staff members in a pre-kindergarten or childcare program that is licensed or regulated by the State. The cancellation authorized by section 465(a)(2)(C) of the HEA for borrowers who are full-time special education teachers, including teachers of infants, toddlers, children, or youth with disabilities in a public or other nonprofit elementary or secondary school system, has been expanded to include borrowers who are special education teachers in a system administered by an educational service agency. Lastly, the cancellation for full-time local, State, or Federal law enforcement or corrections officers authorized by section 465(a)(2)(F) of the HEA has been expanded to include full-time attorneys employed in Federal Public Defender Organizations or Community Defender Organizations established in accordance with section

3006A(g)(2) of title 18 of the United States Code.

Effective August 14, 2008, an institution must cancel up to 100 percent of the outstanding balance of a borrower's NDSL, Defense, or Federal Perkins loan for eligible service performed in each of these expanded cancellation categories.

*Current Regulations:* Current § 674.53 of the Perkins Loan Program regulations requires an institution to cancel up to 100 percent of the outstanding balance on a Perkins Loan for borrowers who perform eligible service as a:

- Full-time teacher in a designated elementary or secondary school serving low-income families;
- Full-time special education teacher (including teaching children with disabilities in a public or other nonprofit elementary or secondary school);
- Full-time teacher of math, science, foreign languages, bilingual, or other fields designated as teacher shortage areas.

Current § 674.57 requires an institution to cancel up to 100 percent of the outstanding balance of a Perkins Loan for borrowers who perform eligible service as a full-time local, State, or Federal law enforcement or corrections officer and who are employed by an eligible employing agency. Lastly, current § 674.58 requires an institution to cancel up to 100 percent of the outstanding balance of a Perkins Loan for borrowers who perform eligible service as a full-time staff member in the educational component of a Head Start program.

*Proposed regulations:* The proposed changes to §§ 674.53, 674.57, 674.58 would extend the new cancellation categories to current Federal Perkins Loan borrowers with outstanding balances on loans already in repayment and all new borrowers who perform eligible service that includes August 14, 2008, or begins on or after that date, regardless of whether information on the expanded cancellation categories appears on the borrower's promissory note.

Under proposed § 674.53, a teacher who is employed by an educational service agency, or a full-time special education teacher, including teachers of infants, toddlers, children, or youth with disabilities, who is working in a system administered by an educational service agency, is eligible for cancellation benefits.

We propose to amend the cancellation provisions for law enforcement or correction officer regulations in § 674.57 to include borrowers who are employed full-time as an attorney in Federal Public Defender Organizations or Community Defender Organizations established in accordance with section 3006A(g)(2) of title 18, United States Code. The HEA provides for cancellation benefits for public defenders that work in these community defender organizations and Federal courts only. State public defenders (unless they are employed by one of the specified organizations) are not eligible for cancellation benefits under this provision.

Consistent with section 465(a)(2)(B) of the HEA, the Secretary proposes to amend current § 674.58 of the Head Start cancellation provisions by expanding cancellation benefits to include borrowers who are performing qualifying service as full-time staff members in a pre-kindergarten or childcare program that is licensed or regulated by the State. We propose to change the heading of § 674.51 to *Cancellation for service in an early childhood education program* to reflect the fact that the expansion of cancellation benefits available to borrowers under this provision are no longer limited to service in early childhood education programs authorized by the Head Start Act. We also propose to add ''pre-kindergarten or child care program'' to the definition of ''full-time staff member'' in § 674.58.

We propose to add definitions of the terms *pre-kindergarten program* and *child care program* to § 674.58(c). A *pre-kindergarten program* would be defined as a State-funded program that serves children from birth through age six and addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development (see proposed § 674.58(c)(2)). A *child care program* would be defined as a program that is licensed and regulated by the State and provides child care services for fewer than 24 hours per day per child, unless care in excess of 24 consecutive hours is needed due to the nature of the parents' work (see proposed § 674.58(c)(3)).

*Reasons:* We are proposing to make changes to §§ 674.53, 674.57, and 674.58 to ensure that the Department's regulations reflect the expansion of benefits that are now available for borrowers in the Federal Perkins Loan program as a result of the enactment of the HEOA.

It is important to note that in order to be consistent with Team I's development of the proposed regulations for the teacher loan forgiveness program contained in the Federal Family Education Loan (FFEL) and William D. Federal Direct Loan (Direct Loan) programs, the Department proposed regulatory language to allow borrowers in the Perkins Loans program to receive credit for a full year of cancellation, as long as the eligible service crossed over the enactment date of August 14, 2008. The non-Federal negotiators agreed with this proposal as it will ensure equitable treatment of borrowers in all three loan programs.

Addition of New Public Service Cancellation Categories (§ 674.56)

*Statute:* Section 465 of the HEOA amended section 465(a)(2) of the HEA by adding the following new public service cancellation categories for borrowers in the Federal Perkins Loan program who are performing qualifying service:

- Full-time faculty members at a Tribal College or University, as that term is defined in section 316 of the HEA.
- Full-time fire fighters who serve a local, State, or Federal fire department or fire district.
- Librarians with a master's degree in library science who are employed in an elementary or secondary school that qualifies for Title I funding, or in a public library that serves a geographic area that includes one or more Title I-eligible schools.
- Full-time speech-language pathologists with a master's degree who are working exclusively with Title I-eligible schools.

*Current Regulations:* None.

*Proposed regulations:* The Secretary proposes to amend § 674.56 to incorporate the new public service employment cancellations for borrowers in the Federal Perkins Loan program who are performing qualifying service as full-time faculty members at a Tribal College or University, full-time fire fighters who serve a local, State, or Federal fire department or fire district, librarians with a master's degree in library science, and full-time speech-language pathologists with a master's degree.

Under proposed § 674.56, current borrowers with outstanding balances on loans already in repayment and all new borrowers who perform eligible service that includes August 14, 2008, or begins on or after that date, in these new cancellation categories, would qualify for cancellation, regardless of whether the cancellation category appears on the borrower's promissory note.

*Reasons:* The Secretary proposes to amend § 674.56 (Employment cancellation—Federal Perkins, NDSL and Defense loans) to incorporate the new public service employment

cancellations reflected in amended section 465(a) of the HEA.

Military Service Cancellation (§ 674.59)

*Statute:* Section 465 of the HEOA amended section 465(a)(3)(A) of the HEA to eliminate the provision that limited cancellation for eligible military service to 50 percent of a borrower's outstanding balance on his or her Perkins Loan.

*Current regulations:* Current § 674.59 provides that Federal Perkins Loan borrowers who are serving in areas of hostility are eligible for cancellation of up to 50 percent of their outstanding balance, in increments of 12 percent a year for each full year of active duty service, if the borrower is serving in an area of imminent danger that qualifies for special pay under section 310 of title 37 of the United States Code.

*Proposed regulations:* Proposed § 674.59 would amend the cancellation rate for each year of qualifying service for the military service cancellation. Specifically, borrowers who are serving in areas of hostility are now eligible to receive a cancellation of up to 100 percent of the loan for each full year of active duty service that includes August 14, 2008, or begins on or after that date in the following increments: 15 percent for the first and second years of service; 20 percent for the third and fourth years of service; and, 30 percent for the fifth year of service.

*Reasons:* The changes in the military service cancellation provisions implement the new statutory changes in the Federal Perkins Loan program as a result of the HEOA.

*Executive Order 12866*

1. Regulatory Impact Analysis

Under Executive Order 12866, the Secretary must determine whether the regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the OMB. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an ''economically significant'' rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement 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.

Pursuant to the terms of the Executive order, it has been determined this proposed regulatory action will not have an annual effect on the economy of more than $100 million. Therefore, this action is not ''economically significant'' and subject to OMB review under section 3(f)(1) of Executive Order 12866. Notwithstanding this determination, the Secretary has assessed the potential costs and benefits of this regulatory action and has determined that the benefits justify the costs.

Need for Federal Regulatory Action

These proposed regulations are needed to implement provisions of the HEA, as amended by the HEOA, particularly related to the new part E to the HEA, *Lender and Institution Requirements Relating to Education Loans,* which establishes extensive new disclosure requirements for lenders and institutions participating in Federal and private student loan programs. These regulations also implement significant changes made by the HEOA to provisions related to institutional cohort default rates and Perkins Loan cancellations.

In general, these regulations simply restate specific HEOA requirements, in many cases using language drawn directly from the statute. In the following areas, the Secretary has exercised limited discretion in implementing the HEOA provisions through proposed regulations:

*Preferred lender arrangement:* In defining a preferred lender arrangement, the Secretary determined that such an arrangement does not exist for private education loans that a covered institution makes to its own students, as long as the private education loan is funded by the covered institution's own funds; is funded by donor-directed contributions; is made under title VII or title VIII of the Public Service Health Act; or is made under an institutional repayment plan of the covered institution.

*Disclosures from schools with preferred lender lists:* In response to concerns from a number of non-Federal negotiators, the Secretary considered whether to require institutions to ''provide'' students and parents with the required materials or, as suggested by the non-Federal negotiators, ''make available'' the required materials. As discussed elsewhere in this preamble, the Secretary determined that a requirement to provide the materials was more appropriate.

*Private loan self-certification forms:* The Secretary determined that private education loan borrowers should be required to fill out self-certification forms even if the lender is their institution.

*Definition of ''gift'':* In defining the term *gift* for the purposes of institutional codes of conduct, section 487(e)(2)(B)(ii) of the HEA excluded favorable terms, conditions, and borrower benefits on a loan provided to students employed at a covered institution, if the terms, conditions, or benefits are comparable to those provided to all students at the institution. As discussed more fully in the code of conduct discussion in this preamble, the Secretary determined that ''all students'' refers to all students employed at the covered institution, rather than to the general student population at that institution.

*Self-certification forms:* The Secretary determined that self-certification forms and information must only be provided to an applicant for a private education loan who is ''enrolled or admitted'' to an institution rather than to any student who requests the information. The Secretary also included a provision to the proposed regulations to require an institution to discuss the availability of Federal, State, and institutional aid with an applicant for a private loan at the request of the applicant.

*Cohort Default Rate:* As discussed further in the discussion surrounding cohort default rates in this preamble, the Secretary determined that the default rate of an institution that establishes an additional location at the site of a closed institution for which it conducted a teach-out would not be affected in any way by the closed institution's cohort default rate.

*Perkins loan cancellations:* Following discussions with the non-Federal negotiators, the Secretary proposed to define a number of key terms used for purposes of determining cancellation benefits in the Perkins Loan Program (see proposed § 674.51). It was determined that additional clarity was needed for some of the terms used in the HEA in order for the Department to implement the Perkins Loan cancellation provisions of the HEA. Some of the key terms proposed to be defined in these regulations include firefighter, faculty member at a Tribal College or University, librarian with a master's degree, and speech language pathologist with a master's degree. The other definitions provided in proposed § 674.51 incorporate the language from the HEA.

The following section addresses the alternatives that the Secretary considered in implementing these discretionary portions of the HEOA provisions. These alternatives are also discussed in more detail in the *Reasons* sections of this preamble related to the specific regulatory provisions.

Regulatory Alternatives Considered

*Preferred lender arrangement:* Several non-Federal negotiators argued that preferred lender arrangements can exist only in cases where a written or verbal agreement exists between a lender and a covered institution or institution-affiliated organization. One non-Federal negotiator submitted an alternative definition for *preferred lender arrangement* that would have built this requirement into the definition, except in cases where conduct by the parties indicates an intention to create a preferred lender arrangement. The Department declined to adopt this alternative definition, arguing that the statutory definition of *preferred lender arrangement* does not address how the arrangement comes about, nor does the definition specify that a written or verbal agreement must exist.

Several non-Federal negotiators proposed to exempt loans made directly by a covered institution to its own students from falling under the term *preferred lender arrangement,* arguing that under those circumstances covered institutions would find it impossible or impractical to comply with a number of the regulatory requirements that flow from having a preferred lender arrangement. For example, non-Federal negotiators noted that a school, in its capacity as a lender, could be prohibited from paying its own employees, in its capacity as a covered institution, under the code of conduct requirement that prohibits a lender from providing gifts to employees of a covered institution's financial aid office.

After considering proposals from non-Federal negotiators, the Department determined that a preferred lender arrangement requires the participation of at least two separate parties. Accordingly, the Department agreed to clarify in the regulatory definition for *preferred lender arrangement* that a preferred lender arrangement does not exist for a private education loan made by a covered institution to the covered institution's own students provided that the loan is paid for by the institution's own funds, funded by donor-directed contributions, made under title VII or title VIII of the Public Service Health Act, or made under an institutional payment plan of the covered institution.

*Disclosures from schools with preferred lender lists:* Non-Federal negotiators raised concerns about the proposed requirement, reflected in proposed § 601.10 that covered institutions ''provide'' certain information to students before those students select a lender or apply for an education loan. These negotiators asked that the requirement be changed from ''provide'' to ''make available.'' The Department declined to make this change, arguing that the term ''make available'' is more passive than the term ''provide,'' and as such is inconsistent with the intent of the requirement. While schools are expected to be proactive in providing information to potential borrowers, the Department did acknowledge that schools cannot ensure every student receives the required information, and that schools making reasonable efforts to give this information to its students at the appropriate time in the award year would be considered to have complied with the requirement.

*Private loan self-certification forms:* Non-Federal negotiators questioned the value of requiring schools to provide applicants with a private education loan self-certification form in cases where the applicant is applying for a private education loan made by the covered institution. These negotiators argued that there was no reason for the covered institution to provide the form to itself. The Department determined that, because the self-certification form is intended to disclose information to the borrower, not to the lender, borrowers should still receive and complete the form before obtaining an institutional loan.

*Definition of ''gift'':* Non-Federal negotiators raised concerns about proposed language excluding from the definition of the term *gift,* favorable terms, conditions, and borrower benefits on a loan provided to students employed at a covered institution, if the terms, conditions, or benefits are comparable to those provided to all students at the institution. These negotiators asked whether ''all students'' at the institution meant the general student population or only other students employed at the institution. After considering the intent of the statutory requirement underlying the proposed regulation and recognizing that lenders may offer preferable terms and conditions to student employees at the school as a matter of course, the Department determined that it is acceptable to use benefits offered to all student employees as a benchmark, rather than the benefits the students in the general population receive.

*Self-certification forms:* A number of negotiators raised concerns about the potential for fraudulent use of the self-certification form. In response, it was suggested that the required self-certification form and information only must be provided to an applicant who is ''enrolled or admitted'' to the institution rather than to any student who requests the information. The Department agreed to adopt this approach, which non-Federal negotiators agreed would minimize the chances a student who is not enrolled or admitted to the institution would use the form and information to obtain a private education loan for which the student is not eligible.

Several non-Federal negotiators requested that an applicant for a private education loan receive as much information as possible regarding available aid options. Accordingly, the Department agreed to add a provision to proposed § 668.14(29)(ii) that would require an institution to discuss the availability of Federal, State, and institutional aid with the applicant, at the request of the applicant. The Department and the non-Federal negotiators agreed that this would result in financial aid administrators counseling the applicant and providing students with an opportunity to ask questions about aid options or how to apply for aid.

*Cohort Default Rate:* The Department and non-Federal negotiators considered the best way to support the clear statutory intent of the HEA to encourage institutions to conduct teach-outs of closed institutions. Discussions indicated that a requirement to include a closed school's cohort default rate in its own rate could dissuade an institution from conducting the teach-out. Accordingly, the Department determined that the cohort default rate of an institution that establishes an additional location at the site of a closed institution for which it conducted a teach-out would not be affected in any way by the closed institution's cohort default rate.

*Perkins loan cancellations:* The Department proposed to define a number of terms, such as *faculty member at a Tribal College or University, firefighter, librarian with a master's degree,* and *speech language pathologist with a master's degree* in proposed § 674.51. The Department included definitions for these terms after considering the generally accepted meaning of the terms as well as the discussion of these terms during the negotiated rulemaking sessions. In addition, to be consistent with proposed regulations developed for the teacher

loan forgiveness program contained in the FFEL and Direct Loan programs, the Secretary determined that borrowers in the Perkins Loans program should receive credit for a full year of cancellation, as long as the eligible service crossed over the enactment date of August 14, 2008.

Benefits

Benefits provided in these regulations include greater transparency for borrowers participating in the Federal and private student loan programs, clearer guidelines on acceptable behavior by and relationships among institutions participating in the student loan programs, and expanded eligibility for Perkins Loan cancellation benefits. It is difficult to quantify benefits related to the new institutional and lender requirements, as there is little specific data available on either the extent of improper or questionable relationships between institutions and lenders prior to the HEOA or of the harm such relationships actually caused for borrowers, institutions, or the Federal taxpayer. The Department is interested in receiving comments or data that would support a more rigorous analysis of the impact of these provisions.

The Department estimates that expanded eligibility for Perkins Loan cancellations would benefit approximately 33,000 borrowers annually. This estimate is based on an analysis of data from a number of sources, including primarily Baccalaureate and Beyond 1993/2003, to project the number of Perkins Loan borrowers in each profession among those included in the newly expanded cancellation categories. Specific estimates by category are shown in the following table.

PERKINS LOAN BORROWERS ELIGIBLE FOR EXPANDED CANCELLATIONS ANNUAL BY OCCUPATION

| Occupation | Estimated number of borrowers |
|---|---|
| ESA Teachers | 20,000 |
| Childcare workers | 5,296 |
| Firefighters | 3,240 |
| Speech pathologists | 2,968 |
| Law enforcement | 770 |
| Librarians | 640 |
| Tribal college faculty | 24 |
| Total | 32,938 |

These benefits all flow directly from statutory changes included in the HEOA; they are not materially affected by discretionary choices exercised by the Department in developing these proposed regulations. As discussed in greater detail under *Net Budget Impacts,* these proposed provisions result in net costs to the government of $71.953 million over 2009–2013.

Costs

Many of the statutory provisions implemented through this NPRM will require regulated entities to develop new disclosures and other materials, as well as accompanying dissemination processes. In total, these changes are estimated to increase burden on entities or individuals participating in the student loan programs by 4,636,495 hours. Of this increased burden, 292 hours are associated with lenders and 1,195,769 hours with institutions. An additional 3,440,434 hours—or 74.2 percent of the total burden associated with the proposed regulations—are associated with borrowers. The monetized cost of this additional burden, using loaded wage data developed by the Bureau of Labor Statistics, is $78.5 million. In estimating the cost of these provisions, the Department used wage information from the Bureau of Labor Statistics. For lenders, institutions, and guaranty agencies, the May 2009 total private non-agricultural average hourly earnings of $18.54 was used as the hourly rate to monetize the burden of these provisions. For borrowers, the first quarter 2009 median weekly earnings for full-time wage and salary workers were used. This was weighted to reflect the age profile of the student loan portfolio, with half at the $472 per week of the 20 to 24 age bracket and half at the $674 per week of the 25 to 34 year old bracket. This resulted in a $16.37 hourly wage rate to use in monetizing the burden on borrowers.

While there is additional burden associated with a range of proposed provisions in this NPRM, as noted earlier in this preamble nearly three-quarters of this burden is associated with individual borrowers. For most provisions, this estimated burden assumes nearly 3 million borrowers will devote very small amounts of time—often as little as five minutes—to review additional disclosures added to existing documents or processes such as entrance and exit counseling. In the case of private loan borrowers, the Department estimates roughly 3.3 million borrowers will devote fifteen minutes to reviewing new Truth in Lending Act disclosures required under the proposed regulations.

For provisions affecting entities other than borrowers, 92.6 percent of the burden hours associated with this package—or 1,107,115 hours—result from new requirements for institutions involving the distribution of private education loans. The following discussion provides additional detail on the impact of this provision.

The proposed regulations require a covered institution, or an institution-affiliated organization of a covered institution, to provide loan disclosures to a prospective borrower private education. These disclosures must provide the prospective borrower with the information required under section 128(e)(1) of the TILA; and must inform the prospective borrower that he or she may qualify for loans or other assistance under Title IV of the HEA; and that the terms and conditions of Title IV, HEA program loans may be more favorable than the provisions of private education loans. The information regarding private education loans must be presented in such a manner as to be distinct from information regarding Title IV, HEA program loans.

The proposed regulations require that, upon an enrolled or admitted student applicant's request for a private education loan self-certification form, an institution must provide to the applicant, in written or electronic form, the self-certification form for private education loans developed by the Secretary to satisfy the requirements of Section 128(e)(3) of the TILA. The institution must also provide the information required to complete the form, if the institution possesses that information.

In assessing burden associated with these new requirements, the Department estimated 6,264 covered institutions (and their institutionally-affiliated organizations) must comply with these proposed disclosure regulations to be. Of these, we estimate 1,757 covered institutions and their institutionally-affiliated organizations will be providing private education loans and therefore adopting TILA compliant disclosures for all private education loans they offer. The burden for the implementation of the TILA compliant disclosures is estimated to be 4 hours per institution. We estimate 3,333,600 borrowers of private education loans and that the average amount of burden to provide the TILA disclosures to be .25 hour per loan, for a total burden of 7,028 hours.

The Department will issue a self-certification form for adoption by all covered institutions. We estimate that on average, there will be 3 hours of additional burden per institution for the adoption and implementation of the Department's self-certification. Additionally, we estimate that 3,333,600 borrowers will receive this new self-

certification form in their pursuit of a private education loan. We estimate the burden to the institution to provide each self-certification form to be .33 hours per form, for a total burden of 1,100,008 hours.

The other provisions that increase burden and associated costs are relatively minor, especially when looked at for an individual entity rather than in total. To a large extent, the cost of many of these requirements can be avoided if institutions choose not to maintain a preferred lender arrangement. Given that there is little data indicating that the absence of such an agreement imposes a significant cost on institutions or their students—particularly given the alternative of simply listing all lenders who have provided loans to an institution, the Department expects few institutions to enter into these arrangements. Other proposed regulations generally would require discrete changes in specific parameters associated with existing requirements—such as changes to entrance and exit counseling, cohort default rates, and Perkins Loan cancellations—rather than wholly new requirements. Accordingly, entities wishing to continue to participate in the student aid programs have already absorbed most of the administrative costs related to implementing these proposed regulations. Marginal costs over this baseline are primarily related to one-time system changes that, while possibly significant in some cases, are an unavoidable cost of continued program participation. In assessing the potential impact of these proposed regulations, the Department recognizes that certain provisions are likely to increase workload for some program participants. In general, the Department estimates that it would take institutions 3 hours to implement each of these minor provisions. (This additional workload is discussed in more detail under the *Paperwork Reduction Act of 1995* section of this preamble.) Additional workload would normally be expected to result in estimated costs associated with either the hiring of additional employees or opportunity costs related to the reassignment of existing staff from other activities. Given the limited data available, the Department is interested in comments and supporting information related to possible burden stemming from the proposed regulations. In particular, we ask institutions to provide detailed data on actual staffing and system costs associated with implementing these proposed regulations; data on the implementation of proposed regulations regarding private education loans would be especially helpful. Estimates included in this notice will be reevaluated based on any information received during the public comment period.

Net Budget Impacts

HEOA provisions implemented by these proposed regulations are estimated to have a net budget impact of $12.408 million in 2009 and $71.953 million over FY 2009–2013. Consistent with the requirements of the Credit Reform Act of 1990, budget cost estimates for the student loan programs reflect the estimated net present value of all future non-administrative Federal costs associated with a cohort of loans. (A cohort reflects all loans originated in a given fiscal year.)

These estimates were developed using the Office of Management and Budget's Credit Subsidy Calculator. (This calculator will also be used for re-estimates of prior-year costs, which will be performed each year beginning in FY 2009). The OMB calculator takes projected future cash flows from the Department's student loan cost estimation model and produces discounted subsidy rates reflecting the net present value of all future Federal costs associated with awards made in a given fiscal year. Values are calculated using a ''basket of zeros'' methodology under which each cash flow is discounted using the interest rate of a zero-coupon Treasury bond with the same maturity as that cash flow. To ensure comparability across programs, this methodology is incorporated into the calculator and used government-wide to develop estimates of the Federal cost of credit programs. Accordingly, the Department believes it is the appropriate methodology to use in developing estimates for these proposed regulations. That said, however, in developing the following Accounting Statement, the Department consulted with OMB on how to integrate our discounting methodology with the discounting methodology traditionally used in developing regulatory impact analyses.

Absent evidence on the impact of these proposed regulations on student behavior, budget cost estimates were based on behavior as reflected in various Department data sets and longitudinal surveys listed under *Assumptions, Limitations, and Data Sources.* Program cost estimates were generated by running projected cash flows related to each provision through the Department's student loan cost estimation model. Student loan cost estimates are developed across five risk categories: Proprietary schools, two-year schools, freshmen/sophomores at four-year schools, juniors/seniors at four-year schools, and graduate students. Risk categories have separate assumptions based on the historical pattern of behavior—for example, the likelihood of default or the likelihood to use statutory deferment or discharge benefits—of borrowers in each category.

The Department estimates no budgetary impact for most of the proposed regulations included in this NPRM. There is no data indicating that the extensive new requirements for disclosures and codes of conduct for student loan program participants will have any impact on the volume or composition of Federal student loans. Similarly, changes to the cohort default rate calculation are not estimated to affect Federal costs, as students are typically assumed to resume their education at another school in the event the school they are attending loses eligibility to participate in the student loan program. In addition, changes to the calculation formula are not estimated to have a significant effect on the number of schools that lose eligibility, as the impact of adding a third year to the calculation is expected to be offset by the higher threshold.

The Department's analysis indicates that approximately 3 percent of schools will be affected by the change to a 3-year cohort default rate calculation. In an analysis of 4,241 schools, 83 with 2-year cohort default rates below 25 were estimated to have 3-year cohort default rates above 30. A total of 133 schools with a 2-year CDR under 25 are estimated to have a 3-year CDR between 25 and 30, demonstrating that the effect of changing to the calculation period is offset by the increased threshold. The small number of schools involved and the ability of students to pursue their education at other institutions means that this change is not expected to affect aggregate loan volumes or Federal costs.

*Perkins Loan Cancellations.* The Department estimates the Perkins Loan cancellation provisions in these proposed regulations would increase the Federal costs by $71.953 million over FY 2009–2013. This estimate reflects the cost of additional cancellation benefits for the newly eligible borrowers discussed elsewhere in this analysis, under *Benefits.*

Assumptions, Limitations, and Data Sources

Because these proposed regulations would largely restate statutory requirements that would be self-implementing in the absence of regulatory action, impact estimates

provided in the preceding section reflect a pre-statutory baseline in which the HEOA changes implemented in these proposed regulations do not exist. Costs have been quantified for five years. In general, these estimates should be considered preliminary; they will be reevaluated in light of any comments or information received by the Department prior to the publication of the final regulations. The final regulations will incorporate this information in a revised analysis.

In developing these estimates, a wide range of data sources were used, including data from the National Student Loan Data System; operational and financial data from Department of Education systems, including especially the Fiscal Operations Report and Application to Participate (FISAP); and data from a range of surveys conducted by the National Center for Education Statistics such as the 2004 National Postsecondary Student Aid Survey, the 1994 National Education Longitudinal Study, and the 1996 Beginning Postsecondary Student Survey. Data from other sources, such as the U.S. Census Bureau, were also used. Data on administrative burden at participating schools, lenders, guaranty agencies, and third-party servicers are extremely limited; accordingly, as noted earlier in this discussion, the Department is particularly interested in receiving comments in this area.

Elsewhere in this **SUPPLEMENTARY INFORMATION** section we identify and explain burdens specifically associated with information collection requirements. See the heading *Paperwork Reduction Act of 1995.*

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.Whitehouse.gov/omb/Circulars/a004/a-4.pdf*), in Table 2, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of these proposed regulations. This table provides our best estimate of the changes in Federal student aid payments as a result of these proposed regulations. Expenditures are classified as transfers from the Federal government to student loan borrowers (for expanded Perkins loan cancellations).

TABLE 2—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES

[In millions]

| Category | Transfers |
|---|---|
| Annualized Monetized Transfers | $90.731. |
| From Whom to Whom? | Federal Government to Student Loan Borrowers. |

2. Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum on ''Plain Language in Government Writing'' require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, *etc.*) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter) sections? (A ''section'' is preceded by the symbol ''§'' and a numbered heading; for example, § 601.30.)
- Could the description of the proposed regulations in the **SUPPLEMENTARY INFORMATION** section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?
- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make these proposed regulations easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities. These proposed regulations would affect institutions of higher education, lenders, and guaranty agencies that participate in Title IV, HEA programs and individual students and loan borrowers. The U.S. Small Business Administration Size Standards define institutions and lenders as ''small entities'' if they are for-profit or nonprofit institutions with total annual revenue below $5,000,000 or if they are institutions controlled by small governmental jurisdictions, which are comprised of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.

Based on data from the Integrated Postsecondary Education Data System (IPEDS), roughly 1,200 institutions participating in the FFEL program meet the definition of ''small entities.'' More than half of these institutions are short-term, for-profit schools focusing on vocational training. Other affected small institutions include small community colleges and tribally controlled schools. Burden on institutions associated with these proposed regulations is largely associated with the requirements to provide students with new disclosures related to preferred lender lists, private loan TILA requirements, and other new borrower rights and responsibilities. In many cases, these requirements only require one-time changes to existing entrance and exit counseling materials and should not represent significant new burden. (The Department estimates these changes generally require three hours or less to implement.) For other requirements, such as those affecting schools choosing to maintain a preferred lender list, the Department is providing model disclosure forms the adoption of which should minimize institutional burden. In addition, FFEL schools meeting the definition of small entities generally have difficulty accessing multiple lenders—during the negotiated rule-making process, representatives of these schools noted that a requirement to include even three lenders on a preferred lender list would represent a major problem for them. The proposed regulation, however, allows these schools to avoid the burdens associated with maintaining such a list by simply providing students with all lenders who have provided loans at the schools in the past. This would effectively accomplish the same thing as the schools' previous preferred lender list without adding significant new burden. To assess overall burden imposed on schools meeting the definition of small entities, the Department developed a

methodology using IPEDS data and the percentage of borrowers attending these institutions. Using this methodology, the Department estimates the proposed regulations will increase total burden hours for these schools by 37,723, or roughly 32 hours per institution. (Monetized using salary data from the Bureau of Labor Statistics, this burden is $699,384 and $593, respectively.) Based on these estimates, the Department believes the proposed new requirements do not impose significant new costs on these institutions.

The Department believes few if any lenders participating in the FFEL program have revenues of less than $5 million. FFEL program activity is highly concentrated among the largest lenders; should an extremely small number of lenders that meet the threshold participate in the program, they likely are making loans as a service to current clients rather than soliciting new business. This type of lender, with a tangential relationship to Federal and private student loans, is highly unlikely to incur significant new compliance costs as a result of the proposed regulation. Accordingly, the Department has determined that the proposed regulations do not represent a significant burden on small lenders.

Guaranty agencies are State and private nonprofit entities that act as agents of the Federal government, and as such are not considered ''small entities'' under the Regulatory Flexibility Act. The impact of the proposed regulations on individuals is not subject to the Regulatory Flexibility Act.

The Secretary invites comments from small institutions and lenders as to whether they believe the proposed changes would have a significant economic impact on them and, if so, requests evidence to support that belief. In particular, we are interested in detailed information on actual staff and systems costs related to implementing new disclosure requirements, particularly related to private loans.

Paperwork Reduction Act of 1995

Proposed §§ 601.10, 601.11, 601.20, 601.21, 601.30, 601.40, 668.16, 668.181, 668.186, 668.190, 668.191, 668.200, 668.202, 668.209, 668.210, 668.211, 668.212, 668.213, 668.214, 668.217, 674.42, 674.53, 674.57, 674.58, 674.56, 674.59, 682.604, and 685.304 contain information collection requirements. Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department of Education has submitted a copy of these sections to the Office of Management and Budget (OMB) for its review.

Section 601.10—Preferred Lender Arrangement Disclosures

Proposed § 601.10(a) would require that a covered institution, or an institution-affiliated organization of a covered institution, that participates in a preferred lender arrangement disclose the maximum amount of Federal grant and loan aid under Title IV of the HEA available to students; the information identified on the model disclosure form developed by the Secretary for each type of education loan that is offered pursuant to a preferred lender arrangement; and a statement that the institution is required to process the documents required to obtain a loan under the FFEL Program from any eligible lender the student selects.

Proposed § 601.10(a)(2) would require a covered institution, or an institution-affiliated organization of a covered institution to provide the disclosures required under section 128(e)(11) of the TILA for each type of private education loan offered pursuant to a preferred lender arrangement.

Proposed § 601.10(c) would require a covered institution and institution-affiliated organization that participates in a preferred lender arrangement to provide the disclosure of the maximum amount of Federal grant and loan aid available to students, the information identified on a model disclosure form developed by the Department, as well as a statement indicating to students and parents that the institution is required to process the documents required to obtain a FFEL loan from any eligible lender the student selects. This information would need to be provided to students attending the covered institution, or the families of such students, as applicable. The information would need to be provided annually and in a manner that allows for the students or their families to take the information into account before selecting a lender or applying for an education loan.

Proposed § 601.10(d) would require that if a covered institution compiles, maintains, and makes available a preferred lender list, the institution must clearly and fully disclose on the preferred lender list why the institution participates in a preferred lender arrangement with each lender on the preferred lender list, particularly with respect to terms and conditions or provisions favorable to the borrower; and that the students attending the institution, or the families of such students, do not have to borrow from a lender on the preferred lender list.

Proposed § 601.10(d)(2) would require the covered institution to ensure, through the use of the list of lender affiliates provided by the Secretary, that there are not less than three FFEL lenders that are not affiliates of each other included on the preferred lender list and, if the institution recommends, promotes, or endorses private education loans, that there are not less than two lenders of private education loans that are not affiliates of each other included on the preferred lender list.

Proposed § 601.10(d)(1)(ii) would require that the preferred lender list must specifically indicate, for each listed lender, whether the lender is or is not an affiliate of another lender on the preferred lender list; and if a lender is an affiliate of another lender on the preferred lender list, must describe the details of such affiliation.

Proposed § 601.10(d)(3) would require that the preferred lender list prominently disclose the method and criteria used by the institution in selecting lenders with which to participate in preferred lender arrangements to ensure that such lenders are selected on the basis of the best interests of the borrowers. These criteria would include payment of origination or other fees on behalf of the borrower; highly competitive interest rates, or other terms and conditions or provisions of Title IV, HEA program loans or private education loans; high-quality servicing; or additional benefits beyond the standard terms and conditions or provisions for such loans.

Proposed § 601.10(d)(4)(ii) would require that the covered institution exercise a duty of care and a duty of loyalty to compile the preferred lender list without prejudice and for the sole benefit of the students attending the institution, or the families of such students.

Proposed § 601.10(d)(5) would require a covered institution to not deny or otherwise impede the borrower's choice of a lender or cause unnecessary delay in certification of a Title IV loan for those borrowers who choose a lender that is not included on the preferred lender list.

These proposed regulations would represent an increase in burden. The affected entities under the proposed regulations are borrowers, and institutions and their institutionally-affiliated organizations. We estimate that the burden for borrowers would increase by 323,103 hours and the burden for institutions and institutionally-affiliated organizations would increase by 12,078 hours, respectively, and we will include the total burden of 335,181 hours in OMB Control Number 1845–XXXA.

Section 601.11—Private Education Loan Disclosures and Self-Certification Form

Proposed § 601.11(a) would require a covered institution, or an institution-affiliated organization of a covered institution, to provide to a prospective borrower private education loan disclosures. The private education loan disclosures required would need to provide the prospective borrower with the information required under section 128(e)(1) of the TILA; and would need to inform the prospective borrower that he or she may qualify for loans or other assistance under Title IV of the HEA; and that the terms and conditions of Title IV, HEA program loans may be more favorable than the provisions of private education loans.

Proposed § 601.11(c) would require the covered institution or institution-affiliated organization to ensure that information regarding private education loans is presented in such a manner as to be distinct from information regarding Title IV, HEA program loans.

Proposed § 601.11(d) would require that, upon an enrolled or admitted student applicant's request for a private education loan self-certification form, an institution must provide to the applicant, in written or electronic form, the self-certification form for private education loans developed by the Secretary to satisfy the requirements of section 128(e)(3) of the TILA. The institution also would need to provide the information required to complete the form, if the institution possesses that information.

These proposed regulations would represent an increase in burden. The affected entities under the proposed regulations are borrowers, and institutions and institutionally-affiliated organizations. We estimate that burden to borrowers would increase by 833,400 hours and the burden to institutions and institutionally-affiliated organizations, respectively would increase by 1,107,115 hours and we will include the total burden of 1,940,515 hours in OMB Control Number 1845–XXXA.

Section 601.20—Annual Report Due From Covered Institutions and Institution-Affiliated Organizations

Proposed § 601.20(a) would require a covered institution, and an institution-affiliated organization, that participates in a preferred lender arrangement to prepare and submit to the Secretary an annual report, by a date determined by the Secretary. The annual report would include, for each lender that participates in a preferred lender arrangement with the covered institution or organization, the information about preferred lenders arrangements that must also be described for students and parents; and a detailed explanation of why the covered institution or institution-affiliated organization participates in a preferred lender arrangement with the lender. The explanation would need to include an explanation of why the terms, conditions, and provisions of each type of education loan provided pursuant to the preferred lender arrangement are beneficial for students attending the institution, or the families of such students, as applicable.

Proposed § 601.20(b) would require a covered institution or institution affiliated organization to ensure that the annual report is made available to the public and provided to students attending or planning to attend the covered institution and the families of such students.

These proposed regulations would represent an increase in burden. The affected entities under the proposed regulations are institutions and institutionally-affiliated organizations. We estimate that burden for institutions and institutionally-affiliated organizations would increase by 336 hours in OMB Control Number 1845–XXXA.

Section 601.21—Code of Conduct

Proposed § 601.21 would require a covered institution that participates in a preferred lender arrangement to develop a code of conduct with respect to FFEL Program loans and private education loans with which the institution's agents must comply to prohibit a conflict of interest with the responsibilities of an agent of an institution with respect to FFEL Program loans and private education loans.

Proposed § 601.21(a)(2)(ii) and (iii) would require the institution to publish the code of conduct prominently on the institution's Web site; and administer and enforce the code by, at a minimum, requiring that all of the institution's agents with responsibilities with respect to FFEL Program loans or private education loans be annually informed of the provisions of the code of conduct.

Proposed § 601.21(b)(1) and (b)(2) would require any institution-affiliated organization of a covered institution that participates in a preferred lender arrangement to comply with the code of conduct developed and published by the covered institution and, if the institution-affiliated organization has a Web site, publish the code of conduct prominently on the Web site.

Under proposed § 601.21(b)(3), the institution-affiliated organization would be required to administer and enforce the code of conduct by, at a minimum, requiring that all of the institution-affiliated organization's agents with responsibilities with respect to FFEL Program loans or private education loans be annually informed of the provisions of the code of conduct.

The code of conduct would apply to agents of an institution who are employees of the financial aid office of the institution or who have responsibilities with respect to FFEL Program loans or private education loans.

Proposed § 601.21(c) would prescribe the minimum requirements of a covered institution's code of conduct. An institution's code of conduct must prohibit: Revenue-sharing arrangements with any lender; soliciting or accepting gifts from a lender, guarantor, or servicer; accepting any fee, payment, or other financial benefit as compensation for any type of consulting or any contractual relationship with a lender; assigning a first-time borrower's loan to a particular lender or refusing to certify, or delaying certification of, any loan based on a borrower's selection of a particular lender; requesting offers of funds for private education loans, including opportunity pool loans, from a lender in exchange for providing the lender with a specified number or loan volume of FFEL Program loans or private education loans or a preferred lender arrangement; requesting or accepting staffing assistance from a lender; and receipt of compensation for serving on an advisory board, commission, or group established by a lender, guarantor, or group of lenders or guarantors.

Proposed 601.21(c)(6) would provide exceptions to the ban on staffing assistance, such as staffing assistance related to professional development or training; providing educational counseling materials; or providing short-term, nonrecurring staffing assistance during disasters or emergencies.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are institutions and institutionally-affiliated organizations. We estimate that burden for institutions and institutionally-affiliated organizations, respectively, would increase to 4,697 in OMB Control Number 1845–XXXA.

Section 601.30—Duties of Institutions Participating in the William D. Ford Direct Loan Program

Proposed § 601.30 would require a covered institution participating in the William D. Ford Direct Loan Program to make the information identified in a

model disclosure form developed by the Secretary available to students attending or planning to attend the institution, or the families of such students. If the institution provides information regarding a private education loan to a prospective borrower, the institution must concurrently provide the borrower with the information identified on the model disclosure form.

Proposed § 601.30(b) would allow a covered institution to use a comparable form designed by the institution to provide this information, instead of the model disclosure form.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are borrowers, and institutions and their institutionally-affiliated organizations. We estimate that burden to borrowers would increase by 56,671 hours and 1,353 hours for institutions and institutionally-affiliated organizations, respectively, and we will include the total burden of 58,024 hours in OMB Control Number 1845–XXXB.

Section 601.40—Lender Responsibilities

Proposed § 601.40(a) would require FFEL lenders to provide FFEL borrowers the disclosures required under current § 682.205(a) and (b). A lender offering private education loans would be required to comply with the disclosures required under section 128(e) of the TILA for each type of private loan.

Proposed § 601.40(b) would set forth the information the lenders will have to provide to the Secretary on an annual basis regarding any reasonable expenses paid or provided to any agent of a covered institution who is employed in the financial aid office or has responsibilities with respect to education loans or other financial aid of the institution for service by the employee on an advisory board, commission or group established by a lender or a group of lenders. This information also would need to be reported for expenses paid or provided to any agent of an institution-affiliated organization involved in recommending, promoting or endorsing education loans. Lenders would be required to report the amount of the expenses paid and the specific instances for which it was paid; the names of the agents to whom expenses were paid; and the date and description of each activity for which expenses were paid. This section of the regulations would also require the lender to submit a certification of compliance to the Secretary.

Proposed § 601.40(c) would require any FFEL lender participating in one or more preferred lender arrangements to annually certify to the Secretary its compliance with the HEA. Lenders required to file an audit under § 682.305(c) would be required to include the certification as part of the audit. A lender that is not required to submit an audit would need to provide the certification separately.

Proposed § 601.40(d) would require FFEL lenders with a preferred lender arrangement with a covered institution or an institution-affiliated organization to annually provide to the institution, institution-affiliated organization and the Secretary information regarding the FFEL loans the lender will provide to students and families pursuant to the preferred lender arrangement for the next award year. The information will be prescribed by the Secretary, after consultation with the Federal Reserve.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are borrowers and lenders. We estimate that burden to borrowers would increase by 632,383 hours and that burden for lenders would increase by 292 hours in OMB Control Number 1845–XXXA.

Sections 668.181, 668.200, and 668.202—Three-Year Cohort Default Rates

The proposed regulations reflected in new proposed subpart N of part 668 would incorporate the three-year cohort default method under proposed § 668.202. With regard to the transition period for use of the current cohort default rate method, proposed §§ 668.181 and 668.200(b) would specify that the Department will issue annually two sets of draft and official cohort default rates for fiscal years 2009, 2010, and 2011.

These proposed regulations describe the purpose of the 3-year rate and explain the calculation and application of the 3-year cohort default rate. As a result, the statement of purpose of this subpart and the description of how the Department will calculate and apply the 3-year cohort default rate will not impact the burden in OMB 1845–0022.

Section 668.16—Administrative Capabilities and Cohort Default Rate Appeals

Proposed § 668.16(m)(1)(ii) would apply the current rules for administrative capability based on two-year cohort default rates during the transition period. Thereafter, a school would be administratively capable if two of its three most recent three-year rates are less than 30 percent. Under proposed § 668.16(m)(2), the current rules for provisional certification based on two year cohort default rates of 25 percent or more but less than 40 percent would continue to apply during the transition period. Thereafter, an institution whose three year default rates are 30 percent or more, but less than 40 percent, for two years would not be provisionally certified based solely on its default rates under the following circumstances:

(1) The institution files timely a request for adjustment or appeal from the second such rate under proposed §§ 668.209 (Uncorrected data adjustments), 668.210 (New data adjustments), or 668.212 (Loan servicing appeals) and the request or appeal is pending or succeeds in reducing the institution's three-year rate below 30 percent.

(2) The institution files timely an appeal under proposed § 668.213 (Economically disadvantaged appeals) from the second such rate and the appeal is pending or successful. proposed § 668.213 would provide that the two rates of 30 percent or more must be successive to permit the appeal.

(3) The institution files a timely participation rate index appeal under proposed § 668.214 and the appeal is pending or successful.

(4) The institution had 30 or fewer borrowers in the three most recent cohorts of borrowers used to calculate the institution's rates.

(5) A three-year rate that would otherwise potentially subject the institution to provisional certification was calculated as an average rate.

To avoid provisional certification by invoking exceptions (1), (2) or (3), the institution would be required to file a request for adjustment or appeal in response to a notice from the Department that the institution's second three-year cohort default rate, or second successive three-year default rate for an economically disadvantaged appeal, is 30 percent or more, but less than 40 percent.

Under proposed § 668.214, a participation rate index appeal could be taken from a loss of eligibility, or potential placement on provisional certification, based on three-year cohort default rates if the participation rate index for any of the excessive rates was .0625 or less. The appeal would be taken within 30 days of receiving the notice of loss of eligibility with the most recent excessive official rate.

In addition, under proposed § 668.204(c)(1)(iii), an institution would be allowed to challenge a potential placement on provisional certification because its three-year cohort default rates for two of the most recent three years would be 30 percent or more, but

less than 40 percent, even though the second such rate was available only as a draft rate, if its participation rate index was equal to or less than 0.0625 for either its draft rate, or its most recent official rate equaling or exceeding 30 percent but less than 40 percent. The challenge would be taken following notice to the school of its draft rate.

The proposed changes in § 668.16 apply the current rules on administrative capability during the transition period. We estimate that the proposed regulations will not impact burden in OMB 1845–0022.

Section 668.186, 668.190, 668.191, 668.209, 668.210, 668.211, and 668.212—Electronic Processes

Proposed § 668.186 would eliminate the need to request a loan record detail report by providing that the report will be sent electronically to the institution as part of a package notifying the institution of its official cohort default rate. The institution would have five business days, from the transmission date of the package as posted on the Department's Web site, to report any problem with receiving that transmission. If the institution reports a problem within the five-day period, and the Department agrees that the institution did not cause the problem, we will extend the adjustment, challenge, and appeal deadlines and timeframes to account for retransmitting the package after the problem is resolved. If no problems are reported by the institution, the timeframe associated with filing or requesting the adjustment, challenge, or appeal begins on the sixth day following the transmission date of the package that is posted on the Department's Web site. The timeframes for the adjustments, challenges, and appeals are reflected in proposed §§ 668.190(b) and 668.191(b).

The subpart M, part 668 provisions reflected in § 668.186, and the provisions for adjustments, challenges, and appeals in the related sections in subpart M of part 668 would also be reflected in the following parallel provisions in subpart N, part 668: §§ 668.209, 668.210, 668.211, and 668.212.

These proposed regulations represent a decrease in burden. The affected entities under these proposed regulations are institutions. We estimate that burden would decrease by −725 hours for institutions which would be reflected in OMB Control Number 1845–0022.

Sections 682.604 and 685.304—Entrance Counseling

Proposed § 682.604(f)(3) would require that institutions provide initial counseling for Stafford and graduate or professional student PLUS Loan borrowers. Comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan would need to be provided. Under this proposed regulation, this information may be provided to the borrower during an entrance counseling session conducted in person; on a separate written form provided to the borrower that the borrower signs and returns to the school; or online or by interactive electronic means, with the borrower acknowledging receipt of the information.

Proposed § 682.604(f)(4) would require a school that conducts initial counseling online or through interactive electronic means to take reasonable steps to ensure that each student borrower receives the counseling materials and participates in and completes the initial counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

Proposed § 682.604(f)(6) would require that initial counseling for Stafford Loan borrowers: Explain the use of a Master Promissory Note; emphasize to the student borrower the seriousness and importance of the repayment obligation the student borrower is assuming; describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation; in the case of a student borrower (other than a loan made or originated by the school), emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school; inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness of Stafford loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained—or the average indebtedness of other borrowers in the same program at the same school as the borrower; to the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance; provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary; inform the borrower of the option to pay the interest on an unsubsidized Stafford Loan while the borrower is in school; explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment; explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation; provide information on NSLDS and how the borrower can access the borrower's records; and provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan.

Proposed § 682.604(f)(7) would require that initial counseling for graduate or professional student PLUS Loan borrowers must: Inform the student borrower of sample monthly repayment amounts based on a range of student levels of indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained or the average indebtedness of other borrowers in the same program at the same school as the borrower; inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school; for a graduate or professional student PLUS Loan borrower who has received a prior FFEL Stafford, or Direct Subsidized or Unsubsidized loan, provide the information, specified in § 682.603(d)(1)(i) through (d)(1)(iii), that compares Stafford and PLUS Loan interest rates, interest accrual periods, and repayment period begin dates; and for a graduate or professional student PLUS Loan borrower who has not received a prior FFEL Stafford, or Direct Subsidized or Unsubsidized loan, provide the Stafford Loan initial counseling information specified in proposed § 682.604(f)(6)(i) through (f)(6)(xii).

Corresponding initial counseling requirements for Direct Subsidized, Direct Unsubsidized, and Direct PLUS

loan borrowers are proposed in § 685.304(a)(1) through (a)(9) of the Direct Loan regulations.

These proposed regulations would represent an increase in burden. The affected entities under the proposed regulations are borrowers and institutions. We estimate that burden in OMB 1845–0020 would increase by 475,152 hours for borrowers and 12,582 hours for institutions; and we estimate that burden in OMB 1845–0021 would increase by 217,900 hours for borrowers and 12,582 hours for institutions for a total of 487,735 hours which would be reflected in OMB Control Number 1845–0020 and a total of 230,482 hours in OMB Control Number 1845–0021.

Sections 674.42, 682.604 and 685.304—Exit Counseling

Proposed §§ 674.42(b), 682.604(g) and 685.304(b) would continue to require a school to ensure that exit counseling is conducted with each Perkins, FFEL Stafford, and Direct Subsidized and Unsubsidized Loan borrower. In addition, schools would be required to provide exit counseling to graduate or professional student FFEL PLUS Loan borrowers and graduate or professional student Direct PLUS Loan borrowers.

Under proposed §§ 674.42(b)(1), 682.604(g)(1) and 685.304(b)(2) and (b)(3), schools would continue to be required to conduct exit counseling either in person, by audiovisual presentation, or by interactive electronic means. In each case, the school would be required to ensure that the exit counseling is conducted shortly before the student borrower ceases at least half-time study at the school, and that an individual with expertise in the Title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. The alternative approach for student borrowers enrolled in a correspondence program or a study-abroad program that the home institution approves for credit would be maintained in the proposed new regulations. The current regulatory procedures for student borrowers who withdraw from school without the school's prior knowledge or fail to complete an exit counseling session as required also would be maintained in the proposed new regulations.

Proposed §§ 674.42(b)(3), 682.604(g)(3) and 685.304(b)(6) would continue to require that if exit counseling is conducted by electronic interactive means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the counseling. Proposed §§ 674.42(b)(4), 682.604(g)(4) and 685.304(b)(7) would retain the requirement that schools maintain documentation substantiating the school's compliance with this section for each student borrower.

Proposed §§ 674.42(b)(2), 682.604(g)(2) and 685.304(b)(4) also would require exit counseling for Perkins, FFEL, and Direct Loan student borrowers to: Review for the student borrower information on the availability of the Student Loan Ombudsman's office; inform the student borrower of the availability of Title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain Title IV loan status information; and provide a general description of the types of tax benefits that may be available to borrowers.

Additionally, proposed §§ 682.604(g)(2)(ii) and 685.304(b)(4)(ii) would require the exit counseling for FFEL and Direct Loan student borrowers to review the available FFEL and Direct Loan repayment plan options, including standard, graduated, extended, income sensitive and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan. The exit counseling also would need to inform FFEL and Direct Loan borrowers of their option to change repayment plans.

For Direct Loan borrowers, proposed § 685.304(b)(4)(vi) would retain the requirement that schools explain to the student borrower how to contact the party servicing the Direct Loan.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are borrowers and institutions. We estimate that burden would increase by 444,970 hours for borrowers and 12,582 hours for institutions for a total of 457,552 hours which would be reflected in OMB Control Number 1845–0020. We estimate that burden would increase by 213,542 hours for borrowers and 12,582 hours for institutions for a total of 226,124 hours which would be reflected in OMB Control Number 1845–0021. We estimate that burden would increase by 214,022 hours for borrowers and 5,940 hours for institutions for a total of 219,962 hours which would be reflected in OMB Control Number 1845.0023.

Sections 674.53, 674.57, and 674.58—Expansion of Teacher, Head Start, and Law Enforcement Cancellation Categories

These proposed regulations would extend the new cancellation categories to current Federal Perkins Loan borrowers with outstanding balances on loans already in repayment and all new borrowers who perform eligible service that includes August 14, 2008, or begins on or after that date, regardless of whether information on the expanded cancellation categories appears on the borrower's promissory note.

Proposed § 674.53 would provide that a teacher who is employed by an educational service agency, or a full-time special education teacher, including teachers of infants, toddlers, children, or youth with disabilities, who is working in a system administered by an educational service agency, is eligible for cancellation benefits.

Proposed § 674.57 would be amended such that the cancellation provisions for law enforcement or correction officer would include borrowers who are employed full-time as an attorney in Federal Public Defender Organizations or Community Defender Organizations.

Proposed § 674.58 of the Head Start cancellation provisions would be amended by expanding cancellation benefits to include borrowers who are performing qualifying service as full-time staff members in a pre-kindergarten or childcare program that is licensed or regulated by the State.

For purposes of determining a borrower's eligibility for cancellation benefits, proposed § 674.58(c)(1) and (2) would define the terms ''pre-kindergarten program'' and ''childcare program.'' A pre-kindergarten program would be defined as a State-funded program that serves children from birth through age six and addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development. A *childcare program* would be defined as a program that is licensed and regulated by the State and provides child care services for fewer than 24 hours per day per child, unless care in excess of 24 consecutive hours is needed due to the nature of the parents' work.

Proposed § 674.58 also would amend the Head Start cancellation provisions by renaming the regulation ''Cancellation for service in an early childhood education program'' to reflect the fact that the expansion of cancellation benefits available to borrowers under this provision are no longer limited to service in early childhood education programs authorized by the Head Start Act.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are borrowers and institutions. We estimate that burden as a result of the

proposed changes in § 674.53 would increase by 2,290 hours for borrowers and 1,145 hours for institutions for a total of 3,435 hours which would be reflected in OMB Control Numbers 1845–XXXC. We estimate that burden as a result of the proposed changes in § 674.57 would increase by 385 hours for borrowers and 193 hours for institutions for a total of 578 hours which would be reflected in OMB Control Number 1845–XXXC. We estimate that burden as a result of the proposed changes in § 674.58 would increase by 2,648 hours for borrowers and 1,325 hours for institutions for a total of 3,973 hours which would be reflected in OMB Control Number 1845–XXXC.

Section 674.56—Addition of New Public Service Cancellation Categories

Proposed § 674.56 would add new public service cancellation categories for borrowers in the Federal Perkins Loan program who are performing qualifying service as: Full-time faculty members at a Tribal College or University; full-time fire fighters who serve a local, State, or Federal fire department or fire district; librarians with a master's degree in library science who are employed in an elementary or secondary school that qualifies for Title I funding, or in a public library that serves a geographic area that includes one or more Title I-eligible schools; or full-time speech-language pathologists with a master's degree who are working exclusively with Title I-eligible schools.

Under these proposed regulations, current borrowers with outstanding balances on loans already in repayment and all new borrowers who perform eligible service that includes August 14, 2008, or begins on or after that date, in these new cancellation categories, would qualify for cancellation, regardless of whether the cancellation category appears on the borrower's promissory note.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are borrowers and institutions. We estimate that burden would increase by 3,436 hours for borrowers and 1,718 hours for institutions for a total of 5,154 hours which would be reflected in OMB Control Number 1845–XXXC.

Section 674.59—Military Service Cancellation

Proposed § 674.59 would amend the cancellation rate for each year of qualifying service for the military service cancellation. Borrowers who are serving in areas of hostility are now eligible to receive a cancellation of up to 100 percent of the loan for each full year of active duty service that includes August 14, 2008, or begins on or after that date in the following increments: 15 percent for the first and second years of service; 20 percent for the third and fourth years of service; and, 30 percent for the fifth year of service.

These proposed regulations represent an increase in burden. The affected entities under the proposed regulations are borrowers and institutions. We estimate that burden would increase by 20,532 hours for borrowers and 10,266 hours for institutions for a total of 30,798 hours which would be reflected in OMB Control Number 1845–XXXC.

Consistent with the discussion in the preceding paragraphs, the following chart describes the sections of the proposed regulations involving information collections, the information being collected, and the collections that the Department will submit to the Office of Management and Budget for approval and public comment under the Paperwork and Reduction Act.

| Regulatory section | Information section | Collection |
|---|---|---|
| 601.10 | Proposed § 601.10(a) would require that a covered institution, or an institution-affiliated organization of a covered institution, that participates in a preferred lender arrangement disclose the information identified on the model disclosure form developed by the Secretary and its preferred lender list. | OMB 1845–XXXA. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments on the form. |
| 601.11 | Proposed § 601.11(a) would require a covered institution, or an institution-affiliated organization of a covered institution, to provide to a prospective borrower private education loan disclosures consistent with section 128(e)(1) of the TILA; to provide a student who requests a private education loan a self-certification form; and to inform the prospective borrower that he or she may qualify for loans or other assistance under Title IV of the HEA; and to inform the prospective borrower that the terms and conditions of Title IV, HEA program loans may be more favorable than the provisions of private education loans. | OMB 1845–XXXA. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments on the form. |
| 601.20 | Proposed § 601.20(a) would require a covered institution, and an institution-affiliated organization that participates in a preferred lender arrangement to prepare and submit to the Secretary an annual report. | OMB 1845–XXXA. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |
| 601.21 | Proposed § 601.21 would require a covered institution that participates in a preferred lender arrangement to develop a code of conduct with respect to FFEL Program loans and private education loans with which the institution's agents must comply to prohibit a conflict of interest with the responsibilities of an agent of an institution with respect to FFEL Program loans and private education loans. | OMB 1845–XXXA. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |

| Regulatory section | Information section | Collection |
|---|---|---|
| 601.30 | Proposed § 601.30 would require a covered institution participating in the William D. Ford Direct Loan Program to make the information identified in a model disclosure form developed by the Secretary available to students attending or planning to attend the institution, or the families of such students. If the institution provides information regarding a private education loan to a prospective borrower, the institution must concurrently provide the borrower with the information identified on the model disclosure form. | OMB 1845–XXXB. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |
| 601.40 | Proposed § 601.40 would set forth the information the lenders will have to provide to the Secretary on an annual basis regarding any reasonable expenses paid or provided to any agent of a covered institution who is employed in the financial aid office or has responsibilities with respect to education loans or other financial aid of the institution for service by the employee on an advisory board, commission or group established by a lender or a group of lenders. | OMB 1845–XXXA. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |
| 668.181, 668.200, & 668.202. | Proposed §§ 668.181, 668.200, and 668.202 would provide a new proposed subpart N, part 668 to incorporate the three-year method under § 668.202. With regard to the transition period, proposed §§ 668.181 and 668.200(b) would specify that the Department will issue annually two sets of draft and official cohort default rates for fiscal years 2009, 2010, and 2011. As a result, the statement of purpose of this subpart and the description of how the Department will calculate and apply the 3-year cohort default rate will not impact the burden in OMB 1845–0022. | OMB 1845–0022.<br>No change in burden. |
| 668.16 | Proposed § 668.16(m) would require institutions to have the new three-year cohort default rate, and would incorporate the transition rules and the basis for appeals for that cohort default rate. The proposed changes in § 668.16 apply the current rules on administrative capability during the transition period. We estimate that the proposed regulations will not impact burden in OMB 1845–0022. | OMB 1845–0022.<br>No change in burden. |
| 668.186, 668.190, 668.191, 668.209, 668.210, 668.211, and 668.212. | These proposed regulations would eliminate the need to request a loan record detail report from the Department; instead an electronic loan report would be sent to each institution. | OMB 1845–0022. |
| 682.604 & 685.304 | Proposed §§ 682.604 and 685.304 would require that institutions provide initial counseling for Stafford and graduate or professional student PLUS Loan borrowers. | OMB 1845–0020 and 1845–0021. |
| 674.42, 682.604, and 685.304. | Proposed §§ 674.42, 682.604 and 685.304 would continue to require a school to ensure that exit counseling is conducted with each Perkins, FFEL Stafford, and Direct Subsidized and Unsubsidized Loan borrower. In addition, schools would be required to provide exit counseling to graduate or professional student FFEL PLUS Loan borrowers and graduate or professional student Direct PLUS Loan borrowers. | OMB 1845–0020, 1845–0021, and 1845–0023. |
| 674.53, 674.57, and 674.58. | Proposed §§ 674.53, 674.57, and 674.58 would extend the new cancellation categories to current Federal Perkins Loan borrowers with outstanding balances on loans already in repayment and all new borrowers who perform eligible service that includes August 14, 2008, or begins on or after that date, regardless of whether information on the expanded cancellation categories appears on the borrower's promissory note. | OMB 1845–XXXC. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |

| Regulatory section | Information section | Collection |
|---|---|---|
| 674.56 | Proposed § 674.56 would add new public service cancellation categories for borrowers in the Federal Perkins Loan program who are performing qualifying service as: Full-time faculty members at a Tribal College or University; full-time fire fighters who serve a local, State, or Federal fire department or fire district; librarians with a master's degree in library science who are employed in an elementary or secondary school that qualifies for Title I funding, or in a public library that serves a geographic area that includes one or more Title I-eligible schools; or full-time speech-language pathologists with a master's degree who are working exclusively with Title I-eligible schools. | OMB 1845–XXXC. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |
| 674.59 | Proposed § 674.59 would amend the cancellation rate for each year of qualifying service for the military service cancellation. Borrowers who are serving in areas of hostility are now eligible to receive a cancellation of up to 100 percent of the loan for each full year of active duty service that includes August 14, 2008, or begins on or after that date in the following increments: 15 percent for the first and second years; 20 percent for the third and fourth years of service; and 30 percent for the fifth year of service. | OMB 1845–XXXC. This will be new collection. A separate 60-day **Federal Register** notice will be published to solicit comments. |

If you want to comment on the proposed information collection requirements, please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for U.S. Department of Education. Send these comments by e-mail to *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. You may also send a copy of these comments to the Department contact named in the **ADDRESSES** section of this preamble.

We consider your comments on these proposed collections of information in—

- Deciding whether the proposed collections are necessary for the proper performance of our functions, including whether the information will have practical use;
- Evaluating the accuracy of our estimate of the burden of the proposed collections, including the validity of our methodology and assumptions;
- Enhancing the quality, usefulness, and clarity of the information we collect; and
- Minimizing the burden on those who must respond. This includes exploring the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, to ensure that OMB gives your comments full consideration, it is important that OMB receives the comments within 30 days of publication. This does not affect the deadline for your comments to us on the proposed regulations.

Intergovernmental Review

These programs are not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

Assessment of Educational Impact

In accordance with section 411 of the General Education Provisions Act, 20 U.S.C. 1221e–4, the Secretary particularly requests comments on whether these proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

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(Catalog of Federal Domestic Assistance Numbers: 84.032 Federal Family Education Loan Program; 84.038 Federal Perkins Loan Program; 84.268 William D. Ford Federal Direct Loan Program.)

**List of Subjects**

*34 CFR Part 601*

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Loan programs—education, Reporting and recordkeeping requirements, Student aid.

*34 CFR Part 668*

Administrative practice and procedure, Colleges and universities, Consumer protection, Education, Grant programs—education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

*34 CFR Parts 674, 682 and 685*

Administrative practice and procedure, Colleges and universities, Education, Loan programs—education, Reporting and recordkeeping requirements, Student aid, Vocational education.

Dated: July 14, 2009.

**Arne Duncan,**

*Secretary of Education.*

For the reasons discussed in the preamble, the Secretary proposes to amend chapter VI of title 34 of the Code of Federal Regulations as follows:

1. Add part 601 to read as follows:

## PART 601—INSTITUTION AND LENDER REQUIREMENTS RELATING TO EDUCATION LOANS

### Subpart A—General

Sec.

601.1 Scope.
601.2 Definitions.

**Subpart B—Loan Information To Be Disclosed by Covered Institutions and Institution-Affiliated Organizations**

601.10 Preferred lender arrangement disclosures.
601.11 Private education loan disclosures and self-certification form.
601.12 Use of institution and lender name.

**Subpart C—Responsibilities of Covered Institutions and Institution-Affiliated Organizations**

601.20 Annual report.
601.21 Code of conduct.

**Subpart D—Loan Information To Be Disclosed by Institutions Participating in the William D. Ford Direct Loan Program**

601.30 Duties of institutions.

**Subpart E—Lender Responsibilities**

601.40 Disclosure and reporting requirements for lenders.

**Authority:** 20 U.S.C. 1019–1019d, 1021, 1094(a) and (h).

## Subpart A—General

### § 601.1 Scope.

This part establishes disclosure and reporting requirements for covered institutions, institution-affiliated organizations, and lenders that provide, issue, recommend, promote, endorse, or provide information relating to education loans. Education loans include loans authorized by the Higher Education Act of 1965, as amended (HEA) and private education loans.

(Authority: 20 U.S.C. 1019–1019d, 1021, 1094(a)(25) and (e))

### § 601.2 Definitions.

(a) The definitions of the following terms used in this part are set forth in the regulations for Institutional Eligibility under the Higher Education Act of 1965, as amended, 34 CFR part 600:

Federal Family Education Loan (FFEL) Program
Secretary
Title IV, HEA program

(b) The following definitions also apply to this part:

*Agent:* An officer or employee of a covered institution or an institution-affiliated organization.

*Covered institution:* Any institution of higher education, proprietary institution of higher education, postsecondary vocational institution, or institution outside the United States, as these terms are defined in 34 CFR part 600, that receives any Federal funding or assistance.

*Education loan:* Except when used as part of the term ''private education loan'',

(1) Any loan made, insured, or guaranteed under the Federal Family Education Loan (FFEL) Program;

(2) Any loan made under the William D. Ford Federal Direct Loan Program; or

(3) A private education loan.

*Institution-affiliated organization:* (1) Any organization that—

(i) Is directly or indirectly related to a covered institution; and

(ii) Is engaged in the practice of recommending, promoting, or endorsing education loans for students attending such covered institution or the families of such students.

(2) An institution-affiliated organization—

(i) May include an alumni organization, athletic organization, foundation, or social, academic, or professional organization, of a covered institution; and

(ii) Does not include any lender with respect to any education loan secured, made, or extended by such lender.

*Lender:* (1) An eligible lender in the Federal Family Education Loan (FFEL) Program, as defined in 34 CFR 682.200(b);

(2) The Department in the Direct Loan program;

(3) In the case of a private educational loan, a private education lender as defined in section 140 of the Truth in Lending Act; and

(4) Any other person engaged in the business of securing, making, or extending education loans on behalf of the lender.

*Officer:* A director or trustee of a covered institution or institution-affiliated organization, if such individual is treated as an employee of such covered institution or institution-affiliated organization, respectively.

*Preferred lender arrangement:* (1) An arrangement or agreement between a lender and a covered institution or an institution-affiliated organization of such covered institution—

(i) Under which a lender provides or otherwise issues education loans to the students attending such covered institution or the families of such students; and

(ii) That relates to such covered institution or such institution-affiliated organization recommending, promoting, or endorsing the education loan products of the lender.

(2) A preferred lender arrangement does not include—

(i) Arrangements or agreements with respect to loans made under the William D. Ford Federal Direct Loan Program; or

(ii) Arrangements or agreements with respect to loans that originate through the PLUS Loan auction pilot program under section 499(b) of the HEA.

(3) For purpose of this definition, an arrangement or agreement does not exist if the private education loan provided or issued to a student attending a covered institution is made by the covered institution, and the private education loan is—

(i) Funded by the covered institution's own funds;

(ii) Funded by donor-directed contributions;

(iii) Made under title VII or title VIII of the Public Service Health Act; or

(iv) Made under an institutional payment plan of the covered institution.

*Private education loan:* As the term is defined in section 140 of the Truth in Lending Act, a loan provided by a private educational lender that is not a title IV loan and that is issued expressly for postsecondary education expenses to a borrower, regardless of whether the loan is provided through the educational institution that the student attends or directly to the borrower from the private educational lender. A private education loan does not include an extension of credit under an open end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling.

(Authority: 20 U.S.C. 1019)

## Subpart B—Loan Information To Be Disclosed by Covered Institutions and Institution-Affiliated Organizations

### § 601.10 Preferred lender arrangement disclosures.

(a) A covered institution, or an institution-affiliated organization of such covered institution, that participates in a preferred lender arrangement must disclose—

(1) On such covered institution's or institution-affiliated organization's Web site and in all informational materials described in paragraph (b) of this section that describe or discuss education loans—

(i) The maximum amount of Federal grant and loan aid under title IV of the HEA available to students, in an easy to understand format;

(ii) The information identified on a model disclosure form developed by the Secretary pursuant to section 153(a)(2)(B) of the HEA, for each type of education loan that is offered pursuant to a preferred lender arrangement of the institution or institution-affiliated organization to students of the institution or the families of such students; and

(iii) A statement that such institution is required to process the documents required to obtain a loan under the

Federal Family Education Loan (FFEL) Program from any eligible lender the student selects; and

(2) On such covered institution's or institution-affiliated organization's Web site and in all informational materials described in paragraph (b) of this section that describe or discuss private education loans—

(i) In the case of a covered institution, the information that the Board of Governors of the Federal Reserve System requires to be disclosed under section 128(e)(11) of the Truth in Lending Act (15 U.S.C. 1638(e)(11)), for each type of private education loan offered pursuant to a preferred lender arrangement of the institution to students of the institution or the families of such students; and

(ii) In the case of an institution-affiliated organization of a covered institution, the information the Board of Governors of the Federal Reserve System requires to be disclosed under section 128(e)(1) of the Truth in Lending Act (15 U.S.C. 1638(e)(1)), for each type of private education loan offered pursuant to a preferred lender arrangement of the organization to students of such institution or the families of such students.

(b) The informational materials described in paragraphs (a)(1) and (a)(2) of this section are publications, mailings, or electronic messages or materials that—

(1) Are distributed to prospective or current students of a covered institution and families of such students; and

(2) Describe or discuss the financial aid opportunities available to students at an institution of higher education.

(c)(1) Each covered institution and each institution-affiliated organization that participates in a preferred lender arrangement must provide the information described in paragraph (a)(1)(ii) of this section, and the information described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section, respectively, for each type of education loan offered pursuant to the preferred lender arrangement.

(2) The information identified in paragraph (c)(1) of this section must be provided to students attending the covered institution, or the families of such students, as applicable, annually and must be provided in a manner that allows for the students or their families to take such information into account before selecting a lender or applying for an education loan.

(d) If a covered institution compiles, maintains, and makes available a preferred lender list as required under § 668.14(b)(28), the institution must—

(1) Clearly and fully disclose on such preferred lender list—

(i) Not less than the information required to be disclosed under section 153(a)(2)(A) of the HEA;

(ii) Why the institution participates in a preferred lender arrangement with each lender on the preferred lender list, particularly with respect to terms and conditions or provisions favorable to the borrower; and

(iii) That the students attending the institution, or the families of such students, do not have to borrow from a lender on the preferred lender list;

(2) Ensure, through the use of the list of lender affiliates provided by the Secretary under section 487(h)(2) of the HEA, that—

(i) There are not less than three FFEL lenders that are not affiliates of each other included on the preferred lender list and, if the institution recommends, promotes, or endorses private education loans, there are not less than two lenders of private education loans that are not affiliates of each other included on the preferred lender list; and

(ii) The preferred lender list under paragraph (d) of this section—

(A) Specifically indicates, for each listed lender, whether the lender is or is not an affiliate of each other lender on the preferred lender list; and

(B) If a lender is an affiliate of another lender on the preferred lender list, describes the details of such affiliation;

(3) Prominently disclose the method and criteria used by the institution in selecting lenders with which to participate in preferred lender arrangements to ensure that such lenders are selected on the basis of the best interests of the borrowers, including—

(i) Payment of origination or other fees on behalf of the borrower;

(ii) Highly competitive interest rates, or other terms and conditions or provisions of Title IV, HEA program loans or private education loans;

(iii) High-quality servicing for such loans; or

(iv) Additional benefits beyond the standard terms and conditions or provisions for such loans;

(4) Exercise a duty of care and a duty of loyalty to compile the preferred lender list under paragraph (d) of this section without prejudice and for the sole benefit of the students attending the institution, or the families of such students; and

(5) Not deny or otherwise impede the borrower's choice of a lender or cause unnecessary delay in loan certification under title IV of the HEA for those borrowers who choose a lender that is not included on the preferred lender list.

(Approved by the Office of Management and Budget under control number 1845–XXXA)

(Authority: 20 U.S.C. 1019a(a)(1)(A) and 1019b(c))

**§ 601.11 Private education loan disclosures and self-certification form.**

(a) A covered institution, or an institution-affiliated organization of such covered institution, that provides information regarding a private education loan from a lender to a prospective borrower must provide private education loan disclosures to the prospective borrower, regardless of whether the covered institution or institution-affiliated organization participates in a preferred lender arrangement.

(b) The private education loan disclosures must—

(1) Provide the prospective borrower with the information the Board of Governors of the Federal Reserve System requires to be disclosed under section 128(e)(1) of the Truth in Lending Act (15 U.S.C. 1638(e)(1)) for such loan;

(2) Inform the prospective borrower that—

(i) The prospective borrower may qualify for loans or other assistance under title IV of the HEA; and

(ii) The terms and conditions of Title IV, HEA program loans may be more favorable than the provisions of private education loans.

(c) The covered institution or institution-affiliated organization must ensure that information regarding private education loans is presented in such a manner as to be distinct from information regarding Title IV, HEA program loans.

(d) Upon an enrolled or admitted student applicant's request for a private education loan self-certification form, an institution must provide to the applicant, in written or electronic form—

(1) The self-certification form for private education loans developed by the Secretary in consultation with the Board of Governors of the Federal Reserve System, to satisfy the requirements of section 128(e)(3) of the Truth in Lending Act (15 U.S.C. 1638(e)(3)); and

(2) The information required to complete the form, to the extent the institution possesses such information as specified in 34 CFR 668.14(b)(29).

(Approved by the Office of Management and Budget under control number 1845–XXXA)

(Authority: 20 U.S.C. 1019a(a)(1)(B) and 1019d)

**§ 601.12 Use of institution and lender name.**

A covered institution, or an institution-affiliated organization of such covered institution, that participates in a preferred lender arrangement with a lender regarding private education loans must—

(a) Not agree to the lender's use of the name, emblem, mascot, or logo of such institution or organization, or other words, pictures, or symbols readily identified with such institution or organization, in the marketing of private education loans to students attending such institution in any way that implies that the loan is offered or made by such institution or organization instead of the lender; and

(b) Ensure that the name of the lender is displayed in all information and documentation related to the private education loans described in this section.

(Authority: 20 U.S.C. 1019a(a)(2)–(a)(3))

## Subpart C—Responsibilities of Covered Institutions and Institution-Affiliated Organizations

**§ 601.20 Annual report.**

Each covered institution, and each institution-affiliated organization of such covered institution, that participates in a preferred lender arrangement, must—

(a) Prepare and submit to the Secretary an annual report, by a date determined by the Secretary, that includes, for each lender that participates in a preferred lender arrangement with such covered institution or organization—

(1) The information described in § 601.10(c); and

(2) A detailed explanation of why such covered institution or institution-affiliated organization participates in a preferred lender arrangement with the lender, including why the terms, conditions, and provisions of each type of education loan provided pursuant to the preferred lender arrangement are beneficial for students attending such institution, or the families of such students, as applicable; and

(b) Ensure that the report required under this section is made available to the public and provided to students attending or planning to attend such covered institution and the families of such students.

(Approved by the Office of Management and Budget under control number 1845–XXXA)

(Authority: 20 U.S.C. 1019b(c)(2))

**§ 601.21 Code of conduct.**

(a)(1) A covered institution that participates in a preferred lender arrangement must comply with the code of conduct requirements described in this section.

(2) The covered institution must—

(i) Develop a code of conduct with respect to FFEL Program loans and private education loans with which the institution's agents must comply. The code of conduct must—

(A) Prohibit a conflict of interest with the responsibilities of an agent of an institution with respect to FFEL Program loans and private education loans; and

(B) At a minimum, include the provisions specified in paragraph (c) of this section;

(ii) Publish such code of conduct prominently on the institution's Web site; and

(iii) Administer and enforce such code by, at a minimum, requiring that all of the institution's agents with responsibilities with respect to FFEL Program loans or private education loans be annually informed of the provisions of the code of conduct.

(b) Any institution-affiliated organization of a covered institution that participates in a preferred lender arrangement must—

(1) Comply with the code of conduct developed and published by such covered institution under paragraph (a)(1) of this section;

(2) If such institution-affiliated organization has a Web site, publish such code of conduct prominently on the Web site; and

(3) Administer and enforce such code of conduct by, at a minimum, requiring that all of such institution-affiliated organization's agents with responsibilities with respect to FFEL Program loans or private education loans be annually informed of the provisions of such code of conduct.

(c) A covered institution's code of conduct must prohibit—

(1) Revenue-sharing arrangements with any lender. The institution must not enter into any revenue-sharing arrangement with any lender. For purposes of this paragraph, the term *revenue-sharing arrangement* means an arrangement between a covered institution and a lender under which—

(i) A lender provides or issues a FFEL Program loan or private education loan to students attending the institution or to the families of such students; and

(ii) The institution recommends the lender or the loan products of the lender and in exchange, the lender pays a fee or provides other material benefits, including revenue or profit sharing, to the institution, an agent;

(2)(i) Employees of the financial aid office receiving gifts from a lender, a guarantor, or a loan servicer. Agents who are employed in the financial aid office of the institution or who otherwise have responsibilities with respect to FFEL Program loans or private education loans, must not solicit or accept any gift from a lender, guarantor, or servicer of FFEL Program loans or private education loans;

(ii) For purposes of paragraph (c) of this section, the term *gift* means any gratuity, favor, discount, entertainment, hospitality, loan, or other item having a monetary value of more than a de minimus amount. The term includes a gift of services, transportation, lodging, or meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred;

(iii) The term *gift* does not include any of the following:

(A) Standard material, activities, or programs on issues related to a loan, default aversion, default prevention, or financial literacy, such as a brochure, a workshop, or training.

(B) Food, refreshments, training, or informational material furnished to an agent as an integral part of a training session that is designed to improve the service of a lender, guarantor, or servicer of FFEL Program loans or private education loans to the institution, if such training contributes to the professional development of the agent.

(C) Favorable terms, conditions, and borrower benefits on a FFEL Program loan or private education loan provided to a student employed by the institution if such terms, conditions, or benefits are comparable to those provided to all students of the institution.

(D) Entrance and exit counseling services provided to borrowers to meet the institution's responsibilities for entrance and exit counseling as required by §§ 682.604(f) and 682.604(g), as long as the institution's staff are in control of the counseling (whether in person or via electronic capabilities) and such counseling does not promote the products or services of any specific lender.

(E) Philanthropic contributions to an institution from a lender, servicer, or guarantor of FFEL Program loans or private education loans that are unrelated to FFEL Program loans or private education loans or any contribution from any lender, servicer, or guarantor, that is not made in exchange for any advantage related to

FFEL Program loans or private education loans.

(F) State education grants, scholarships, or financial aid funds administered by or on behalf of a State; and

(iv) For purposes of paragraph (c) of this section, a gift to a family member of an agent, or to any other individual based on that individual's relationship with the agent, is considered a gift to the agent if—

(A) The gift is given with the knowledge and acquiescence of the agent; and

(B) The agent has reason to believe the gift was given because of the official position of the agent;

(3) Consulting or other contracting arrangements. An agent who is employed in the financial aid office of the institution or who otherwise has responsibilities with respect to FFEL Program loans or private education loans must not accept from any lender or affiliate of any lender any fee, payment, or other financial benefit (including the opportunity to purchase stock) as compensation for any type of consulting arrangement or other contract to provide services to a lender or on behalf of a lender relating to FFEL Program loans or private education loans. Nothing in paragraph (c)(3) of this section will be construed as prohibiting—

(i) An agent who is not employed in the institution's financial aid office and who does not otherwise have responsibilities with respect to FFEL Program loans or private education loans from performing paid or unpaid service on a board of directors of a lender, guarantor, or servicer of education loans;

(ii) An agent who is not employed in the institution's financial aid office but who has responsibility with respect to FFEL Program loans or private education loans from performing paid or unpaid service on a board of directors of a lender, guarantor, or servicer of FFEL Program loans or private education loans, if the institution has a written conflict of interest policy that clearly sets forth that agents must recuse themselves from participating in any decision of the board regarding FFEL Program loans or private education loans at the institution; or

(iii) An officer, employee, or contractor of a lender, guarantor, or servicer of FFEL Program loans or private education loans from serving on a board of directors, or serving as a trustee, of an institution, if the institution has a written conflict of interest policy that the board member or trustee must recuse themselves from any decision regarding FFEL Program loans or private education loans at the institution;

(4) Directing borrowers to particular lenders or delaying loan certifications. The institution must not—

(i) For any first-time borrower, assign, through award packaging or other methods, the borrower's loan to a particular lender; or

(ii) Refuse to certify, or delay certification of, any loan based on the borrower's selection of a particular lender or guaranty agency;

(5)(i) Offers of funds for private loans. The institution must not request or accept from any lender any offer of funds to be used for private education loans, including funds for an opportunity pool loan, to students in exchange for the institution providing concessions or promises regarding providing the lender with—

(A) A specified number of FFEL Program loans or private education loans;

(B) A specified loan volume of such loans; or

(C) A preferred lender arrangement for such loans.

(ii) For purposes of paragraph (c) of this section, the term *opportunity pool loan* means a private education loan made by a lender to a student attending the institution or the family member of such a student that involves a payment, directly or indirectly, by such institution of points, premiums, additional interest, or financial support to such lender for the purpose of such lender extending credit to the student or the family;

(6) Staffing assistance. The institution must not request or accept from any lender any assistance with call center staffing or financial aid office staffing, except that nothing in this paragraph will be construed to prohibit the institution from requesting or accepting assistance from a lender related to—

(i) Professional development training for financial aid administrators;

(ii) Providing educational counseling materials, financial literacy materials, or debt management materials to borrowers, provided that such materials disclose to borrowers the identification of any lender that assisted in preparing or providing such materials; or

(iii) Staffing services on a short-term, nonrecurring basis to assist the institution with financial aid-related functions during emergencies, including State-declared or federally declared natural disasters, federally declared national disasters, and other localized disasters and emergencies identified by the Secretary; and

(7) Advisory board compensation. Any employee who is employed in the financial aid office of the institution, or who otherwise has responsibilities with respect to FFEL Program loans or private education loans or other student financial aid of the institution, and who serves on an advisory board, commission, or group established by a lender, guarantor, or group of lenders or guarantors, must not receive anything of value from the lender, guarantor, or group of lenders or guarantors, except that the employee may be reimbursed for reasonable expenses, as that term is defined in § 668.16(d)(2)(ii), incurred in serving on such advisory board, commission, or group.

(Approved by the Office of Management and Budget under control number 1845–XXXA)

(Authority: 20 U.S.C. 1019b(c)(2)), 1094(a)(25) and (e))

## Subpart D—Loan Information To Be Disclosed by Institutions Participating in the William D. Ford Direct Loan Program

### § 601.30 Duties of institutions.

(a) Each covered institution participating in the William D. Ford Direct Loan Program under part D of title IV of the HEA must—

(1) Make the information identified in a model disclosure form developed by the Secretary pursuant to section 154(a) of the HEA available to students attending or planning to attend the institution, or the families of such students, as applicable; and

(2) If the institution provides information regarding a private education loan to a prospective borrower, concurrently provide such borrower with the information identified on the model disclosure form that the Secretary provides to the institution under section 154(a) of the HEA.

(b) In providing the information required under paragraph (a) of this section, a covered institution may use a comparable form designed by the institution instead of the model disclosure form.

(Approved by the Office of Management and Budget under control number 1845–XXXB)

(Authority: 20 U.S.C. 1019c(b)).

## Subpart E—Lender Responsibilities

### § 601.40 Disclosure and reporting requirements for lenders.

(a) *Disclosures to borrowers.* (1) A lender must, at or prior to disbursement of a FFEL loan, provide the borrower, in writing (including through electronic means), in clear and understandable

terms, the disclosures required in § 682.205(a) and (b).

(2) A lender must, for each of its private education loans, comply with the disclosure requirements under section 128(e) of the Truth in Lending Act (15 U.S.C. 1638(e)).

(b) *Reports to the Secretary.* Each FFEL lender must report annually to the Secretary—

(1) Any reasonable expenses paid or provided to any agent of a covered institution who is employed in the financial aid office or has other responsibilities with respect to education loans or other student financial aid of the institution for service on a lender advisory board, commission or group established by a lender or group of lenders; or

(2) Any similar expenses paid or provided to any agent of an institution-affiliated organization who is involved in recommending, promoting, or endorsing education loans.

(3) The report required by this paragraph must include—

(i) The amount of expenses paid or provided for each specific instance in which the lender provided expenses;

(ii) The name of any agent described in paragraph (b)(1) of this section to whom the expenses were paid or provided;

(iii) The dates of the activity for which the expenses were paid or provided; and

(iv) A brief description of the activity for which the expenses were paid or provided.

(c) *Lender certification of compliance.* (1) Any FFEL lender participating in one or more preferred lender arrangements must annually certify to the Secretary its compliance with the Higher Education Act of 1965, as amended; and

(2) If the lender is required to submit an audit under 34 CFR 682.305(c), the lender's compliance with the requirements under this section must be reported on and attested to annually by the lender's auditor.

(3) A lender may comply with the certification requirements of this section if the certifications are provided as part of the annual audit required by 34 CFR 682.305(c).

(4) A lender who is not required to submit an audit must submit the required certification at such time and in such manner as directed by the Secretary.

(d) *Annual lender report to covered institutions.* A FFEL lender with a preferred lender arrangement with a covered institution or an institution-affiliated organization relating to FFEL loans must annually, on a date prescribed by the Secretary, provide to the covered institution or the institution-affiliated organization and to the Secretary, such information required by the Secretary in relation to the FFEL loans the lender plans to offer pursuant to that preferred lender arrangement for the next award year.

(Approved by the Office of Management and Budget under control number 1845–XXXA)

(Authority: 20 U.S.C. 1019a(b) and 1019b(b))

## PART 668—STUDENT ASSISTANCE GENERAL PROVISIONS

2. The authority citation for part 668 continues to read as follows:

**Authority:** 20 U.S.C. 1001, 1002, 1003, 1070g, 1085, 1088, 1091, 1092, 1094, 1099c, and 1099c–1, unless otherwise noted.

3. Section 668.14 is amended by adding new paragraphs (b)(27), (b)(28) and (b)(29) as follows:

### § 668.14 Program participation agreement.

* * * * *

(b) * * *

(27) In the case of an institution participating in a Title IV, HEA loan program, the institution—

(i) Will develop, publish, administer, and enforce a code of conduct with respect to loans made, insured or guaranteed under the Title IV, HEA loan programs in accordance with 34 CFR 601.21; and

(ii) Must inform its officers, employees, and agents with responsibilities with respect to loans made, insured or guaranteed under the Title IV, HEA loan programs annually of the provisions of the code required under paragraph (b)(27) of this section;

(28) For any year in which the institution has a preferred lender arrangement (as defined in 34 CFR 601.2(b)), it will at least annually compile, maintain, and make available for students attending the institution, and the families of such students, a list in print or other medium, of the specific lenders for loans made, insured, or guaranteed under title IV of the HEA or private education loans that the institution recommends, promotes, or endorses in accordance with such preferred lender arrangement. In making such a list, the institution must comply with the requirements in 34 CFR 682.212(h) and 34 CFR 601.10;

(29)(i) It will, upon the request of an enrolled or admitted student who is an applicant for a private education loan (as defined in 34 CFR 601.2(b)), provide to the applicant the self-certification form required under 34 CFR 601.11(d) and the information required to complete the form, to the extent the institution possesses such information, including—

(A) The applicant's cost of attendance at the institution, as determined by the institution under part F of title IV of the HEA;

(B) The applicant's expected family contribution, for students who have completed the Free Application for Federal Student Aid;

(C) The applicant's estimated financial assistance, as determined by the institution in accordance with 34 CFR 682.200;

(D) The difference between the amounts under paragraphs (b)(29)(i)(A) and (29)(i)(C) of this section, as applicable; and

(E) The sum of the amounts under paragraphs (b)(29)(i)(B) and (b)(29)(i)(D) of this section, as applicable.

(ii) It will, upon the request of the applicant, discuss with the applicant the availability of Federal, State, and institutional student financial aid;

* * * * *

4. Section 668.16 is amended by:

A. Revising paragraph (d).

B. Revising paragraph (m).

C. Revising the authority citation that appears at the end of the section.

The revisions read as follows:

### § 668.16 Standards of administrative capability.

* * * * *

(d)(1) Establishes and maintains records required under this part and the individual Title IV, HEA program regulations; and

(2)(i) Reports annually to the Secretary on any reasonable reimbursements paid or provided by a private education lender or group of lenders as described under section 140(d) of the Truth in Lending Act (15 U.S.C. 1631(d)) to any employee who is employed in the financial aid office of the institution or who otherwise has responsibilities with respect to education loans or other financial aid of the institution, including—

(A) The amount for each specific instance of reasonable expenses paid or provided;

(B) The name of the financial aid official, other employee, or agent to whom the expenses were paid or provided;

(C) The dates of the activity for which the expenses were paid or provided; and

(D) A brief description of the activity for which the expenses were paid or provided.

(ii) Expenses are considered to be reasonable if the expenses—

(A) Meet the standards of and are paid in accordance with a State government reimbursement policy applicable to the entity; or

(B) Meet the standards of and are paid in accordance with the applicable Federal cost principles for reimbursement, if no State policy that is applicable to the entity exists.

(iii) The policy must be consistently applied to an institution's employees reimbursed under this paragraph;

* * * * *

(m)(1) Has a cohort default rate—

(i) That is less than 25 percent for each of the three most recent fiscal years during which rates have been issued, to the extent those rates are calculated under subpart M of this part;

(ii) On or after 2014, that is less than 30 percent for at least two of the three most recent fiscal years during which the Secretary has issued rates for the institution under subpart N of this part; and

(iii) As defined in 34 CFR 674.5, on loans made under the Federal Perkins Loan Program to students for attendance at that institution that does not exceed 15 percent.

(2)(i) However, if the Secretary determines that an institution's administrative capability is impaired solely because the institution fails to comply with paragraph (m)(1) of this section, and the institution is not subject to a loss of eligibility under §§ 668.187(a) or 668.206(a), the Secretary allows the institution to continue to participate in the Title IV, HEA programs. In such a case, the Secretary may provisionally certify the institution in accordance with § 668.13(c) except as provided in paragraphs (m)(2)(ii), (m)(2)(iii), (m)(2)(iv), and (m)(2)(v) of this section.

(ii) An institution that fails to meet the standard of administrative capability under paragraph (m)(1)(ii) based on two cohort default rates that are greater than or equal to 30 percent but less than 40 percent is not placed on provisional certification under paragraph (m)(2)(i) of this section—

(A) If it has timely filed a request for adjustment or appeal under §§ 668.209, 668.210, or 668.212 with respect to the second such rate, and the request for adjustment or appeal is either pending or succeeds in reducing the rate below 30 percent; or

(B) If it has timely filed an appeal under §§ 668.213 or 668.214 after receiving the second such rate, and the appeal is either pending or successful.

(iii) The institution may appeal the loss of full participation in a Title IV, HEA program under paragraph (m)(2)(i) of this section by submitting an erroneous data appeal in writing to the Secretary in accordance with and on the grounds specified in §§ 668.192 or 668.211 as applicable;

(iv) If you have 30 or fewer borrowers in the three most recent cohorts of borrowers used to calculate your cohort default rate under subpart N of this part, we not provisionally certify you solely based on cohort default rates;

(v) If a rate that would otherwise potentially subject you to provisional certification under paragraph (m)(1)(ii) and (m)(2)(i) of this section is calculated as an average rate, we will not provisionally certify you solely based on cohort default rates;

* * * * *

(Authority: 20 U.S.C. 1082, 1085, 1092, 1094, and 1099c)

5. Section 668.42 is amended by:

A. In paragraph (a)(1), removing the word ''student's'' and adding, in its place, the word ''students''.

B. In paragraph (a), adding a new paragraph (4).

C. In paragraph (c) introductory text, removing the word ''shall'' and adding, in its place, the word ''must''.

D. In paragraph (c)(5), adding the word ''and'' after the punctuation ''\;''.

E. In paragraph (c)(6), removing the words ''The institution shall provide and collect exit counseling information'' and adding, in their place, the words ''The exit counseling the institution provides and collects''.

F. In paragraph (c)(6), removing the punctuation and word ''; and'' and adding, in their place, the punctuation ''.''.

G. In paragraph (c), removing paragraph (7).

The addition reads as follows:

**§ 668.42 Financial assistance information.**

(a) * * *

(4) The institution must describe the terms and conditions of the loans students receive under the Federal Family Education Loan Program, the William D. Ford Federal Direct Student Loan Program, and the Federal Perkins Loan Program.

* * * * *

6. Revise the subpart heading of subpart M to read as follows:

## Subpart M—Two Year Cohort Default Rates

7. Section 668.181 is revised to read as follows:

**§ 668.181 Purpose of this subpart.**

(a) *General.* Your cohort default rate is a measure we use to determine your eligibility to participate in various Title IV, HEA programs. We may also use it for determining your eligibility for exemptions, such as those for certain disbursement requirements under the FFEL and Direct Loan Programs. This subpart applies solely to cohorts, as defined in §§ 668.182(a) and 668.183(b), for fiscal years through 2011. For these cohorts, this subpart describes how cohort default rates are calculated, some of the consequences of cohort default rates, and how you may request changes to your cohort default rates or appeal their consequences. Under this subpart, you submit a ''challenge'' after you receive your draft cohort default rate, and you request an ''adjustment'' or ''appeal'' after your official cohort default rate is published.

(b) *Cohort Default Rates.* Notwithstanding anything to the contrary in this subpart, we will issue annually two sets of draft and official cohort default rates for fiscal years 2009, 2010, and 2011. For each of these years, you will receive one set of draft and official cohort default rates under this subpart and another set of draft and official cohort default rates under subpart N of this part.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.184 [Amended]**

8. Section 668.184(a)(1) is amended by removing the word ''If'' and adding, in its place, the words ''Except as provided under 34 CFR 600.32(d), if''.

9. Section 668.185(a)(3) is revised to read as follows:

**§ 668.185 Draft cohort default rates and your ability to challenge before official cohort default rates are issued.**

(a) * * *

(3) Your draft cohort default rate and the loan record detail report are not considered public information and may not be otherwise voluntarily released to the public by a data manager.

* * * * *

10. Section 668.186 is revised to read as follows:

**§ 668.186 Notice of your official cohort default rate.**

(a) We electronically notify you of your cohort default rate after we calculate it, by sending you an eCDR notification package to the destination point you designate. After we send our notice to you, we publish a list of cohort default rates calculated under this subpart for all institutions.

(b) If you have one or more borrowers entering repayment or are subject to sanctions, or if the Department believes you will have an official cohort default rate calculated as an average rate, you will receive a loan record detail report as part of your eCDR notification package.

(c) You have five business days, from the transmission date for eCDR notification packages as posted on the Department's Web site, to report any problem with receipt of the electronic transmission of your eCDR notification package.

(d) Except as provided in paragraph (e) of this section, timelines for submitting challenges, adjustments, and appeals begin on the sixth business day following the transmission date for eCDR notification packages that is posted on the Department's Web site.

(e) If you timely report a problem with the receipt of the electronic transmission of your eCDR notification package under paragraph (c) of this section and the Department agrees that the problem with transmission was not caused by you, the Department will extend the challenge, appeal and adjustment deadlines and timeframes to account for a retransmission of your eCDR notification package after the technical problem is resolved.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

11. Section 668.187 is revised to read as follows:

**§ 668.187 Consequences of cohort default rates on your ability to participate in Title IV, HEA programs.**

(a) *End of participation.* (1) Except as provided in paragraph (e) of this section, you lose your eligibility to participate in the FFEL and Direct Loan programs 30 days after you receive our notice that your most recent cohort default rate is greater than 40 percent.

(2) Except as provided in paragraphs (d) and (e) of this section, you lose your eligibility to participate in the FFEL, Direct Loan, and Federal Pell Grant programs 30 days after you receive our notice that your three most recent cohort default rates are each 25 percent or greater.

(b) *Length of period of ineligibility.* Your loss of eligibility under this section continues—

(1) For the remainder of the fiscal year in which we notify you that you are subject to a loss of eligibility; and

(2) For the next 2 fiscal years.

(c) *Using a cohort default rate more than once.* The use of a cohort default rate as a basis for a loss of eligibility under this section does not preclude its use as a basis for—

(1) Any concurrent or subsequent loss of eligibility under this section; or

(2) Any other action by us.

(d) *Continuing participation in Pell.* If you are subject to a loss of eligibility under paragraph (a)(2) of this section, based on three cohort default rates of 25 percent or greater, you may continue to participate in the Federal Pell Grant Program if we determine that you—

(1) Were ineligible to participate in the FFEL and Direct Loan programs before October 7, 1998, and your eligibility was not reinstated;

(2) Requested in writing, before October 7, 1998, to withdraw your participation in the FFEL and Direct Loan programs, and you were not later reinstated; or

(3) Have not certified an FFELP loan or originated a Direct Loan Program loan on or after July 7, 1998.

(e) *Requests for adjustments and appeals.* (1) A loss of eligibility under this section does not take effect while your request for adjustment or appeal, as listed in § 668.189(a), is pending, provided your request for adjustment or appeal is complete, timely, accurate, and in the required format.

(2) Eligibility continued under paragraph (e)(1) of this section ends if we determine that none of the requests for adjustments and appeals you have submitted qualify you for continued eligibility under § 668.189. Loss of eligibility takes effect on the date that you receive notice of our determination on your last pending request for adjustment or appeal.

(3) You do not lose eligibility under this section if we determine that your request for adjustment or appeal meets all requirements of this subpart and qualifies you for continued eligibility under § 668.189.

(4) To avoid liabilities you might otherwise incur under paragraph (g) of this section, you may choose to suspend your participation in the FFEL and Direct Loan programs during the adjustment or appeal process.

(f) *Liabilities during the adjustment or appeal process.* If you continued to participate in the FFEL or Direct Loan Program under paragraph (d)(1) of this section, and we determine that none of your requests for adjustments or appeals qualify you for continued eligibility—

(1) For any FFEL or Direct Loan Program loan that you certified and delivered or originated and disbursed more than 30 days after you received the notice of your cohort default rate, we estimate the amount of interest, special allowance, reinsurance, and any related or similar payments we make or are obligated to make on those loans;

(2) We exclude from this estimate any amount attributable to funds that you delivered or disbursed more than 45 days after you submitted your completed appeal to us;

(3) We notify you of the estimated amount; and

(4) Within 45 days after you receive our notice of the estimated amount, you must pay us that amount, unless—

(i) You file an appeal under the procedures established in subpart H of this part (for the purposes of subpart H of this part, our notice of the estimate is considered to be a final program review determination); or

(ii) We permit a longer repayment period.

(g) *Regaining eligibility.* If you lose your eligibility to participate in a program under this section, you may not participate in that program until—

(1) The period described in paragraph (b) of this section has ended;

(2) You pay any amount owed to us under this section or are meeting that obligation under an agreement acceptable to us;

(3) You submit a new application for participation in the program;

(4) We determine that you meet all of the participation requirements in effect at the time of your application; and

(5) You and we enter into a new program participation agreement.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

12. In § 668.188, the introductory text in paragraph (a) is revised to read as follows:

**§ 668.188 Preventing evasion of the consequences of cohort default rates.**

(a) *General.* You are subject to a loss of eligibility that has already been imposed against another institution as a result of cohort default rates if—

* * * * *

13. Section 668.190 is revised to read as follows:

**§ 668.190 Uncorrected data adjustments.**

(a) *Eligibility.* You may request an uncorrected data adjustment for your most recent cohort of borrowers, used to calculate your most recent official cohort default rate, if in response to your challenge under § 668.185(b), a data manager agreed correctly to change the data, but the changes are not reflected in your official cohort default rate.

(b) *Deadlines for requesting an uncorrected data adjustment.* You must send us a request for an uncorrected data adjustment, including all supporting documentation, within 30 days after you receive your loan record detail report from us.

(c) *Determination.* We recalculate your cohort default rate, based on the

corrected data, and electronically correct the rate that is publicly released, if we determine that—

(1) In response to your challenge under § 668.185(b), a data manager agreed to change the data;

(2) The changes described in paragraph (c)(1) of this section are not reflected in your official cohort default rate; and

(3) We agree that the data are incorrect.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

14. Section 668.191 is revised to read as follows:

**§ 668.191 New data adjustments.**

(a) *Eligibility.* You may request a new data adjustment for your most recent cohort of borrowers, used to calculate your most recent official cohort default rate, if—

(1) A comparison of the loan record detail reports that we provide to you for the draft and official cohort default rates shows that the data have been newly included, excluded, or otherwise changed; and

(2) You identify errors in the data described in paragraph (a)(1) of this section that are confirmed by the data manager.

(b) *Deadlines for requesting a new data adjustment.* (1) You must send to the relevant data manager, or data managers, and us a request for a new data adjustment, including all supporting documentation, within 15 days after you receive your loan record detail report from us.

(2) Within 20 days after receiving your request for a new data adjustment, the data manager must send you and us a response that—

(i) Addresses each of your allegations of error; and

(ii) Includes the documentation used to support the data manager's position.

(3) Within 15 days after receiving a guaranty agency's notice that we hold an FFELP loan about which you are inquiring, you must send us your request for a new data adjustment for that loan. We respond to your request as set forth under paragraph (b)(3) of this section.

(4) Within 15 days after receiving incomplete or illegible records or data from a data manager, you must send a request for replacement records or clarification of data to the data manager and us.

(5) Within 20 days after receiving your request for replacement records or clarification of data, the data manager must—

(i) Replace the missing or illegible records;

(ii) Provide clarifying information; or

(iii) Notify you and us that no clarifying information or additional or improved records are available.

(6) You must send us your completed request for a new data adjustment, including all supporting documentation—

(i) Within 30 days after you receive the final data manager's response to your request or requests; or

(ii) If you are also filing an erroneous data appeal or a loan servicing appeal, by the latest of the filing dates required in paragraph (b)(7)(i) of this section or in § 668.192(b)(6)(i) or § 668.193(c)(10)(i).

(c) *Determination.* If we determine that incorrect data were used to calculate your cohort default rate, we recalculate your cohort default rate based on the correct data and electronically correct the rate that is publicly released.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

15. Section 668.192(c) is revised to read as follows:

**§ 668.192 Erroneous data appeals.**

* * * * *

(c) *Determination.* If we determine that incorrect data were used to calculate your cohort default rate, we recalculate your cohort default rate based on the correct data and electronically correct the rate that is publicly released.

* * * * *

16. Section 668.193(f)(2) is revised to read as follows:

**§ 668.193 Loan servicing appeals.**

* * * * *

(2) Based on our determination, we use a statistically valid methodology to exclude the corresponding percentage of borrowers from both the numerator and denominator of the calculation of your cohort default rate, and electronically correct the rate that is publicly released.

* * * * *

17. Section 668.196(c) is revised to read as follows:

**§ 668.196 Average rates appeals.**

* * * * *

(c) *Determination.* You do not lose eligibility under § 668.187 if we determine that you meet the requirements for an average rates appeal. In such a case, we electronically correct the rate that is publicly released.

* * * * *

**§ 668.198 [Removed]**

18. Section 668.198 is removed.

19. Part 668, subpart M, is amended by:

A. Removing appendix A.

B. Redesignating appendix B as appendix A.

20. Part 668 is amended by adding new subpart N to read as follows:

**Subpart N—Cohort Default Rates**

Sec.

668.200 Purpose of this subpart.
668.201 Definitions of terms used in this subpart.
668.202 Calculating and applying cohort default rates.
668.203 Determining cohort default rates for institutions that have undergone a change in status.
668.204 Draft cohort default rates and your ability to challenge before official cohort default rates are issued.
668.205 Notice of your official cohort default rate.
668.206 Consequences of cohort default rates on your ability to participate in Title IV, HEA programs.
668.207 Preventing evasion of the consequences of cohort default rates.
668.208 General requirements for adjusting official cohort default rates and for appealing their consequences.
668.209 Uncorrected data adjustments.
668.210 New data adjustments.
668.211 Erroneous data appeals.
668.212 Loan servicing appeals.
668.213 Economically disadvantaged appeals.
668.214 Participation rate index appeals.
668.215 Average rates appeals.
668.216 Thirty-or-fewer borrowers appeals.
668.217 Default prevention plans.
Appendix A to Subpart N of Part 668—Sample Default Prevention Plan

## Subpart N—Cohort Default Rates

**§ 668.200 Purpose of this subpart.**

(a) *General.* Your cohort default rate is a measure we use to determine your eligibility to participate in various Title IV, HEA programs. We may also use it for determining your eligibility for exemptions, such as those for certain disbursement requirements under the FFEL and Direct Loan Programs. This subpart applies solely to cohorts, as defined in §§ 668.201(a) and 668.202(b), for fiscal years 2009 and later. For these cohorts, this subpart describes how cohort default rates are calculated, some of the consequences of cohort default rates, and how you may request changes to your cohort default rates or appeal their consequences. Under this subpart, you submit a ''challenge'' after you receive your draft cohort default rate, and you request an ''adjustment'' or ''appeal'' after your official cohort default rate is published.

(b) *Cohort Default Rates.* Notwithstanding anything to the

contrary in this subpart, we will issue annually two sets of draft and official cohort default rates for fiscal years 2009, 2010, and 2011. For each of these years, you will receive one set of draft and official cohort default rates under this subpart and another set of draft and official cohort default rates under subpart M of this part.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.201 Definitions of terms used in this subpart.**

We use the following definitions in this subpart:

(a) *Cohort.* Your cohort is a group of borrowers used to determine your cohort default rate. The method for identifying the borrowers in a cohort is provided in § 668.202(b).

(b) *Data manager.* (1) For FFELP loans held by a guaranty agency or lender, the guaranty agency is the data manager.

(2) For FFELP loans that we hold, we are the data manager.

(3) For Direct Loan Program loans, the Direct Loan Servicer, as defined in 34 CFR 685.102, is the data manager.

(c) *Days.* In this subpart, ''days'' means calendar days.

(d) *Default.* A borrower is considered to be in default for cohort default rate purposes under the rules in § 668.202(c).

(e) *Draft cohort default rate.* Your draft cohort default rate is a rate we issue, for your review, before we issue your official cohort default rate. A draft cohort default rate is used only for the purposes described in § 668.204.

(f) *Entering repayment.* (1) Except as provided in paragraphs (f)(2) and (f)(3) of this section, loans are considered to enter repayment on the dates described in 34 CFR 682.200 (under the definition of ''repayment period'') and in 34 CFR 685.207.

(2) A Federal SLS loan is considered to enter repayment—

(i) At the same time the borrower's Federal Stafford loan enters repayment, if the borrower received the Federal SLS loan and the Federal Stafford loan during the same period of continuous enrollment; or

(ii) In all other cases, on the day after the student ceases to be enrolled at an institution on at least a half-time basis in an educational program leading to a degree, certificate, or other recognized educational credential.

(3) For the purposes of this subpart, a loan is considered to enter repayment on the date that a borrower repays it in full, if the loan is paid in full before the loan enters repayment under paragraphs (f)(1) or (f)(2) of this section.

(g) *Fiscal year.* A fiscal year begins on October 1 and ends on the following September 30. A fiscal year is identified by the calendar year in which it ends.

(h) *Loan record detail report.* The loan record detail report is a report that we produce. It contains the data used to calculate your draft or official cohort default rate.

(i) *Official cohort default rate.* Your official cohort default rate is the cohort default rate that we publish for you under § 668.205. Cohort default rates calculated under this subpart are not related in any way to cohort default rates that are calculated for the Federal Perkins Loan Program.

(j) *We.* We are the Department, the Secretary, or the Secretary's designee.

(k) *You.* You are an institution.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.202 Calculating and applying cohort default rates.**

(a) *General.* This section describes the four steps that we follow to calculate and apply your cohort default rate for a fiscal year:

(1) First, under paragraph (b) of this section, we identify the borrowers in your cohort for the fiscal year. If the total number of borrowers in that cohort is fewer than 30, we also identify the borrowers in your cohorts for the 2 most recent prior fiscal years.

(2) Second, under paragraph (c) of this section, we identify the borrowers in the cohort (or cohorts) who are considered to be in default by the end of the second fiscal year following the fiscal year those borrowers entered repayment. If more than one cohort will be used to calculate your cohort default rate, we identify defaulted borrowers separately for each cohort.

(3) Third, under paragraph (d) of this section, we calculate your cohort default rate.

(4) Fourth, we apply your cohort default rate to all of your locations—

(i) As you exist on the date you receive the notice of your official cohort default rate; and

(ii) From the date on which you receive the notice of your official cohort default rate until you receive our notice that the cohort default rate no longer applies.

(b) *Identify the borrowers in a cohort.* (1) Except as provided in paragraph (b)(3) of this section, your cohort for a fiscal year consists of all of your current and former students who, during that fiscal year, entered repayment on any Federal Stafford loan, Federal SLS loan, Direct Subsidized loan, or Direct Unsubsidized loan that they received to attend your institution, or on the portion of a loan made under the Federal Consolidation Loan Program or the Federal Direct Consolidation Loan Program (as defined in 34 CFR 685.102) that is used to repay those loans.

(2) A borrower may be included in more than one of your cohorts and may be included in the cohorts of more than one institution in the same fiscal year.

(3) A TEACH Grant that has been converted to a Federal Direct Unsubsidized Loan is not considered for the purpose of calculating and applying cohort default rates.

(c) *Identify the borrowers in a cohort who are in default.* (1) Except as provided in paragraph (c)(2) of this section, a borrower in a cohort for a fiscal year is considered to be in default if, before the end of the second fiscal year following the fiscal year the borrower entered repayment—

(i) The borrower defaults on any FFELP loan that was used to include the borrower in the cohort or on any Federal Consolidation Loan Program loan that repaid a loan that was used to include the borrower in the cohort (however, a borrower is not considered to be in default unless a claim for insurance has been paid on the loan by a guaranty agency or by us);

(ii) The borrower fails to make an installment payment, when due, on any Direct Loan Program loan that was used to include the borrower in the cohort or on any Federal Direct Consolidation Loan Program loan that repaid a loan that was used to include the borrower in the cohort, and the borrower's failure persists for 360 days (or for 270 days, if the borrower's first day of delinquency was before October 7, 1998); or

(iii) You or your owner, agent, contractor, employee, or any other affiliated entity or individual make a payment to prevent a borrower's default on a loan that is used to include the borrower in that cohort.

(2) A borrower is not considered to be in default based on a loan that is, before the end of the second fiscal year following the fiscal year in which it entered repayment—

(i) Rehabilitated under 34 CFR 682.405 or 34 CFR 685.211(e); or

(ii) Repurchased by a lender because the claim for insurance was submitted or paid in error.

(d) Calculate the cohort default rate. Except as provided in § 668.203, if there are—

(1)(i) Thirty or more borrowers in your cohort for a fiscal year, your cohort default rate is the percentage that is calculated by—

(ii) Dividing the number of borrowers in the cohort who are in default, as determined under paragraph (c) of this

section by the number of borrowers in the cohort, as determined under paragraph (b) of this section.

(2)(i) Fewer than 30 borrowers in your cohort for a fiscal year, your cohort default rate is the percentage that is calculated by—

(ii) Dividing the total number of borrowers in that cohort and in the two most recent prior cohorts who are in default, as determined for each cohort under paragraph (c) of this section by the total number of borrowers in that cohort and the two most recent prior cohorts, as determined for each cohort under paragraph (b) of this section.

(Authority: 20 U.S.C. 1070g, 1082, 1085, 1094, 1099c)

**§ 668.203 Determining cohort default rates for institutions that have undergone a change in status.**

(a) *General.* (1) Except as provided under 34 CFR 600.32(d), if you undergo a change in status identified in this section, your cohort default rate is determined under this section.

(2) In determining cohort default rates under this section, the date of a merger, acquisition, or other change in status is the date the change occurs.

(3) A change in status may affect your eligibility to participate in Title IV, HEA programs under § 668.206 or § 668.207.

(4) If another institution's cohort default rate is applicable to you under this section, you may challenge, request an adjustment, or submit an appeal for the cohort default rate under the same requirements that would be applicable to the other institution under §§ 668.204 and 668.208.

(b) *Acquisition or merger of institutions.* If your institution acquires, or was created by the merger of, one or more institutions that participated independently in the Title IV, HEA programs immediately before the acquisition or merger—

(1) For the cohort default rates published before the date of the acquisition or merger, your cohort default rates are the same as those of your predecessor that had the highest total number of borrowers entering repayment in the two most recent cohorts used to calculate those cohort default rates; and

(2) Beginning with the first cohort default rate published after the date of the acquisition or merger, your cohort default rates are determined by including the applicable borrowers from each institution involved in the acquisition or merger in the calculation under § 668.202.

(c) *Acquisition of branches or locations.* If you acquire a branch or a location from another institution participating in the Title IV, HEA programs—

(1) The cohort default rates published for you before the date of the change apply to you and to the newly acquired branch or location;

(2) Beginning with the first cohort default rate published after the date of the change, your cohort default rates for the next 3 fiscal years are determined by including the applicable borrowers from your institution and the other institution (including all of its locations) in the calculation under § 668.202;

(3) After the period described in paragraph (c)(2) of this section, your cohort default rates do not include borrowers from the other institution in the calculation under § 668.202; and

(4) At all times, the cohort default rate for the institution from which you acquired the branch or location is not affected by this change in status.

(d) *Branches or locations becoming institutions.* If you are a branch or location of an institution that is participating in the Title IV, HEA programs, and you become a separate, new institution for the purposes of participating in those programs—

(1) The cohort default rates published before the date of the change for your former parent institution are also applicable to you;

(2) Beginning with the first cohort default rate published after the date of the change, your cohort default rates for the next 3 fiscal years are determined by including the applicable borrowers from your institution and your former parent institution (including all of its locations) in the calculation under § 668.202; and

(3) After the period described in paragraph (d)(2) of this section, your cohort default rates do not include borrowers from your former parent institution in the calculation under § 668.202.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.204 Draft cohort default rates and your ability to challenge before official cohort default rates are issued.**

(a) *General.* (1) We notify you of your draft cohort default rate before your official cohort default rate is calculated. Our notice includes the loan record detail report for the draft cohort default rate.

(2) Regardless of the number of borrowers included in your cohort, your draft cohort default rate is always calculated using data for that fiscal year alone, using the method described in § 668.202(d)(1).

(3) Your draft cohort default rate and the loan record detail report are not considered public information and may not be otherwise voluntarily released to the public by a data manager.

(4) Any challenge you submit under this section and any response provided by a data manager must be in a format acceptable to us. This acceptable format is described in the ''Cohort Default Rate Guide'' that we provide to you. If your challenge does not comply with the requirements in the ''Cohort Default Rate Guide,'' we may deny your challenge.

(b) *Incorrect data challenges.* (1) You may challenge the accuracy of the data included on the loan record detail report by sending a challenge to the relevant data manager, or data managers, within 45 days after you receive the data. Your challenge must include—

(i) A description of the information in the loan record detail report that you believe is incorrect; and

(ii) Documentation that supports your contention that the data are incorrect.

(2) Within 30 days after receiving your challenge, the data manager must send you and us a response that—

(i) Addresses each of your allegations of error; and

(ii) Includes the documentation that supports the data manager's position.

(3) If your data manager concludes that draft data in the loan record detail report are incorrect, and we agree, we use the corrected data to calculate your cohort default rate.

(4) If you fail to challenge the accuracy of data under this section, you cannot contest the accuracy of those data in an uncorrected data adjustment, under § 668.209, or in an erroneous data appeal, under § 668.211.

(c) *Participation rate index challenges.* (1)(i) You may challenge an anticipated loss of eligibility under § 668.206(a)(1), based on one cohort default rate over 40 percent, if your participation rate index for that cohort's fiscal year is equal to or less than 0.06015.

(ii) You may challenge an anticipated loss of eligibility under § 668.206(a)(2), based on three cohort default rates of 30 percent or greater, if your participation rate index is equal to or less than 0.0625 for any of those three cohorts' fiscal years.

(iii) You may challenge a potential placement on provisional certification under § 668.16(m)(2)(i), based on two cohort default rates that fail to satisfy the standard of administrative capability in § 668.16(m)(1)(ii), if your participation rate index is equal to or less than 0.0625 for either of the two cohorts' fiscal years.

(2) For a participation rate index challenge, your participation rate index

is calculated as described in § 668.214(b), except that—

(i) The draft cohort default rate is considered to be your most recent cohort default rate; and

(ii) If the cohort used to calculate your draft cohort default rate included fewer than 30 borrowers, you may calculate your participation rate index for that fiscal year using either your most recent draft cohort default rate or the average rate that would be calculated for that fiscal year, using the method described in § 668.202(d)(2).

(3) You must send your participation rate index challenge, including all supporting documentation, to us within 45 days after you receive your draft cohort default rate.

(4) We notify you of our determination on your participation rate index challenge before your official cohort default rate is published.

(5) If we determine that you qualify for continued eligibility or full certification based on your participation rate index challenge, you will not lose eligibility under § 668.206 or be placed on provisional certification under § 668.16(m)(2)(i) when your next official cohort default rate is published. A successful challenge that is based on your draft cohort default rate does not excuse you from any other loss of eligibility or placement on provisional certification. However, if your successful challenge under paragraph (c)(1)(ii) or (c)(1)(iii) of this section is based on a prior, official cohort default rate, and not on your draft cohort default rate, we also excuse you from any subsequent loss of eligibility, under § 668.206(a)(2) or placement on provisional certification, under § 668.16(m)(2)(i), that would be based on that official cohort default rate.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.205 Notice of your official cohort default rate.**

(a) We electronically notify you of your cohort default rate after we calculate it, by sending you an eCDR notification package to the destination point you designate. After we send our notice to you, we publish a list of cohort default rates for all institutions.

(b) If you had one or more borrowers entering repayment in the fiscal year for which the rate is calculated, or are subject to sanctions, or if the Department believes you will have an official cohort default rate calculated as an average rate, you will receive a loan record detail report as part of your eCDR notification package.

(c) You have five business days, from the transmission date for eCDR notification packages as posted on the Department's Web site, to report any problem with receipt of the electronic transmission of your eCDR notification package.

(d) Except as provided in paragraph (e) of this section, timelines for submitting challenges, adjustments, and appeals begin on the sixth business day following the announced transmission date.

(e) If you timely report a problem with transmission of your eCDR notification package under paragraph (c) of this section and the Department agrees that the problem with transmission was not caused by you, the Department will extend the challenge, appeal and adjustment deadlines and timeframes to account for a retransmission of your eCDR notification package after the technical problem is resolved.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.206 Consequences of cohort default rates on your ability to participate in Title IV, HEA programs.**

(a) *End of participation.* (1) Except as provided in paragraph (e) of this section, you lose your eligibility to participate in the FFEL and Direct Loan programs 30 days after you receive our notice that your most recent cohort default rate for fiscal year 2011 or later is greater than 40 percent.

(2) Except as provided in paragraphs (d) and (e) of this section, you lose your eligibility to participate in the FFEL, Direct Loan, and Federal Pell Grant programs 30 days after you receive our notice that your three most recent cohort default rates are each 30 percent or greater.

(b) *Length of period of ineligibility.* Your loss of eligibility under this section continues—

(1) For the remainder of the fiscal year in which we notify you that you are subject to a loss of eligibility; and

(2) For the next 2 fiscal years.

(c) *Using a cohort default rate more than once.* The use of a cohort default rate as a basis for a loss of eligibility under this section does not preclude its use as a basis for—

(1) Any concurrent or subsequent loss of eligibility under this section; or

(2) Any other action by us.

(d) *Continuing participation in Pell.* If you are subject to a loss of eligibility under paragraph (a)(2) of this section, based on three cohort default rates of 30 percent or greater, you may continue to participate in the Federal Pell Grant Program if we determine that you—

(1) Were ineligible to participate in the FFEL and Direct Loan programs before October 7, 1998, and your eligibility was not reinstated;

(2) Requested in writing, before October 7, 1998, to withdraw your participation in the FFEL and Direct Loan programs, and you were not later reinstated; or

(3) Have not certified an FFELP loan or originated a Direct Loan Program loan on or after July 7, 1998.

(e) *Requests for adjustments and appeals.* (1) A loss of eligibility under this section does not take effect while your request for adjustment or appeal, as listed in § 668.208(a), is pending, provided your request for adjustment or appeal is complete, timely, accurate, and in the required format.

(2) Eligibility continued under paragraph (e)(1) of this section ends if we determine that none of the requests for adjustments and appeals you have submitted qualify you for continued eligibility under § 668.208. Loss of eligibility takes effect on the date that you receive notice of our determination on your last pending request for adjustment or appeal.

(3) You do not lose eligibility under this section if we determine that your request for adjustment or appeal meets all requirements of this subpart and qualifies you for continued eligibility under § 668.208.

(4) To avoid liabilities you might otherwise incur under paragraph (f) of this section, you may choose to suspend your participation in the FFEL and Direct Loan programs during the adjustment or appeal process.

(f) *Liabilities during the adjustment or appeal process.* If you continued to participate in the FFEL or Direct Loan Program under paragraph (e)(1) of this section, and we determine that none of your requests for adjustments or appeals qualify you for continued eligibility—

(1) For any FFEL or Direct Loan Program loan that you certified and delivered or originated and disbursed more than 30 days after you received the notice of your cohort default rate, we estimate the amount of interest, special allowance, reinsurance, and any related or similar payments we make or are obligated to make on those loans;

(2) We exclude from this estimate any amount attributable to funds that you delivered or disbursed more than 45 days after you submitted your completed appeal to us;

(3) We notify you of the estimated amount; and

(4) Within 45 days after you receive our notice of the estimated amount, you must pay us that amount, unless—

(i) You file an appeal under the procedures established in subpart H of this part (for the purposes of subpart H

of this part, our notice of the estimate is considered to be a final program review determination); or

(ii) We permit a longer repayment period.

(g) *Regaining eligibility.* If you lose your eligibility to participate in a program under this section, you may not participate in that program until—

(1) The period described in paragraph (b) of this section has ended;

(2) You pay any amount owed to us under this section or are meeting that obligation under an agreement acceptable to us;

(3) You submit a new application for participation in the program;

(4) We determine that you meet all of the participation requirements in effect at the time of your application; and

(5) You and we enter into a new program participation agreement.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.207 Preventing evasion of the consequences of cohort default rates.**

(a) *General.* You are subject to a loss of eligibility that has already been imposed against another institution as a result of cohort default rates if—

(1) You and the ineligible institution are both parties to a transaction that results in a change of ownership, a change in control, a merger, a consolidation, an acquisition, a change of name, a change of address, any change that results in a location becoming a freestanding institution, a purchase or sale, a transfer of assets, an assignment, a change of identification number, a contract for services, an addition or closure of one or more locations or branches or educational programs, or any other change in whole or in part in institutional structure or identity;

(2) Following the change described in paragraph (a)(1) of this section, you offer an educational program at substantially the same address at which the ineligible institution had offered an educational program before the change; and

(3) There is a commonality of ownership or management between you and the ineligible institution, as the ineligible institution existed before the change.

(b) *Commonality of ownership or management.* For the purposes of this section, a commonality of ownership or management exists if, at each institution, the same person (as defined in 34 CFR 600.31) or members of that person's family, directly or indirectly—

(1) Holds or held a managerial role; or

(2) Has or had the ability to affect substantially the institution's actions, within the meaning of 34 CFR 600.21.

(c) *Teach-outs.* Notwithstanding paragraph (b)(1) of this section, a commonality of management does not exist if you are conducting a teach-out under a teach-out agreement as defined in 34 CFR 602.3 and administered in accordance with 34 CFR 602.24(c), and—

(1)(i) Within 60 days after the change described in this section, you send us the names of the managers for each facility undergoing the teach-out as it existed before the change and for each facility as it exists after you believe that the commonality of management has ended; and

(ii) We determine that the commonality of management, as described in paragraph (b)(1) of this section, has ended; or

(2)(i) Within 30 days after you receive our notice that we have denied your submission under paragraph (c)(1)(i) of this section, you make the management changes we request and send us a list of the names of the managers for each facility undergoing the teach-out as it exists after you make those changes; and

(ii) We determine that the commonality of management, as described in paragraph (b)(1) of this section, has ended.

(d) *Initial determination.* We encourage you to contact us before undergoing a change described in this section. If you write to us, providing the information we request, we will provide a written initial determination of the anticipated change's effect on your eligibility.

(e) *Notice of accountability.* (1) We notify you in writing if, in response to your notice or application filed under 34 CFR 600.20 or 600.21, we determine that you are subject to a loss of eligibility, under paragraph (a) of this section, that has been imposed against another institution.

(2) Our notice also advises you of the scope and duration of your loss of eligibility. The loss of eligibility applies to all of your locations from the date you receive our notice until the expiration of the period of ineligibility applicable to the other institution.

(3) If you are subject to a loss of eligibility under this section that has already been imposed against another institution, you may only request an adjustment or submit an appeal for the loss of eligibility under the same requirements that would be applicable to the other institution under § 668.208.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.208 General requirements for adjusting official cohort default rates and for appealing their consequences.**

(a) *Remaining eligible.* You do not lose eligibility under § 668.206 if—

(1) We recalculate your cohort default rate, and it is below the percentage threshold for the loss of eligibility as the result of—

(i) An uncorrected data adjustment submitted under this section and § 668.209;

(ii) A new data adjustment submitted under this section and § 668.210;

(iii) An erroneous data appeal submitted under this section and § 668.211; or

(iv) A loan servicing appeal submitted under this section and § 668.212; or

(2) You meet the requirements for—

(i) An economically disadvantaged appeal submitted under this section and § 668.213;

(ii) A participation rate index appeal submitted under this section and § 668.214;

(iii) An average rates appeal submitted under this section and § 668.215; or

(iv) A thirty-or-fewer borrowers appeal submitted under this section and § 668.216.

(b) *Limitations on your ability to dispute your cohort default rate.* (1) You may not dispute the calculation of a cohort default rate except as described in this subpart or in § 668.16(m)(2).

(2) You may not request an adjustment or appeal a cohort default rate, under § 668.209, § 668.210, § 668.211, or § 668.212, more than once.

(3) You may not request an adjustment or appeal a cohort default rate, under § 668.209, § 668.210, § 668.211, or § 668.212, if you previously lost your eligibility to participate in a Title IV, HEA program, under § 668.206, or were placed on provisional certification under § 668.16(m)(2)(i), based entirely or partially on that cohort default rate.

(c) *Content and format of requests for adjustments and appeals.* We may deny your request for adjustment or appeal if it does not meet the following requirements:

(1) All appeals, notices, requests, independent auditor's opinions, management's written assertions, and other correspondence that you are required to send under this subpart must be complete, timely, accurate, and in a format acceptable to us. This acceptable format is described in the ''Cohort Default Rate Guide'' that we provide to you.

(2) Your completed request for adjustment or appeal must include—

(i) All of the information necessary to substantiate your request for adjustment or appeal; and

(ii) A certification by your chief executive officer, under penalty of perjury, that all the information you provide is true and correct.

(d) *Our copies of your correspondence*. Whenever you are required by this subpart to correspond with a party other than us, you must send us a copy of your correspondence within the same time deadlines. However, you are not required to send us copies of documents that you received from us originally.

(e) *Requirements for data managers' responses*. (1) Except as otherwise provided in this subpart, if this subpart requires a data manager to correspond with any party other than us, the data manager must send us a copy of the correspondence within the same time deadlines.

(2) If a data manager sends us correspondence under this subpart that is not in a format acceptable to us, we may require the data manager to revise that correspondence's format, and we may prescribe a format for that data manager's subsequent correspondence with us.

(f) *Our decision on your request for adjustment or appeal*. (1) We determine whether your request for an adjustment or appeal is in compliance with this subpart.

(2) In making our decision for an adjustment, under § 668.209 or § 668.210, or an appeal, under § 668.211 or § 668.212—

(i) We presume that the information provided to you by a data manager is correct unless you provide substantial evidence that shows the information is not correct; and

(ii) If we determine that a data manager did not provide the necessary clarifying information or legible records in meeting the requirements of this subpart, we presume that the evidence that you provide to us is correct unless it is contradicted or otherwise proven to be incorrect by information we maintain.

(3) Our decision is based on the materials you submit under this subpart. We do not provide an oral hearing.

(4) We notify you of our decision—

(i) If you request an adjustment or appeal because you are subject to a loss of eligibility under § 668.206 or potential placement on provisional certification under § 668.16(m)(2)(i) or file an economically disadvantaged appeal under § 668.213(a)(2), within 45 days after we receive your completed request for an adjustment or appeal; or

(ii) In all other cases, except for appeals submitted under § 668.211(a) following placement on provisional certification, before we notify you of your next official cohort default rate.

(5) You may not seek judicial review of our determination of a cohort default rate until we issue our decision on all pending requests for adjustments or appeals for that cohort default rate.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.209 Uncorrected data adjustments.**

(a) *Eligibility*. You may request an uncorrected data adjustment for your most recent cohort of borrowers, used to calculate your most recent official cohort default rate, if in response to your challenge under § 668.204(b), a data manager agreed correctly to change the data, but the changes are not reflected in your official cohort default rate.

(b) *Deadlines for requesting an uncorrected data adjustment*. You must send us a request for an uncorrected data adjustment, including all supporting documentation, within 30 days after you receive your loan record detail report from us.

(c) *Determination*. We recalculate your cohort default rate, based on the corrected data, and electronically correct the rate that is publicly released if we determine that—

(1) In response to your challenge under § 668.204(b), a data manager agreed to change the data;

(2) The changes described in paragraph (c)(1) of this section are not reflected in your official cohort default rate; and

(3) We agree that the data are incorrect.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.210 New data adjustments.**

(a) *Eligibility*. You may request a new data adjustment for your most recent cohort of borrowers, used to calculate your most recent official cohort default rate, if—

(1) A comparison of the loan record detail reports that we provide to you for the draft and official cohort default rates shows that the data have been newly included, excluded, or otherwise changed; and

(2) You identify errors in the data described in paragraph (a)(1) of this section that are confirmed by the data manager.

(b) *Deadlines for requesting a new data adjustment*. (1) You must send to the relevant data manager, or data managers, and us a request for a new data adjustment, including all supporting documentation, within 15 days after you receive your loan record detail report from us.

(2) Within 20 days after receiving your request for a new data adjustment, the data manager must send you and us a response that—

(i) Addresses each of your allegations of error; and

(ii) Includes the documentation used to support the data manager's position.

(3) Within 15 days after receiving a guaranty agency's notice that we hold an FFELP loan about which you are inquiring, you must send us your request for a new data adjustment for that loan. We respond to your request as set forth under paragraph (b)(2) of this section.

(4) Within 15 days after receiving incomplete or illegible records or data from a data manager, you must send a request for replacement records or clarification of data to the data manager and us.

(5) Within 20 days after receiving your request for replacement records or clarification of data, the data manager must—

(i) Replace the missing or illegible records;

(ii) Provide clarifying information; or

(iii) Notify you and us that no clarifying information or additional or improved records are available.

(6) You must send us your completed request for a new data adjustment, including all supporting documentation—

(i) Within 30 days after you receive the final data manager's response to your request or requests; or

(ii) If you are also filing an erroneous data appeal or a loan servicing appeal, by the latest of the filing dates required in paragraph (b)(7)(i) of this section or in § 668.211(b)(6)(i) or § 668.212(c)(10)(i).

(c) *Determination*. If we determine that incorrect data were used to calculate your cohort default rate, we recalculate your cohort default rate based on the correct data and make electronic corrections to the rate that is publicly released.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.211 Erroneous data appeals.**

(a) *Eligibility*. Except as provided in § 668.208(b), you may appeal the calculation of a cohort default rate upon which a loss of eligibility, under

§ 668.206, or provisional certification, under § 668.16(m), is based if—

(1) You dispute the accuracy of data that you previously challenged on the basis of incorrect data, under § 668.204(b); or

(2) A comparison of the loan record detail reports that we provide to you for the draft and official cohort default rates shows that the data have been newly included, excluded, or otherwise changed, and you dispute the accuracy of that data.

(b) *Deadlines for submitting an appeal.* (1) You must send a request for verification of data errors to the relevant data manager, or data managers, and to us within 15 days after you receive the notice of your loss of eligibility or provisional certification. Your request must include a description of the information in the cohort default rate data that you believe is incorrect and all supporting documentation that demonstrates the error.

(2) Within 20 days after receiving your request for verification of data errors, the data manager must send you and us a response that—

(i) Addresses each of your allegations of error; and

(ii) Includes the documentation used to support the data manager's position.

(3) Within 15 days after receiving a guaranty agency's notice that we hold an FFELP loan about which you are inquiring, you must send us your request for verification of that loan's data errors. Your request must include a description of the information in the cohort default rate data that you believe is incorrect and all supporting documentation that demonstrates the error. We respond to your request as set forth under paragraph (b)(2) of this section.

(4) Within 15 days after receiving incomplete or illegible records or data, you must send a request for replacement records or clarification of data to the data manager and us.

(5) Within 20 days after receiving your request for replacement records or clarification of data, the data manager must—

(i) Replace the missing or illegible records;

(ii) Provide clarifying information; or

(iii) Notify you and us that no clarifying information or additional or improved records are available.

(6) You must send your completed appeal to us, including all supporting documentation—

(i) Within 30 days after you receive the final data manager's response to your request; or

(ii) If you are also requesting a new data adjustment or filing a loan servicing appeal, by the latest of the filing dates required in paragraph (b)(6)(i) of this section or in § 668.210(b)(6)(i) or § 668.212(c)(10)(i).

(c) *Determination.* If we determine that incorrect data were used to calculate your cohort default rate, we recalculate your cohort default rate based on the correct data and electronically correct the rate that is publicly released.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.212 Loan servicing appeals.**

(a) *Eligibility.* Except as provided in § 668.208(b), you may appeal, on the basis of improper loan servicing or collection, the calculation of—

(1) Your most recent cohort default rate; or

(2) Any cohort default rate upon which a loss of eligibility under § 668.206 is based.

(b) *Improper loan servicing.* For the purposes of this section, a default is considered to have been due to improper loan servicing or collection only if the borrower did not make a payment on the loan and you prove that the FFEL Program lender or the Direct Loan Servicer, as defined in 34 CFR 685.102, failed to perform one or more of the following activities, if that activity applies to the loan:

(1) Send at least one letter (other than the final demand letter) urging the borrower to make payments on the loan.

(2) Attempt at least one phone call to the borrower.

(3) Send a final demand letter to the borrower.

(4) For a Direct Loan Program loan only, document that skip tracing was performed if the Direct Loan Servicer determined that it did not have the borrower's current address.

(5) For an FFELP loan only—

(i) Submit a request for preclaims or default aversion assistance to the guaranty agency; and

(ii) Submit a certification or other documentation that skip tracing was performed to the guaranty agency.

(c) *Deadlines for submitting an appeal.* (1) If the loan record detail report was not included with your official cohort default rate notice, you must request it within 15 days after you receive the notice of your official cohort default rate.

(2) You must send a request for loan servicing records to the relevant data manager, or data managers, and to us within 15 days after you receive your loan record detail report from us. If the data manager is a guaranty agency, your request must include a copy of the loan record detail report.

(3) Within 20 days after receiving your request for loan servicing records, the data manager must—

(i) Send you and us a list of the borrowers in your representative sample, as described in paragraph (d) of this section (the list must be in social security number order, and it must include the number of defaulted loans included in the cohort for each listed borrower);

(ii) Send you and us a description of how your representative sample was chosen; and

(iii) Either send you copies of the loan servicing records for the borrowers in your representative sample and send us a copy of its cover letter indicating that the records were sent, or send you and us a notice of the amount of its fee for providing copies of the loan servicing records.

(4) The data manager may charge you a reasonable fee for providing copies of loan servicing records, but it may not charge more than $10 per borrower file. If a data manager charges a fee, it is not required to send the documents to you until it receives your payment of the fee.

(5) If the data manager charges a fee for providing copies of loan servicing records, you must send payment in full to the data manager within 15 days after you receive the notice of the fee.

(6) If the data manager charges a fee for providing copies of loan servicing records, and—

(i) You pay the fee in full and on time, the data manager must send you, within 20 days after it receives your payment, a copy of all loan servicing records for each loan in your representative sample (the copies are provided to you in hard copy format unless the data manager and you agree that another format may be used), and it must send us a copy of its cover letter indicating that the records were sent; or

(ii) You do not pay the fee in full and on time, the data manager must notify you and us of your failure to pay the fee and that you have waived your right to challenge the calculation of your cohort default rate based on the data manager's records. We accept that determination unless you prove that it is incorrect.

(7) Within 15 days after receiving a guaranty agency's notice that we hold an FFELP loan about which you are inquiring, you must send us your request for the loan servicing records for that loan. We respond to your request under paragraph (c)(3) of this section.

(8) Within 15 days after receiving incomplete or illegible records, you

must send a request for replacement records to the data manager and us.

(9) Within 20 days after receiving your request for replacement records, the data manager must either—

(i) Replace the missing or illegible records; or

(ii) Notify you and us that no additional or improved copies are available.

(10) You must send your appeal to us, including all supporting documentation—

(i) Within 30 days after you receive the final data manager's response to your request for loan servicing records; or

(ii) If you are also requesting a new data adjustment or filing an erroneous data appeal, by the latest of the filing dates required in paragraph (c)(10)(i) of this section or in § 668.210(b)(6)(i) or § 668.211(b)(6)(i).

(d) *Representative sample of records.* (1) To select a representative sample of records, the data manager first identifies all of the borrowers for whom it is responsible and who had loans that were considered to be in default in the calculation of the cohort default rate you are appealing.

(2) From the group of borrowers identified under paragraph (d)(1) of this section, the data manager identifies a sample that is large enough to derive an estimate, acceptable at a 95 percent confidence level with a plus or minus 5 percent confidence interval, for use in determining the number of borrowers who should be excluded from the calculation of the cohort default rate due to improper loan servicing or collection.

(e) *Loan servicing records.* Loan servicing records are the collection and payment history records—

(1) Provided to the guaranty agency by the lender and used by the guaranty agency in determining whether to pay a claim on a defaulted loan; or

(2) Maintained by our Direct Loan Servicer that are used in determining your cohort default rate.

(f) *Determination.* (1) We determine the number of loans, included in your representative sample of loan servicing records, that defaulted due to improper loan servicing or collection, as described in paragraph (b) of this section.

(2) Based on our determination, we use a statistically valid methodology to exclude the corresponding percentage of borrowers from both the numerator and denominator of the calculation of your cohort default rate, and electronically correct the rate that is publicly released.

(Approved by the Office of Management and Budget under control number 1845–0022)

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.213 Economically disadvantaged appeals.**

(a) *General.* As provided in this section you may appeal—

(1) A notice of a loss of eligibility under § 668.206; or

(2) A notice of a second successive official cohort default rate calculated under this subpart that is equal to or greater than 30 percent but less than or equal to 40 percent, potentially subjecting you to provisional certification under § 668.16(m)(2)(i).

(b) *Eligibility.* You may appeal under this section if an independent auditor's opinion certifies that your low income rate is two-thirds or more and—

(1) You offer an associate, baccalaureate, graduate, or professional degree, and your completion rate is 70 percent or more; or

(2) You do not offer an associate, baccalaureate, graduate, or professional degree, and your placement rate is 44 percent or more.

(c) *Low income rate.* (1) Your low income rate is the percentage of your students, as described in paragraph (c)(2) of this section, who—

(i) For an award year that overlaps the 12-month period selected under paragraph (c)(2) of this section, have an expected family contribution, as defined in 34 CFR 690.2, that is equal to or less than the largest expected family contribution that would allow a student to receive one-half of the maximum Federal Pell Grant award, regardless of the student's enrollment status or cost of attendance; or

(ii) For a calendar year that overlaps the 12-month period selected under paragraph (c)(2) of this section, have an adjusted gross income that, when added to the adjusted gross income of the student's parents (if the student is a dependent student) or spouse (if the student is a married independent student), is less than the amount listed in the Department of Health and Human Services poverty guidelines for the size of the student's family unit.

(2) The students who are used to determine your low income rate include only students who were enrolled on at least a half-time basis in an eligible program at your institution during any part of a 12-month period that ended during the 6 months immediately preceding the cohort's fiscal year.

(d) *Completion rate.* (1) Your completion rate is the percentage of your students, as described in paragraph (d)(2) of this section, who—

(i) Completed the educational programs in which they were enrolled;

(ii) Transferred from your institution to a higher level educational program;

(iii) Remained enrolled and are making satisfactory progress toward completion of their educational programs at the end of the same 12-month period used to calculate the low income rate; or

(iv) Entered active duty in the Armed Forces of the United States within 1 year after their last date of attendance at your institution.

(2) The students who are used to determine your completion rate include only regular students who were—

(i) Initially enrolled on a full-time basis in an eligible program; and

(ii) Originally scheduled to complete their programs during the same 12-month period used to calculate the low income rate.

(e) *Placement rate.* (1) Except as provided in paragraph (e)(2) of this section, your placement rate is the percentage of your students, as described in paragraphs (e)(3) and (e)(4) of this section, who—

(i) Are employed, in an occupation for which you provided training, on the date following 1 year after their last date of attendance at your institution;

(ii) Were employed for at least 13 weeks, in an occupation for which you provided training, between the date they enrolled at your institution and the first date that is more than a year after their last date of attendance at your institution; or

(iii) Entered active duty in the Armed Forces of the United States within 1 year after their last date of attendance at your institution.

(2) For the purposes of this section, a former student is not considered to have been employed based on any employment by your institution.

(3) The students who are used to determine your placement rate include only former students who—

(i) Were initially enrolled in an eligible program on at least a half-time basis;

(ii) Were originally scheduled, at the time of enrollment, to complete their educational programs during the same 12-month period used to calculate the low income rate; and

(iii) Remained in the program beyond the point at which a student would have received a 100 percent tuition refund from you.

(4) A student is not included in the calculation of your placement rate if that student, on the date that is 1 year after the student's originally scheduled completion date, remains enrolled in the same program and is making satisfactory progress.

(f) *Scheduled to complete.* In calculating a completion or placement

rate under this section, the date on which a student is originally scheduled to complete a program is based on—

(1) For a student who is initially enrolled full-time, the amount of time specified in your enrollment contract, catalog, or other materials for completion of the program by a full-time student; or

(2) For a student who is initially enrolled less than full-time, the amount of time that it would take the student to complete the program if the student remained at that level of enrollment throughout the program.

(g) *Deadline for submitting an appeal.* (1) Within 30 days after you receive the notice of your loss of eligibility, you must send us your management's written assertion, as described in the Cohort Default Rate Guide.

(2) Within 60 days after you receive the notice of your loss of eligibility, you must send us the independent auditor's opinion described in paragraph (h) of this section.

(h) *Independent auditor's opinion.* (1) The independent auditor's opinion must state whether your management's written assertion, as you provided it to the auditor and to us, meets the requirements for an economically disadvantaged appeal and is fairly stated in all material respects.

(2) The engagement that forms the basis of the independent auditor's opinion must be an examination-level compliance attestation engagement performed in accordance with—

(i) The American Institute of Certified Public Accountants' (AICPA) Statement on Standards for Attestation Engagements, Compliance Attestation (AICPA, Professional Standards, vol. 1, AT sec. 500), as amended (these standards may be obtained by calling the AICPA's order department, at 1–888–777–7077); and

(ii) Government Auditing Standards issued by the Comptroller General of the United States.

(i) *Determination.* You do not lose eligibility under § 668.206, and we do not provisionally certify you under § 668.16(m)(2)(i), if—

(1) Your independent auditor's opinion agrees that you meet the requirements for an economically disadvantaged appeal; and

(2) We determine that the independent auditor's opinion and your management's written assertion—

(i) Meet the requirements for an economically disadvantaged appeal; and

(ii) Are not contradicted or otherwise proven to be incorrect by information we maintain, to an extent that would render the independent auditor's opinion unacceptable.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.214 Participation rate index appeals.**

(a) *Eligibility.* (1) You may appeal a notice of a loss of eligibility under § 668.206(a)(1), based on one cohort default rate over 40 percent, if your participation rate index for that cohort's fiscal year is equal to or less than 0.06015.

(2) You may appeal a notice of a loss of eligibility under § 668.206(a)(2), based on three cohort default rates of 30 percent or greater, if your participation rate index is equal to or less than 0.0625 for any of those three cohorts' fiscal years.

(3) You may appeal potential placement on provisional certification under § 668.16(m)(2)(i) based on two cohort default rates that fail to satisfy the standard of administrative capability in § 668.16(m)(1)(ii) if your participation rate index is equal to or less than 0.0625 for either of the two cohorts' fiscal years.

(b) *Calculating your participation rate index.* (1) Except as provided in paragraph (b)(2) of this section, your participation rate index for a fiscal year is determined by multiplying your cohort default rate for that fiscal year by the percentage that is derived by dividing—

(i) The number of students who received an FFELP or a Direct Loan Program loan to attend your institution during a period of enrollment, as defined in 34 CFR 682.200 or 685.102, that overlaps any part of a 12-month period that ended during the 6 months immediately preceding the cohort's fiscal year, by

(ii) The number of regular students who were enrolled at your institution on at least a half-time basis during any part of the same 12-month period.

(2) If your cohort default rate for a fiscal year is calculated as an average rate under § 668.202(d)(2), you may calculate your participation rate index for that fiscal year using either that average rate or the cohort default rate that would be calculated for the fiscal year alone using the method described in § 668.202(d)(1).

(c) *Deadline for submitting an appeal.* You must send us your appeal under this section, including all supporting documentation, within 30 days after you receive—

(1) Notice of your loss of eligibility; or

(2) Notice of a second cohort default rate that equals or exceeds 30 percent but is less than 40 percent and that, in combination with an earlier rate, potentially subjects you to provisional certification under § 668.16(m)(2)(i).

(d) *Determination.* (1) You do not lose eligibility under § 668.206 and we do not place you on provisional certification, if we determine that you meet the requirements for a participation rate index appeal.

(2) If we determine that your participation rate index for a fiscal year is equal to or less than 0.06015 or 0.0625, under paragraph (d)(1) of this section, we also excuse you from any subsequent loss of eligibility under § 668.206(a)(2) or placement on provisional certification under § 668.16(m)(2)(i) that would be based on the official cohort default rate for that fiscal year.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.215 Average rates appeals.**

(a) *Eligibility.* (1) You may appeal a notice of a loss of eligibility under § 668.206(a)(1), based on one cohort default rate over 40 percent, if that cohort default rate is calculated as an average rate under § 668.202(d)(2).

(2) You may appeal a notice of a loss of eligibility under § 668.206(a)(2), based on three cohort default rates of 30 percent or greater, if at least two of those cohort default rates—

(i) Are calculated as average rates under § 668.202(d)(2); and

(ii) Would be less than 30 percent if calculated for the fiscal year alone using the method described in § 668.202(d)(1).

(b) *Deadline for submitting an appeal.* (1) Before notifying you of your official cohort default rate, we make an initial determination about whether you qualify for an average rates appeal. If we determine that you qualify, we notify you of that determination at the same time that we notify you of your official cohort default rate.

(2) If you disagree with our initial determination, you must send us your average rates appeal, including all supporting documentation, within 30 days after you receive the notice of your loss of eligibility.

(c) *Determination.* You do not lose eligibility under § 668.206 if we determine that you meet the requirements for an average rates appeal. In such a case, we electronically correct the rate that is publicly released.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.216 Thirty-or-fewer borrowers appeals.**

(a) *Eligibility.* You may appeal a notice of a loss of eligibility under § 668.206 if 30 or fewer borrowers, in total, are included in the 3 most recent cohorts of borrowers used to calculate your cohort default rates.

(b) *Deadline for submitting an appeal.* (1) Before notifying you of your official cohort default rate, we make an initial determination about whether you qualify for a thirty-or-fewer borrowers appeal. If we determine that you qualify, we notify you of that determination at the same time that we notify you of your official cohort default rate.

(2) If you disagree with our initial determination, you must send us your thirty-or-fewer borrowers appeal, including all supporting documentation, within 30 days after you receive the notice of your loss of eligibility.

(c) *Determination.* You do not lose eligibility under § 668.206 if we determine that you meet the requirements for a thirty-or-fewer borrowers appeal.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

**§ 668.217 Default prevention plans.**

(a) *First year.* (1) If your cohort default rate is equal to or greater than 30 percent you must establish a default prevention task force that prepares a plan to—

(i) Identify the factors causing your cohort default rate to exceed the threshold;

(ii) Establish measurable objectives and the steps you will take to improve your cohort default rate;

(iii) Specify the actions you will take to improve student loan repayment, including counseling students on repayment options; and

(iv) Submit your default prevention plan to us.

(2) We will review your default prevention plan and offer technical assistance intended to improve student loan repayment.

(b) *Second year.* (1) If your cohort default rate is equal to or greater than 30 percent for two consecutive fiscal years, you must revise your default prevention plan and submit it to us for review.

(2) We may require you to revise your default prevention plan or specify actions you need to take to improve student loan repayment.

(Authority: 20 U.S.C. 1082, 1085, 1094, 1099c)

## Appendix A to Subpart N of Part 668—Sample Default Prevention Plan

This appendix is provided as a sample plan for those institutions developing a default prevention plan in accordance with § 668.199(a)(1). It describes some measures you may find helpful in reducing the number of students that default on federally funded loans. These are not the only measures you could implement when developing a default prevention plan.

**I. Core Default Reduction Strategies**

1. Establish your default prevention team by engaging your chief executive officer and relevant senior executive officials and enlisting the support of representatives from offices other than the financial aid office. Consider including individuals and organizations independent of your institution that have experience in preventing title IV loan defaults.

2. Consider your history, resources, dollars in default, and targets for default reduction to determine which activities will result in the most benefit to you and your students.

3. Define evaluation methods and establish a data collection system for measuring and verifying relevant default prevention statistics, including a statistical analysis of the borrowers who default on their loans.

4. Identify and allocate the personnel, administrative, and financial resources appropriate to implement the default prevention plan.

5. Establish annual targets for reductions in your rate.

6. Establish a process to ensure the accuracy of your rate.

**II. Additional Default Reduction Strategies**

1. Enhance the borrower's understanding of his or her loan repayment responsibilities through counseling and debt management activities.

2. Enhance the enrollment retention and academic persistence of borrowers through counseling and academic assistance.

3. Maintain contact with the borrower after he or she leaves your institution by using activities such as skip tracing to locate the borrower.

4. Track the borrower's delinquency status by obtaining reports from data managers and FFEL Program lenders.

5. Enhance student loan repayments through counseling the borrower on loan repayment options and facilitating contact between the borrower and the data manager or FFEL Program lender.

6. Assist a borrower who is experiencing difficulty in finding employment through career counseling, job placement assistance, and facilitating unemployment deferments.

7. Identify and implement alternative financial aid award policies and develop alternative financial resources that will reduce the need for student borrowing in the first 2 years of academic study.

**III. Statistics for Measuring Progress**

1. The number of students enrolled at your institution during each fiscal year.

2. The average amount borrowed by a student each fiscal year.

3. The number of borrowers scheduled to enter repayment each fiscal year.

4. The number of enrolled borrowers who received default prevention counseling services each fiscal year.

5. The average number of contacts that you or your agent had with a borrower who was in deferment or forbearance or in repayment status during each fiscal year.

6. The number of borrowers at least 60 days delinquent each fiscal year.

7. The number of borrowers who defaulted in each fiscal year.

8. The type, frequency, and results of activities performed in accordance with the default prevention plan.

## PART 674—FEDERAL PERKINS LOAN PROGRAM

21. The authority citation for part 674 is revised to read as follows:

**Authority:** 20 U.S.C. 1070g, 1087aa–1087hh, unless otherwise noted.

22. Section 674.42 is amended by revising paragraph (b) to read as follows:

**§ 674.42 Contact with the borrower.**

* * * * *

(b) *Exit interview.* (1) An institution must ensure that exit counseling is conducted with each borrower either in person, by audiovisual presentation, or by interactive electronic means. The institution must ensure that exit counseling is conducted shortly before the borrower ceases at least half-time study at the institution. As an alternative, in the case of a student enrolled in a correspondence program or a study-abroad program that the institution approves for credit, the borrower may be provided with written counseling material by mail within 30 days after the borrower completes the program. If a borrower withdraws from the institution without the institution's prior knowledge or fails to complete an exit counseling session as required, the institution must ensure that exit counseling is provided through either interactive electronic means or by mailing counseling materials to the borrower at the borrower's last known address within 30 days after learning that the borrower has withdrawn from the institution or failed to complete exit counseling as required.

(2) The exit counseling must—

(i) Inform the student as to the average anticipated monthly repayment amount based on the student's indebtedness or on the average indebtedness of students who have obtained Perkins loans for attendance at the institution or in the borrower's program of study;

(ii) Explain to the borrower the options to prepay each loan and pay each loan on a shorter schedule;

(iii) Review for the borrower the option to consolidate a Federal Perkins Loan, including the consequences of consolidating a Perkins Loan. Information on the consequences of loan consolidation must include, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan

forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan or to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(iv) Include debt-management strategies that are designed to facilitate repayment;

(v) Explain the use of a Master Promissory Note;

(vi) Emphasize to the borrower the seriousness and importance of the repayment obligation the borrower is assuming;

(vii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(viii) Emphasize that the borrower is obligated to repay the full amount of the loan even if the borrower has not completed the program, has not completed the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or did not receive educational or other services that the borrower purchased from the institution;

(ix) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or cancellation of principal and interest, defer repayment of principal or interest, or be granted an extension of the repayment period or a forbearance on a title IV loan; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(x) Require the borrower to provide current information concerning name, address, social security number, references, and driver's license number, the borrower's expected permanent address, the address of the borrower's next of kin, as well as the name and address of the borrower's expected employer;

(xi) Review for the borrower information on the availability of the Student Loan Ombudsman's office;

(xii) Inform the borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information; and

(xiii) A general description of the types of tax benefits that may be available to borrowers.

(3) If exit counseling is conducted through interactive electronic means, the institution must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.

(4) The institution must maintain documentation substantiating the institution's compliance with this section for each borrower.

* * * * *

23. Section 674.51 is amended by:

A. Revising paragraph (d).

B. Redesignating paragraphs (e) through (s) as follows:

| Old paragraph | New paragraph |
|---|---|
| 674.51(e) | 674.51(f) |
| 674.51(f) | 674.51(h) |
| 674.51(g) | 674.51(l) |
| 674.51(h) | 674.51(m) |
| 674.51(i) | 674.51(n) |
| 674.51(j) | 674.51(p) |
| 674.51(k) | 674.51(q) |
| 674.51(l) | 674.51(r) |
| 674.51(m) | 674.51(s) |
| 674.51(n) | 674.51(t) |
| 674.51(o) | 674.51(u) |
| 674.51(p) | 674.51(w) |
| 674.51(q) | 674.51(y) |
| 674.51(r) | 674.51(z) |
| 674.51(s) | 674.51(aa) |

C. Adding new paragraphs (e), (g), (i), (j), (k), (o), (v), (x), and (bb).

D. In newly redesignated paragraph (f), removing the number ''672(2)'', and adding, in its place, the number ''632(4)''.

E. Revising newly redesignated paragraph (n).

F. In newly redesignated paragraph (t), by removing the number ''672(2)'', and adding, in its place, the number ''632''.

G. Revising newly designated paragraph (aa).

H. Revising the authority citation that appears at the end of the section.

The revisions and additions read as follows:

**§ 674.51 Special Definitions.**

* * * * *

(d) *Child with a disability:* A child or youth from ages 3 through 21, inclusive, who requires special education and related services because he or she has one or more disabilities as defined in section 602(3) of the Individuals with Disabilities Education Act.

(e) *Community defender organizations:* A defender organization established in accordance with section 3006A(g)(2)(B) of title 18, United States Code.

* * * * *

(g) *Educational service agency:* A regional public multi-service agency authorized by State law to develop, manage, and provide services or programs to local educational agencies as defined in section 9101 of the Elementary and Secondary Education Act of 1965, as amended.

* * * * *

(i) *Faculty member at a Tribal College or University:* An educator or tenured individual who is employed by a Tribal College or University, as that term is defined in section 316 of the HEA, to teach, research, or perform administrative functions. For purposes of this definition an educator may be an instructor, lecturer, lab faculty, assistant professor, associate professor, full professor, dean, or academic department head.

(j) *Federal public defender organization:* A defender organization established in accordance with section 3006A(g)(2)(A) of title 18, United States Code.

(k) *Firefighter:* A firefighter is an individual who is employed by a Federal, State, or local firefighting agency to extinguish destructive fires; or provide firefighting related services such as—

(1) Providing community disaster support and, as a first responder, providing emergency medical services;

(2) Conducting search and rescue; or

(3) Providing hazardous materials mitigation (HAZMAT).

* * * * *

(n) *Infant or toddler with a disability:* An infant or toddler from birth to age 2, inclusive, who need early intervention services for specified reasons, as defined in section 632(5)(A) of the Individuals with Disabilities Education Act.

(o) *Librarian with a master's degree:* A librarian with a master's degree is an information professional trained in library or information science who has obtained a postgraduate academic degree in library science awarded after the completion of an academic program of up to six years in duration, excluding a doctorate or professional degree.

* * * * *

(v) *Speech language pathologist with a master's degree:* An individual who evaluates or treats disorders that affect a person's speech, language, cognition, voice, swallowing and the rehabilitative or corrective treatment of physical or cognitive deficits/disorders resulting in difficulty with communication, swallowing, or both and has obtained a postgraduate academic degree awarded after the completion of an academic program of up to six years in duration, excluding a doctorate or professional degree.

(x) *Substantial gainful activity:* A level of work performed for pay or profit that involves doing significant physical

or mental activities, or a combination of both.

* * * * *

(aa) *Total and permanent disability:* The condition of an individual who—

(1) Is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that—

(i) Can be expected to result in death;

(ii) Has lasted for a continuous period of not less than 60 months; or

(iii) Can be expected to last for a continuous period of not less than 60 months; or

(2) Has been determined by the Secretary of Veterans Affairs to be unemployable due to a service-connected disability.

(bb) *Tribal College or University:* An institution that—

(1) Qualifies for funding under the Tribally Controlled Colleges and Universities Assistance Act of 1978 (25 U.S.C. 1801 *et seq.*) or the Navajo Community College Assistance Act of 1978 (25 U.S.C. 640a note); or

(2) Is cited in section 532 of the Equity in Education Land Grant Status Act of 1994 (7 U.S.C. 301 note).

* * * * *

24. Section 674.53 is amended by:

A. Adding new paragraph (a)(1)(iii).

B. Revising paragraphs (a)(2)(i) and (a)(2)(ii).

C. Revising paragraph (a)(3).

D. Revising paragraphs (a)(4)(i) and (a)(4)(ii).

E. Removing paragraph (a)(4)(iii).

F. Revising paragraph (a)(6).

G. Adding new paragraph (b)(3).

H. In paragraph (d)(1), removing the word ''shall'' and adding, in its place, the word ''must''.

I. Revising paragraph (e).

The revisions and additions read as follows:

**§ 674.53 Teacher cancellation—Federal Perkins, NDSL and Defense loans.**

* * * * *

(a) * * *

(1) * * *

(iii) An institution must cancel up to 100 percent of the outstanding balance of a Federal Perkins, NDSL, or Defense loan for teaching service that includes August 14, 2008, or begins on or after that date, at an educational service agency.

* * * * *

(2) * * *

(i) Is in a school district that qualified for funds, in that year, under part A of title I of the Elementary and Secondary Education Act of 1965, as amended; and

(ii) Has been selected by the Secretary based on a determination that more than 30 percent of the school's or educational service agency's total enrollment is made up of title I children.

(3) For each academic year, the Secretary notifies participating institutions of the schools and educational service agencies selected under paragraph (a) of this section.

(4)(i) The Secretary selects schools and educational service agencies under paragraph (a)(1) of this section based on a ranking by the State education agency.

(ii) The State education agency must base its ranking of the schools and educational service agencies on objective standards and methods. These standards must take into account the numbers and percentages of title I children attending those schools and educational service agencies.

* * * * *

(6) A teacher, who performs service in a school or educational service agency that meets the requirement of paragraph (a)(1) of this section in any year and in a subsequent year fails to meet these requirements, may continue to teach in that school or educational service agency and will be eligible for loan cancellation pursuant to paragraph (a) of this section in subsequent years.

* * * * *

(b) * * *

(3) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins, NDSL, or Defense loan for a borrower's service that includes August 14, 2008, or begins on or after that date, as a full-time special education teacher of infants, toddlers, children, or youth with disabilities, in an educational service agency.

* * * * *

(e) *Teaching in a school system.* The Secretary considers a borrower to be teaching in a public or other nonprofit elementary or secondary school system or an educational service agency only if the borrower is directly employed by the school system.

* * * * *

25. Section 674.56 is amended by:

A. Revising paragraph (c)(1).

B. Redesignating paragraph (d) as paragraph (h).

C. Adding paragraphs (d), (e), (f), and (g), respectively.

C. Revising newly redesignated paragraph (h).

The revisions and additions read as follows:

**§ 674.56 Employment cancellation—Federal Perkins, NDSL, and Defense loans.**

* * * * *

(c) * * * (1) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins or NDSL made on or after July 23, 1992, for the borrower's service as a full-time qualified professional provider of early intervention services in a public or other nonprofit program under public supervision by the lead agency as authorized in section 632 of the Individuals with Disabilities Education Act.

* * * * *

(d) *Cancellation for full-time employment as a firefighter to a local, State, or Federal fire department or fire district.* An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins, NDSL, or Defense loan for service that includes August 14, 2008, or begins on or after that date, as a full-time firefighter.

(e) *Cancellation for full-time employment as a faculty member at a Tribal College or University.* An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins, NDSL, or Defense loan for service that includes August 14, 2008, or begins on or after that date, as a full-time faculty member at a Tribal College or University.

(f) *Cancellation for full-time employment as a librarian with a master's degree.* (1) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins Loan, NDSL, or Defense loan for service that includes August 14, 2008, or begins on or after that date, as a full-time librarian, provided that the individual—

(i) Is a librarian with a master's degree; and

(ii) Is employed in an elementary school or secondary school that is eligible for assistance under part A of title I of the Elementary and Secondary Education Act of 1965, as amended; or

(iii) Is employed by a public library that serves a geographic area that contains one or more schools eligible for assistance under part A of title I of the Elementary and Secondary Education Act of 1965, as amended.

(2) For the purposes of paragraph (f) of this section, the term *geographic area* is defined as the area served by the local school district.

(g) *Cancellation for full-time employment as a speech pathologist with a master's degree.* An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins Loan, NDSL, or Defense loan for full-time employment that includes August 14, 2008, or begins on or after that date, as a speech pathologist

with a master's degree who is working exclusively with schools eligible for funds under part A of title I of the Elementary and Secondary Education Act of 1965, as amended.

(h) *Cancellation rates.* (1) To qualify for cancellation under paragraphs (a), (b), (c), (d), (e), (f), and (g) of this section, a borrower must work full-time for 12 consecutive months.

* * * * *

26. Section 674.57 is revised to read as follows:

**§ 674.57 Cancellation for law enforcement or corrections officer service—Federal Perkins, NDSL, and Defense loans.**

(a)(1) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins or NDSL made on or after November 29, 1990, for full-time service as a law enforcement or corrections officer for an eligible employing agency.

(2) An institution must cancel up to 100 percent of the outstanding loan balance on a Federal Perkins, NDSL, or Defense loan made prior to November 29, 1990, for law enforcement or correction officer service performed on or after October 7, 1998, if the cancellation benefits provided under this section are not included in the terms of the borrower's promissory note.

(3) An eligible employing agency is an agency—

(i) That is a local, State, or Federal law enforcement or corrections agency;

(ii) That is public-funded; and

(iii) The principal activities of which pertain to crime prevention, control, or reduction or the enforcement of the criminal law.

(4) Agencies that are primarily responsible for enforcement of civil, regulatory, or administrative laws are ineligible employing agencies.

(5) A borrower qualifies for cancellation under this section only if the borrower is—

(i) A sworn law enforcement or corrections officer; or

(ii) A person whose principal responsibilities are unique to the criminal justice system.

(6) To qualify for a cancellation under this section, the borrower's service must be essential in the performance of the eligible employing agency's primary mission.

(7) The agency must be able to document the employee's functions.

(8) A borrower whose principal official responsibilities are administrative or supportive does not qualify for cancellation under this section.

(b) An institution must cancel up to 100 percent of the outstanding balance of a borrower's Federal Perkins, NDSL, or Defense loan for service that includes August 14, 2008, or begins on or after that date, as a full-time attorney employed in Federal public defender organizations or community defender organizations, established in accordance with section 3006A(g)(2) of title 18, U.S.C.

(c)(1) To qualify for cancellation under paragraph (a) of this section, a borrower must work full-time for 12 consecutive months.

(2) Cancellation rates are—

(i) 15 percent of the original principal loan amount plus the interest on the unpaid balance accruing during the year of qualifying service, for each of the first and second years of full-time employment;

(ii) 20 percent of the original principal loan amount plus the interest on the unpaid balance accruing during the year of qualifying service, for each of the third and fourth years of full-time employment; and

(iii) 30 percent of the original principal loan amount plus the interest on the unpaid balance accruing during the year of qualifying service, for the fifth year of full-time employment.

(Authority: 20 U.S.C. 1087ee)

27. Section 674.58 is amended by:

A. Revising the section heading.

B. Redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5), respectively.

C. Adding new paragraph (a)(3).

D. Revising newly redesignated paragraph (a)(4).

E. Revising newly redesignated paragraph (a)(5).

F. Redesignating paragraph (c)(2) as paragraph (c)(4).

G. Adding new paragraphs (c)(2) and (c)(3).

H. Revising newly redesignated paragraph (c)(4).

The revisions and additions read as follows:

**§ 674.58 Cancellation for service in an early childhood education program.**

* * * * *

(a) * * *

(3) An institution must cancel up to 100 percent of the outstanding balance of a borrower's NDSL, Defense, or Federal Perkins loan for service that includes August 14, 2008, or begins on or after that date, as a full-time staff member of a pre-kindergarten or childcare program that is licensed or regulated by the State.

(4) The Head Start, pre-kindergarten or child care program in which the borrower serves must operate for a complete academic year, or its equivalent.

(5) In order to qualify for cancellation, the borrower's salary may not exceed the salary of a comparable employee working in the local educational agency of the area served by the local Head Start, pre-kindergarten or child care program.

* * * * *

(c) * * *

(2) A pre-kindergarten program is a State-funded program that serves children from birth through age six and addresses the children's cognitive (including language, early literacy, and early mathematics), social, emotional, and physical development.

(3) A child care program is a program that is licensed and regulated by the State and provides child care services for fewer than 24 hours per day per child, unless care in excess of 24 consecutive hours is needed due to the nature of the parents' work.

(4) ''Full-time staff member'' is a person regularly employed in a full-time professional capacity to carry out the educational part of a Head Start, pre-kindergarten or child care program.

* * * * *

28. Section 674.59 is amended by:

a. Revising the section heading.

b. Removing in paragraph (a)(1) the word ''shall'' and adding, in its place, the word ''must''.

c. Revising paragraph (b)(1).

d. Adding new paragraph (c).

e. Redesignating paragraph (b)(3) as paragraph (d).

f. Revising the authority citation that appears at the end of the section.

The addition and revisions read as follows:

**§ 674.59 Cancellation for military service.**

* * * * *

(b) * * * (1) An institution must cancel up to 50 percent of the outstanding balance on an NDSL or Perkins loan for active duty service that ended before August 14, 2008, as a member of the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard in an area of hostilities that qualifies for special pay under section 310 of title 37 of the United States Code.

* * * * *

(c)(1) An institution must cancel up to 100 percent of the outstanding balance on a borrower's Federal Perkins or NDSL loan for a borrower's full year of active duty service that includes August 14, 2008, or begins on or after that date, as a member of the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard in an area of hostilities that qualifies for special pay under section 310 of title 37 of the United States Code.

(2) The cancellation rate is 15 percent for the first and second year of

qualifying service, 20 percent for the third and fourth year of qualifying service, and 30 percent for the fifth year of qualifying service.

* * * * *

(Authority: 20 U.S.C. 1087ee)

**§ 674.61 [Amended]**

29. Section 674.61 is amended by removing the citation ''§ 674.51(s)'' each time it appears and adding, in its place, the citation ''§ 674.51(aa)''.

## PART 682—FEDERAL FAMILY EDUCATION LOAN (FFEL) PROGRAM

30. The authority citation for part 682 is revised to read as follows:

**Authority:** 20 U.S.C. 1070g, 1071 to 1087–2, unless otherwise noted.

31. Paragraph (h) of § 682.212 is revised to read as follows:

**§ 682.212 Prohibited transactions.**

* * * * *

(h) A school may, at its option, make available a list of recommended or suggested lenders, in print or any other medium or form, for use by the school's students or their parents provided that such list complies with the requirements in 34 CFR 601.10 and 668.14(a)(28).

* * * * *

32. Section 682.604 is amended by revising paragraphs (c)(5), (c)(8), (f), and (g) to read as follows:

**§ 682.604 Processing the borrower's loan proceeds and counseling borrowers.**

* * * * *

(c) * * *

(5) A school may not release the first installment of a Stafford loan for endorsement to a student who is enrolled in the first year of an undergraduate program of study and who has not previously received a Stafford, SLS, Direct Subsidized, or Direct Unsubsidized loan until 30 days after the first day of the student's program of study unless—

(i) Except as provided in paragraph (c)(5)(ii) of this section, the school in which the student is enrolled has a cohort default rate, calculated under subpart M of 34 CFR part 668, of less than 10 percent for each of the three most recent fiscal years for which data are available; or

(ii) For loans first disbursed on or after October 1, 2011, the school in which the student is enrolled has a cohort default rate, calculated under either subpart M or subpart N of 34 CFR part 668 of less than 15 percent for each of the three most recent fiscal years for which data are available; or

(iii) The school is an eligible home institution certifying a loan to cover the student's cost of attendance in a study abroad program and has a cohort default rate, calculated under either subpart M or subpart N of 34 CFR part 668, of less than 5 percent for the single most recent fiscal year for which data are available.

* * * * *

(8) Notwithstanding the requirements of paragraphs (c)(6) through (c)(9) of this section, a school is not required to deliver loan proceeds in more than one installment if—

(i)(A) The student's loan period is not more than one semester, one trimester, one quarter, or, for non term-based schools or schools with non-standard terms, 4 months; and

(B)(*1*) Except as provided in paragraph (c)(8)(i)(B)(*2*) of this section, the school in which the student is enrolled has a cohort default rate, calculated under subpart M of 34 CFR part 668, of less than 10 percent for each of the three most recent fiscal years for which data are available; or

(*2*) For loan disbursements made on or after October 1, 2011, the school in which the student is enrolled has a cohort default rate, calculated under either subpart M or subpart N of 34 CFR part 668 of less than 15 percent for each of the three most recent fiscal years for which data are available; or

(ii) The school is an eligible home institution certifying a loan to cover the student's cost of attendance in a study abroad program and has a cohort default rate, calculated under subpart M or subpart N of 34 CFR part 668, of less than 5 percent for the single most recent fiscal year for which data are available.

* * * * *

(f) *Initial counseling.* (1) A school must ensure that initial counseling is conducted with each Stafford loan borrower prior to its release of the first disbursement, unless the student borrower has received a prior Federal Stafford, Federal SLS, or Direct subsidized or unsubsidized loan.

(2) A school must ensure that initial counseling is conducted with each graduate or professional student PLUS loan borrower prior to its release of the first disbursement, unless the student has received a prior Federal PLUS loan or Direct PLUS loan.

(3) Initial counseling for Stafford and graduate or professional student PLUS Loan borrowers must provide comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(4) If initial counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the initial counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions regarding those programs. As an alternative, prior to releasing the proceeds of a loan, in the case of a student borrower enrolled in a correspondence program or a student borrower enrolled in a study-abroad program that the home institution approves for credit, the counseling may be provided through written materials.

(6) Initial counseling for Stafford Loan borrowers must—

(i) Explain the use of a Master Promissory Note;

(ii) Emphasize to the student borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) In the case of a student borrower (other than a loan made or originated by the school), emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Stafford loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on an unsubsidized Stafford Loan while the borrower is in school;

(ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

(x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

(xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records; and

(xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan.

(7) Initial counseling for graduate or professional student PLUS Loan borrowers must—

(i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Stafford and PLUS loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student PLUS Loan borrower who has received a prior FFEL Stafford, or Direct subsidized or unsubsidized loan, provide the information specified in § 682.603(d)(1)(i) through § 682.603(d)(1)(iii); and

(iv) For a graduate or professional student PLUS Loan borrower who has not received a prior FFEL Stafford, or Direct subsidized or unsubsidized loan, provide the information specified in paragraph (f)(6)(i) through (f)(6)(xii) of this section.

(8) A school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(g) *Exit counseling.* (1) A school must ensure that exit counseling is conducted with each Stafford loan borrower and graduate or professional student PLUS Loan borrower either in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that this counseling is conducted shortly before the student borrower ceases at least half-time study at the school, and that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program that the home institution approves for credit, written counseling materials may be provided by mail within 30 days after the student borrower completes the program. If a student borrower withdraws from school without the school's prior knowledge or fails to complete an exit counseling session as required, the school must ensure that exit counseling is provided through either interactive electronic means or by mailing written counseling materials to the student borrower at the student borrower's last known address within 30 days after learning that the student borrower has withdrawn from school or failed to complete the exit counseling as required.

(2) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Stafford loans, PLUS Loans, or student borrowers who have obtained both Stafford and PLUS loans, depending on the types of loans the student borrower has obtained, for attendance at the same school or in the same program of study at the same school;

(ii) Review for the student borrower available repayment plan options, including standard, graduated, extended, income sensitive and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

(vi) Include the matters described in paragraph (f)(6)(i), (f)(6)(ii), and (f)(6)(iv) of this section;

(vii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(viii) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan, including forgiveness benefits or discharge benefits available to a FFEL borrower who consolidates his or her loan into the Direct Loan program; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(ix) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known). The school must ensure that this information is provided to the guaranty agency or agencies listed in the student borrower's records within 60 days after the student borrower provides the information;

(x) Review for the student borrower information on the availability of the Student Loan Ombudsman's office;

(xi) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how

NSLDS can be used to obtain title IV loan status information; and

(xii) A general description of the types of tax benefits that may be available to borrowers.

(3) If exit counseling is conducted by electronic interactive means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the counseling.

(4) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

* * * * *

## PART 685—WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

33. The authority citation for part 685 continues to read as follows:

**Authority:** 20 U.S.C. 1070g, 1087a, *et seq.*, unless otherwise noted.

34. Section 685.301(b)(6) is amended by:

A. Revising paragraph (b)(6)(i).

B. In paragraph (b)(6)(ii), removing the reference to ''Paragraphs (b)(8)(i)(A) and (B) of this section'' and adding, in its place, a reference to ''Paragraphs (b)(6)(i)(A) and (B) of this section''.

C. In paragraph (b)(6)(ii), adding the words ''or subpart N'' after the words ''under subpart M''.

D. In paragraph (b)(6)(iii), removing the reference to ''Paragraph (b)(8)(i)(B) of this section'' and adding, in its place, a reference to ''Paragraph (b)(6)(i)(B) of this section''.

E. In paragraph (b)(6)(iii), adding the words ''or subpart N'' after the words ''under subpart M''.

The revision reads as follows:

### § 685.301 Origination of a loan by a Direct Loan Program school.

* * * * *

(b) * * *

(6)(i) A school is not required to make more than one disbursement if—

(A)(*1*) The loan period is not more than one semester, one trimester, one quarter, or, for non term-based schools or schools with non-standard terms, 4 months; and

(*2*)(*i*) Except as provided in paragraph (b)(6)(i)(A)(*2*)(*ii*) of this section, the school has a cohort default rate, calculated under subpart M of 34 CFR part 668 of less than 10 percent for each of the three most recent fiscal years for which data are available;

(*ii*) For loan disbursements made on or after October 1, 2011, the school in which the student is enrolled has a cohort default rate, calculated under either subpart M or subpart N of 34 CFR part 668 of less than 15 percent for each of the three most recent fiscal years, for which data are available.

(B) The school is an eligible home institution originating a loan to cover the cost of attendance in a study abroad program and has a cohort default rate, calculated under subpart M or subpart N of 34 part 668, of less than 5 percent for the single most recent fiscal year for which data are available; or

(C) The school is not in a State.

* * * * *

35. Section 685.303(b)(4) is amended by:

A. Revising paragraph (b)(4)(i)(A).

B. In paragraph (b)(4)(ii), adding the words ''or subpart N'' after the words ''under subpart M''.

C. In paragraph (b)(4)(iii), removing the words ''Subpart M'' and adding in their place the words ''subpart M or subpart N''.

The revision reads as follows:

### § 685.303 Processing loan proceeds.

* * * * *

(b) * * *

(4) * * *

(i) * * *

(A)(*1*) Except as provided in paragraph (b)(4)(i)(A)(*2*) of this section, the school has a cohort default rate, calculated under subpart M of 34 CFR part 668, or weighted average cohort rate of less than 10 percent for each of the three most recent fiscal years for which data are available; or

(*2*) For loans first disbursed on or after October 1, 2011, the school in which the student is enrolled has a cohort default rate, calculated under either subpart M or N of 34 CFR part 668 of less than 15 percent for each of the three most recent fiscal years for which data are available;

* * * * *

36. Section 685.304 is revised to read as follows:

### § 685.304 Counseling borrowers.

(a) *Initial counseling.* (1) Except as provided in paragraph (a)(8) of this section, a school must ensure that initial counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan student borrower prior to making the first disbursement of the proceeds of a loan to a student borrower unless the student borrower has received a prior Direct Subsidized, Direct Unsubsidized, Federal Stafford, or Federal SLS Loan.

(2) Except as provided in paragraph (a)(8) of this section, a school must ensure that initial counseling is conducted with each graduate or professional student Direct PLUS Loan borrower prior to making the first disbursement of the loan unless the student borrower has received a prior Direct PLUS Loan or Federal PLUS Loan.

(3) Initial counseling for Direct Subsidized Loan, Direct Unsubsidized Loan, and graduate or professional student Direct PLUS Loan borrowers must provide the borrower with comprehensive information on the terms and conditions of the loan and on the responsibilities of the borrower with respect to the loan. This information may be provided to the borrower—

(i) During an entrance counseling session, conducted in person;

(ii) On a separate written form provided to the borrower that the borrower signs and returns to the school; or

(iii) Online or by interactive electronic means, with the borrower acknowledging receipt of the information.

(4) If initial counseling is conducted online or through interactive electronic means, the school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the initial counseling, which may include completion of any interactive program that tests the borrower's understanding of the terms and conditions of the borrower's loans.

(5) A school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials before the loan proceeds are disbursed.

(6) Initial counseling for Direct Subsidized Loan and Direct Unsubsidized Loan borrowers must—

(i) Explain the use of a Master Promissory Note (MPN);

(ii) Emphasize to the borrower the seriousness and importance of the repayment obligation the student borrower is assuming;

(iii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(iv) Emphasize that the student borrower is obligated to repay the full amount of the loan even if the student borrower does not complete the program, does not complete the program within the regular time for program completion, is unable to obtain employment upon completion, or is otherwise dissatisfied with or does not

receive the educational or other services that the student borrower purchased from the school;

(v) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels of indebtedness of Direct Subsidized Loan and Direct Unsubsidized Loan borrowers, or student borrowers with Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school as the borrower;

(vi) To the extent practicable, explain the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance;

(vii) Provide information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary;

(viii) Inform the borrower of the option to pay the interest on a Direct Unsubsidized Loan while the borrower is in school;

(ix) Explain the definition of half-time enrollment at the school, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment;

(x) Explain the importance of contacting the appropriate offices at the school if the borrower withdraws prior to completing the borrower's program of study so that the school can provide exit counseling, including information regarding the borrower's repayment options and loan consolidation;

(xi) Provide information on the National Student Loan Data System and how the borrower can access the borrower's records; and

(xii) Provide the name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower's rights and responsibilities or the terms and conditions of the loan.

(7) Initial counseling for graduate or professional student Direct PLUS Loan borrowers must—

(i) Inform the student borrower of sample monthly repayment amounts based on—

(A) A range of student levels or indebtedness of graduate or professional student PLUS loan borrowers, or student borrowers with Direct PLUS Loans and Direct Subsidized Loans or Direct Unsubsidized Loans, depending on the types of loans the borrower has obtained; or

(B) The average indebtedness of other borrowers in the same program at the same school;

(ii) Inform the borrower of the option to pay interest on a PLUS Loan while the borrower is in school;

(iii) For a graduate or professional student PLUS Loan borrower who has received a prior FFEL Stafford, or Direct Subsidized or Unsubsidized Loan, provide the information specified in § 685.301(a)(3)(i)(A) through § 685.301(a)(3)(i)(C); and

(iv) For a graduate or professional student PLUS Loan borrower who has not received a prior FFEL Stafford, or Direct Subsidized or Direct Unsubsidized Loan, provide the information specified in paragraph (a)(6)(i) through paragraph (a)(6)(xii) of this section.

(8) A school may adopt an alternative approach for initial counseling as part of the school's quality assurance plan described in § 685.300(b)(9). If a school adopts an alternative approach, it is not required to meet the requirements of paragraphs (a)(1) through (a)(7) of this section unless the Secretary determines that the alternative approach is not adequate for the school. The alternative approach must—

(i) Ensure that each student borrower subject to initial counseling under paragraph (a)(1) or (a)(2) of this section is provided written counseling materials that contain the information described in paragraphs (a)(6)(i) through (a)(6)(v) of this section;

(ii) Be designed to target those student borrowers who are most likely to default on their repayment obligations and provide them more intensive counseling and support services; and

(iii) Include performance measures that demonstrate the effectiveness of the school's alternative approach. These performance measures must include objective outcomes, such as levels of borrowing, default rates, and withdrawal rates.

(9) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(b) *Exit counseling.* (1) A school must ensure that exit counseling is conducted with each Direct Subsidized Loan or Direct Unsubsidized Loan borrower and graduate or professional student Direct PLUS Loan borrower shortly before the student borrower ceases at least half-time study at the school.

(2) The exit counseling must be in person, by audiovisual presentation, or by interactive electronic means. In each case, the school must ensure that an individual with expertise in the title IV programs is reasonably available shortly after the counseling to answer the student borrower's questions. As an alternative, in the case of a student borrower enrolled in a correspondence program or a study-abroad program approved for credit at the home institution, the student borrower may be provided with written counseling materials within 30 days after the student borrower completes the program.

(3) If a student borrower withdraws from school without the school's prior knowledge or fails to complete the exit counseling as required, exit counseling must be provided either through interactive electronic means or by mailing written counseling materials to the student borrower at the student borrower's last known address within 30 days after the school learns that the student borrower has withdrawn from school or failed to complete the exit counseling as required.

(4) The exit counseling must—

(i) Inform the student borrower of the average anticipated monthly repayment amount based on the student borrower's indebtedness or on the average indebtedness of student borrowers who have obtained Direct Subsidized Loans and Direct Unsubsidized Loans, student borrowers who have obtained only Direct PLUS Loans, or student borrowers who have obtained Direct Subsidized, Direct Unsubsidized, and Direct PLUS Loans, depending on the types of loans the student borrower has obtained, for attendance at the same school or in the same program of study at the same school;

(ii) Review for the student borrower available repayment plan options including the standard repayment, extended repayment, graduated repayment, income contingent repayment plans, and income-based repayment plans, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments under each plan;

(iii) Explain to the borrower the options to prepay each loan, to pay each loan on a shorter schedule, and to change repayment plans;

(iv) Provide information on the effects of loan consolidation including, at a minimum—

(A) The effects of consolidation on total interest to be paid, fees to be paid, and length of repayment;

(B) The effects of consolidation on a borrower's underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities;

(C) The options of the borrower to prepay the loan and to change repayment plans; and

(D) That borrower benefit programs may vary among different lenders;

(v) Include debt-management strategies that are designed to facilitate repayment;

(vi) Explain to the student borrower how to contact the party servicing the student borrower's Direct Loans;

(vii) Meet the requirements described in paragraphs (a)(6)(i), (a)(6)(ii), and (a)(6)(iv) of this section;

(viii) Describe the likely consequences of default, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation;

(ix) Provide—

(A) A general description of the terms and conditions under which a borrower may obtain full or partial forgiveness or discharge of principal and interest, defer repayment of principal or interest, or be granted forbearance on a title IV loan; and

(B) A copy, either in print or by electronic means, of the information the Secretary makes available pursuant to section 485(d) of the HEA;

(x) Review for the student borrower information on the availability of the Department's Student Loan Ombudsman's office;

(xi) Inform the student borrower of the availability of title IV loan information in the National Student Loan Data System (NSLDS) and how NSLDS can be used to obtain title IV loan status information;

(xii) A general description of the types of tax benefits that may be available to borrowers; and

(xiii) Require the student borrower to provide current information concerning name, address, social security number, references, and driver's license number and State of issuance, as well as the student borrower's expected permanent address, the address of the student borrower's next of kin, and the name and address of the student borrower's expected employer (if known).

(5) The school must ensure that the information required in paragraph (b)(4)(xiii) of this section is provided to the Secretary within 60 days after the student borrower provides the information.

(6) If exit counseling is conducted through interactive electronic means, a school must take reasonable steps to ensure that each student borrower receives the counseling materials, and participates in and completes the exit counseling.

(7) The school must maintain documentation substantiating the school's compliance with this section for each student borrower.

(Approved by the Office of Management and Budget under control number 1845–0021)

(Authority: 20 U.S.C. 1087a *et seq.*)

[FR Doc. E9–17119 Filed 7–27–09; 8:45 am]

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**H.R. 1777/P.L. 111–39**
To make technical corrections to the Higher Education Act of 1965, and for other purposes. (July 1, 2009; 123 Stat. 1934)

**S. 614/P.L. 111–40**
To award a Congressional Gold Medal to the Women Airforce Service Pilots ("WASP"). (July 1, 2009; 123 Stat. 1958)

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