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

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1205

[Doc. # AMS–CN–09–0015; CN–09–002]

Cotton Board Rules and Regulations: Adjusting Supplemental Assessment on Imports (2009 Amendments)

Correction

In rule document E9–16031 beginning on page 32400 in the issue of Wednesday, July 8, 2009, make the following correction:

§1205.510 [Corrected]

On page 32403, in §1205.510(3)(ii), in the table titled IMPORT ASSESSMENT TABLE, the third column heading, ''Cents/pkg.'' should read ''Cents/kg.'', throughout the table.

[FR Doc. Z9–16031 Filed 8–5–09; 8:45 am]

BILLING CODE 1505–01–D

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 7

Contract Market Rules Altered or Supplemented by the Commission

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rulemaking.

SUMMARY: Regulation 7.201 of the Commodity Futures Trading Commission (''Commission'') alters and supplements Chicago Board of Trade (''CBOT'') Rule 620.01(B) by requiring members of the CBOT to submit to arbitration of any customer claim or grievance initiated by the customer according to the arbitration rules and regulations of the CBOT. On November 25, 2007, following the merger of Chicago Mercantile Exchange (''CME'') Holdings, Inc. with CBOT Holdings, Inc., CBOT Rule 620.01(B) was superseded by new CBOT Rule 600.D. Like Regulation 7.201, new Rule 600.D specifically requires exchange members to submit to customer-initiated arbitrations. Accordingly, on petition of The CME Group Inc., CBOT's parent company, Regulation 7.201 is being repealed by the Commission as no longer necessary.

DATES: *Effective Date:* Effective August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Donald Heitman, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581, telephone (202) 418–5041, e-mail *dheitman@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 8a(7) of the Commodity Exchange Act (''Act''), 7 U.S.C. 12a(7), provides in relevant part that the Commission is authorized to ''alter or supplement the rules of a registered entity insofar as necessary or appropriate * * * for the protection of traders or to insure fair dealing in commodities traded for future delivery on such registered entity.'' In 1981, pursuant to section 5a(11) of the Act and Part 180 of the Commission's regulations, each contract market was required to ''provide a fair and equitable procedure through arbitration or otherwise * * * for the settlement of customers' claims and grievances against any member or employee thereof.'' [1]

In November of 1981, the Commission published a final rule that disapproved proposed CBOT Rule 620.01(B), dealing with arbitration, and altered and supplemented CBOT's rule by implementing in its place Commission Regulation 7.201.[2] CBOT Rule 620.01(B), as interpreted by CBOT, would have restricted the ability of customers to arbitrate claims against CBOT members and their employees under CBOT's arbitration rules and regulations. The CBOT had argued that the Act did not compel its members to participate in customer-initiated arbitration proceedings and, during the period of 1980–81, CBOT members had denied five customers the right to arbitrate their disputes with members because those members refused to participate in the CBOT's arbitration procedures.

The Commission regulation, adopted pursuant to its section 8a(7) authority, altered and supplemented CBOT Rule 620.01(B) to implement a Commission-drafted version of Rule 620.01(B). The Commission-imposed rule assured that CBOT members would submit to arbitration proceedings initiated by customers under CBOT rules and regulations. Regulation 7.201 has remained in place ever since.

On July 12, 2007, CBOT Holdings, Inc. merged with CME Holdings, Inc. to form The CME Group, Inc. On November 25, 2007, as part of the harmonization of the rules of the CBOT with those of the CME, the CBOT deleted Rule 620.01(B) from its rulebook and adopted new Rule 600.D governing permissive arbitrations. New CBOT Rule 600.D, which is identical to CME Rule 600.D, provides in relevant part that a CBOT member is, ''* * * required to arbitrate * * * claims of a customer against a member that relate to or arise out of any transaction on or subject to the rules of the Exchange.''

On June 8, 2009, The CME Group, Inc., CBOT's parent company, submitted a petition pursuant to Commission Regulation 13.2 for the repeal of Regulation 7.201.[3] Given that new CBOT Rule 600.D has, since November 25, 2007, compelled members to submit to arbitration claims initiated by customers, that Rule 600.D fully

[1] Section 5a(11) of the Act, 7 U.S.C. 7a (1981). *See also* 17 CFR 180.2 (1981) (implementing section 5a(11) through the establishment of minimum requirements). Subsequently, section 5a(11) and Part 180 were superseded by amended provisions. However, boards of trade are still required to ''establish and enforce rules regarding and provide facilities for alternative dispute resolution as appropriate for market participants and any market intermediaries.'' Section 5(d)(13) of the Act, 7 U.S.C. 7(d)(13) (2009). *See also* 17 CFR Part 38, Appendix B, Core Principle 13 (application guidance and acceptable practices related to section 5(d)(13)).

[2] 46 FR 57457 (November 24, 1981) (adopting Commission Regulation 7.201). *See also* 49 FR 10659 (March 24, 1984) (subsequent amendment).

[3] Copies of the petition are available on written request from David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, by telephone request at (202) 418–5100, or by e-mail request to *secretary@cftc.gov*. Reference should be made to ''CME Group petition to repeal Regulation 7.201.''

conforms to the Commission's interpretation of section 5a(11) of the Act at the time Regulation 7.201 was adopted, and to the Commission's interpretation of CBOT's obligations under successor section 5(d)(13) of the Act, and that Regulation 7.201 refers to a CBOT rule that is no longer in the CBOT rulebook, the Commission has determined to grant the CME Group's petition and hereby repeals Regulation 7.201.

II. Related Matters

A. No Notice Required Under 5 U.S.C. 553

The Administrative Procedure Act (''APA'') requires rulemakings to be commenced with a general notice of public rulemaking, published in the **Federal Register**,[4] except, among other things, ''when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [5]

The repeal of Commission Regulation 7.201 will not cause new regulatory requirements to be effected, because new CBOT Rule 600.D imposes the same requirements on CBOT members that Commission Regulation 7.201 was adopted to impose. Therefore, the Commission finds for good cause that the notice and public procedure are unnecessary before finalizing the repeal of Commission Regulation 7.201.

B. Regulatory Flexibility Act

The Commission is required to prepare and make available for public comment a regulatory flexibility analysis describing the impact of a rule on small entities when the Commission is required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking.[6] The Commission has found according to the provisions of 5 U.S.C. 553 that a notice of proposed rulemaking is unnecessary for the repeal of Regulation 7.201. Therefore, the Commission is not required to prepare and make available a regulatory flexibility analysis, and the head of the agency alternatively is not making a certification as to the economic impact of the rule on a substantial number of small entities.[7]

C. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501 *et seq.,* imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The repeal of Regulation 7.201 is not associated with a collection of information. Accordingly, the Paperwork Reduction Act does not apply.

D. Cost Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its action before promulgating a new regulation or order under the Act. Since this action repeals rather than promulgates a regulation, by its terms, § 15(a) does not apply. In any event, the repeal of Commission Regulation 7.201 will not cause new regulatory requirements to be effected, as new CBOT Rule 600.D imposes the same requirements on CBOT members that Commission Regulation 7.201 was adopted to impose. Thus, the repeal of Regulation 7.201 is cost/benefit neutral.

List of Subjects in 17 CFR Part 7

Arbitration, Commodity exchanges, Commodity futures.

■ In consideration of the foregoing, and pursuant to the authority in the Commodity Exchange Act and, in particular, sections 5 and 8a of the Act, the Commission hereby amends Title 17, part 7, of the Code of Federal Regulations as follows:

PART 7—CONTRACT MARKET RULES ALTERED OR SUPPLEMENTED BY THE COMMISSION

■ 1. The authority citation for part 7 is revised to read as follows:

Authority: 7 U.S.C. 7(a) and 12a(7).

§ 7.201 [Removed and reserved]

■ 2. Section 7.201 is removed and reserved.

Issued in Washington, DC, on July 31, 2009.

By the Commission.

David Stawick,

Secretary of the Commission.

[FR Doc. E9–18855 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

[4] 5 U.S.C. 553(b).

[5] 5 U.S.C. 553. *See also* Commission Regulations 13.3 through 13.5, 17 CFR 13.3–13.5 (notice of proposed rulemaking and public participation in the rulemaking process required unless the Commission finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest).

[6] 5 U.S.C. 603 and 604.

[7] *See* 5 U.S.C. 605 (certification by the head of an agency permitted as an alternative to the regulatory flexibility analyses required at 5 U.S.C. 603 and 604).

DEPARTMENT OF STATE

22 CFR Part 123

[Public Notice: 6646]

Amendment to the International Traffic in Arms Regulations: Temporary Export Exemption for Body Armor

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to add an exemption for the temporary export of body armor for exclusive personal use to destinations not subject to restrictions under the ITAR § 126.1 and to Afghanistan and Iraq under specified conditions.

DATES: *Effective Date:* This rule is effective August 6, 2009.

ADDRESSES: Interested parties may submit comments at any time by any of the following methods:

- *E-mail: DDTCResponseTeam@state.gov* with an appropriate subject line.
- *Mail:* Department of State, Directorate of Defense Trade Controls, Office of Defense Trade Controls Policy, ATTN: Regulatory Change, Section 123.17, SA–1, 12th Floor, Washington, DC 20522–0112.

Persons with access to the Internet may also view this notice by going to the regulations.gov Web site at *http://regulations.gov/index.cfm.*

FOR FURTHER INFORMATION CONTACT: Director Charles B. Shotwell, Office of Defense Trade Controls Policy, Department of State, Telephone (202) 663–2792 or Fax (202) 261–8199; E-mail *DDTCResponseTeam@state.gov.* ATTN: Regulatory Change, Section 123.17.

SUPPLEMENTARY INFORMATION: U.S. individuals are traveling to hazardous areas in foreign countries where they need to wear body armor for personal safety. Consequently, the Department of State is amending the International Traffic in Arms Regulations (ITAR) to add an exemption for the temporary export of body armor covered by 22 CFR 121.1, Category X(a)(1). The exemption is available for destinations not subject to restrictions under ITAR § 126.1 and to Afghanistan and Iraq under specified conditions. In order to use the exemption, the protective equipment must be for the individual's exclusive use and must be returned to the United States. The individual may not re-export the protective equipment to a foreign person or otherwise transfer ownership. The protective equipment may not be exported to any country where the

importation would be in violation of that country's laws.

The U.S. person declaring the temporary export of body armor to U.S. Customs and Border Protection should use CBP Form 4457 entitled the ''Certificate of Registration for Personal Effects Taken Abroad.'' The export information is not required to be reported electronically using the Automated Export System (AES). Upon re-entering the United States, the CBP Form 4457 should be presented.

In the event the body armor is lost or otherwise not returned to the United States, a detailed report about the incident must be submitted to the Office of Defense Trade Controls Compliance. The report should describe all attempts to locate the body armor.

Regulatory Analysis and Notices

Administrative Procedure Act

This amendment involves a foreign affairs function of the United States and, therefore, is not subject to the procedures contained in 5 U.S.C. 553 and 554.

Regulatory Flexibility Act

Since this amendment is not subject to the notice-and-comment procedures of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This amendment 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. Therefore, in accordance with Executive Order 13132, it is determined that this amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this amendment.

Executive Order 12866

This amendment is exempt from review under Executive Order 12866, but has been reviewed internally by the Department of State to ensure consistency with the purposes thereof.

Executive Order 12988

The Department of State has reviewed the proposed regulations in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 123

Arms and munitions, Exports.

■ Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 123 is amended as follows:

PART 123—LICENSES FOR THE EXPORT OF DEFENSE ARTICLES

■ 1. The authority citation for part 123 continues to read as follows:

Authority: Secs. 2, 38, and 71, Public Law 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Public Law 105–261, 112 Stat. 1920; Sec. 1205(a), Public Law 107–228.

■ 2. Section 123.17 is amended by adding paragraphs (f) and (g) to read as follows:

§ 123.17 Exports of firearms, ammunition, and body armor.

* * * * *

(f) Except as provided in § 126.1 of this subchapter, Port Directors of U.S. Customs and Border Protection shall permit U.S. persons to export temporarily from the United States without a license one set of body armor covered by Category X(a)(1) of this subchapter provided that:

(1) A declaration by the U.S. person and an inspection by a customs officer is made;

(2) The body armor is with the U.S. person's baggage or effects, whether accompanied or unaccompanied (but not mailed);

(3) The body armor is for that person's exclusive use and not for re-export or other transfer of ownership; and

(4) If the body armor is lost or otherwise not returned to the United States, a detailed report must be submitted to the Office of Defense Trade Controls Compliance in § 127.12(c)(2) of this subchapter entitled ''Voluntary disclosures.''

(g) The license exemption set forth in paragraph (f) of this section is also available for the temporary export of body armor for personal use to Afghanistan and to Iraq provided that:

(1) The conditions in paragraphs (f)(1)–(f)(3) of this section are met;

(2) For temporary exports to Iraq the U.S. person utilizing the license exemption is either a person affiliated with the U.S. Government traveling on official business or is a person not affiliated with the U.S. Government but traveling to Iraq under a direct authorization by the Government of Iraq and engaging in humanitarian activities for, on behalf of, or at the request of the Government of Iraq.

Dated: July 8, 2009.

Rose E. Gottemoeller,

Assistant Secretary, Verification, Compliance and Implementation, Department of State.

[FR Doc. E9–18843 Filed 8–5–09; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2009–0251]

RIN 1625–AA08

Special Local Regulations for Marine Events; Patapsco River, Northwest Harbor, Baltimore, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing special local regulations during the ''Baltimore Dragon Boat Challenge'', a marine event to be held on the waters of the Patapsco River, Northwest Harbor, Baltimore, MD. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Patapsco River during the event.

DATES: This rule is effective from August 22, 2009 through August 29, 2009.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0251 and are available online by going to *http://www.regulations.gov,* selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0251 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, e-mail *Ronald.L.Houck@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 2, 2009, we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations for Marine Events; Patapsco River, Northwest Harbor, Baltimore, MD in the **Federal Register** (74 FR 26326). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** The potential dangers posed by powered vessels operating in close proximity to relatively small rowing vessels in a restricted waterway make special local regulations necessary. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the safety of the event participants, patrol vessels, spectator craft and other vessels transiting the event area. However, the Coast Guard will provide advance notifications to users of the effected waterways via marine information broadcasts, local notice to mariners, commercial radio stations and area newspapers.

Background and Purpose

On August 22, 2009, Baltimore Dragon Boat Club, Inc. will sponsor Dragon Boat Races in the Patapsco River, Northwest Harbor at Baltimore, MD. The event will consist of approximately 15 teams rowing Chinese Dragon Boats in heats of 2 to 4 boats for a distance of 500-meters. Due to the need for vessel control during the event, the Coast Guard will temporarily restrict vessel traffic in the event area to provide for the safety of participants, spectators and other transiting vessels.

Discussion of Comments and Changes

The Coast Guard did not receive comments in response to the notice of proposed rulemaking (NPRM) published in the **Federal Register**. Accordingly, the Coast Guard is establishing temporary special local regulations on specified waters of the Patapsco River, Northwest Harbor, Baltimore, MD.

Regulatory Analyses

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

Regulatory Planning and Review

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary. Although this regulation will prevent traffic from transiting a portion of the Patapsco River during the event, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the extensive advance notifications that will be made to the maritime community via the Local Notice to Mariners, marine information broadcasts, and area newspapers, so mariners can adjust their plans accordingly. Additionally, the regulated area has been narrowly tailored to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit the regulated area at slow speed between heats, when the Coast Guard Patrol Commander deems it is safe to do so.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in the effected portions of the Patapsco River during the event.

Although this regulation prevents traffic from transiting a portion of the Patapsco River, Northwest Harbor during the event, this rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This rule would be in effect for only a limited period. Vessel traffic will be able to transit the regulated area between heats, when the Coast Guard Patrol Commander deems it is safe to do so. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves implementation of regulations within 33 CFR Part 100 that apply to organized marine events on the navigable waters of the United States that may have potential for negative impact on the safety or other interest of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, canoe and sail board racing.

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

List of Subjects in 33 CFR Part 100

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

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

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

Authority: 33 U.S.C. 1233.

■ 2. Add a temporary section, § 100.35–T05–0251 to read as follows:

§ 100.35–T05–0251 Special Local Regulations for Marine Events; Patapsco River, Northwest Harbor, MD.

(a) *Regulated area.* The following locations are regulated areas: All waters of the Patapsco River, Northwest Harbor, Maryland, located near Locust Point, within an area bounded by the following lines of reference; bounded on the west by a line running along longitude 076°35′35″ W; bounded on the east by a line running along longitude 076°35′10″ W; bounded on the north by a line running along latitude 39°16′40″ N; and bounded on the south by the shoreline. All coordinates reference Datum NAD 1983.

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector, Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(c) *Special local regulations:* (1) Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area.

(2) The operator of any vessel in the regulated area must: (i) Stop the vessel immediately when directed to do so by the Coast Guard Patrol Commander or any Official Patrol.

(ii) Proceed as directed by the Coast Guard Patrol Commander or any Official Patrol.

(d) Enforcement period: This section will be enforced as follows; (1) from 6 a.m. until 7 p.m. on August 22, 2009.

(2) In the case of inclement weather this marine event may be postponed and rescheduled for 6 a.m. to 7 p.m. on August 29, 2009.

(3) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

Dated: July 13, 2009.

Patrick B. Trapp,

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

[FR Doc. E9–18750 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0454]

RIN 1625–AA00

Safety Zone; Festivus, Lower Colorado River, Bullhead City, AZ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the lower Colorado River at Bullhead City, AZ in support of Festivus. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port or his designated representative.

DATES: This rule is effective from September 11, 2009 through September 13, 2009.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–0454 and are available online by going to *http://www.regulations.gov*, selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–2009–0454 in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail Petty Officer Kristen Beer, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7262, e-mail *Kristen.A.Beer@uscg.mil*. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is necessary to ensure the safety of vessels, spectators, participants, and other vessels and users of the waterway. Delaying the rule would be contrary to the public interest.

Background and Purpose

The Boys and Girls Club and BMX is sponsoring Festivus, which is a river festival to benefit the community. Festivus includes wakeboarder demonstrations on the lower Colorado River. This temporary safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and other users and vessels on the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port or his designated representative.

Discussion of Rule

The Coast Guard is establishing a temporary safety zone that will be enforced from 10 a.m. to 10 p.m. on September 11, 2009 through September 13, 2009. This safety zone is necessary to provide for the safety of the crew, spectators, participants, and other users and vessels of the waterway. Persons and vessels will be prohibited from entering into, transiting through, or anchoring within the safety zone unless authorized to do so by the Captain of the Port or his designated representative. The safety zone will include all navigable waters within the following coordinates:

Northwest Boundary Line

35°05.45′ N, 114°37.84′ W;
35°05.53′ N, 114°37.78′ W.

Southeast Boundary Line

35°05.31′ N, 114°37.48′ W;
35°05.38′ N, 114°37.44′ W.

Regulatory Analyses

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

Regulatory Planning and Review

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary. This determination is based on the location and small size of the safety zone. Recreational vessels will not be allowed to transit through the established safety zone during the specified times unless authorized to do so by the Captain of the Port or his designated representative.

Small Entities

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

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

This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit or anchor in the affected portion of the lower Colorado River from 10 a.m. to 10 p.m. on September 11, 2009 through September 13, 2009.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: Although the safety zone will apply to the entire width of the river, traffic will be

allowed to pass through the zone with the permission of the Coast Guard patrol commander. Before the effective period, the Coast Guard will publish a local notice to mariners (LNM).

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction because it establishes a safety zone.

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add temporary § 165.T11–204 to read as follows:

§ 165.T11–204 Safety Zone; Festivus, Lower Colorado River, Bullhead City, AZ.

(a) *Location.* The following area is a safety zone: All waters of the Lower Colorado River, from surface to bottom and shore to shore, bounded by the following lines:

Northwest Boundary Line

From 35°05.45′ N, 114°37.84′ W to 35°05.53′ N, 114°37.78′ W.

Southeast Boundary Line

From 35°05.31′ N, 114°37.48′ W to 35°05.38′ N, 114°37.44′ W (NAD 83).

(b) *Enforcement Period.* This section will be enforced from 10 a.m. to 10 p.m., each day, on September 11, 2009 through September 13, 2009. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone.

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

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

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

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

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

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

Dated: July 23, 2009.

T.H. Farris,

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

[FR Doc. E9–18739 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 10 and 11

[Docket No. USCG–2006–24371]

RIN 1625–AB02

Consolidation of Merchant Mariner Qualification Credentials; Corrections

AGENCY: Coast Guard, DHS.

ACTION: Final rule, correction.

SUMMARY: The Coast Guard published a document in the **Federal Register** on March 16, 2009 (74 FR 11196), consolidating regulations concerning the issuance of merchant mariner credentials. That document contained several non-substantive errors, including an improperly worded amendatory instruction. This document corrects those errors.

DATES: This final rule is effective August 6, 2009.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call Mayte Medina, Coast Guard, telephone 202–372–1406. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The document published in the **Federal Register** on March 16, 2009 (74 FR 11196), contained errors that this document corrects.

We are making the following corrections in part 10. In § 10.109, we are reinserting three STCW endorsements that were erroneously left out of the final rule. In § 10.211, the Coast Guard discussed the date change in the final rule (74 FR 11197). However, when making the date change, we inadvertently missed this instance. In § 10.213, the change in the footnote to Table 12.213(c) is a correction to a cross-reference, which the Coast Guard inadvertently missed when we revised part 10 in the final rule. In § 10.227, we are correcting a similar cross-reference correction. In § 10.235, we are making corrections to clarify the language in that section.

We are making the following corrections in part 11. In § 11.102, we are correcting those sections where material that has been incorporated by reference may be found in part 11. In § 11.104, we are removing redundancy by eliminating definitions that already appear at the beginning of the subchapter in § 10.107. Finally, in the final rule, the amendatory instruction for § 11.601 incorrectly referred to paragraphs (a) through (c) (79 FR 11252). We have included the correct amendatory language here.

None of the above listed corrections are substantive in nature.

List of Subjects

46 CFR Part 10

Incorporation by reference, Penalties, Reporting and recordkeeping requirements, Seamen, Transportation Worker Identification Card.

46 CFR Part 11

Incorporation by reference, Penalties, Reporting and recordkeeping requirements, Schools, Seamen.

■ For the reasons discussed above, the Coast Guard corrects 46 CFR parts 10 and 11 as follows:

PART 10—MERCHANT MARINER CREDENTIAL

■ 1. The authority citation for part 10 continues to read as follows:

Authority: 14 U.S.C. 633; 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, 2110; 46 U.S.C. chapter 71; 46 U.S.C. chapter 72; 46 U.S.C. chapter 75; 46 U.S.C. 7701, 8906 and 70105; Executive Order 10173; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 10.109, add paragraphs (d)(15), (16), and (17) to read as follows:

§ 10.109 Classification of endorsements.

* * * * *

(d) * * *

(15) Tankerman PIC.

(16) Tankerman assistant.

(17) Tankerman engineer.

■ 3. In § 10.211(c), remove the words ''September 25, 208'' and add, in their place, the words ''April 15, 2009''.

§ 10.213 [Amended]

■ 4. In § 10.213, in the first footnote of Table 10.213(c), remove the cross-reference ''(a)'' after the word ''paragraph'' and add, in its place, the cross-reference ''(f)''.

§ 10.227 [Amended]

■ 5. In § 10.227, in paragraph (g)(1), remove the cross-reference ''(g)'' after the word ''paragraph'' and add, in its place, the cross-reference ''(d)(8)''.

§ 10.235 [Amended]

■ 6. In § 10.235—

■ a. In paragraph (b), in the first and second sentences, after the words ''applied for as an original'', add the words ''following the procedures of §§ 5.901–5.905 of this subchapter'';

■ b. In paragraph (d), after the words ''revoked, the mariner'', remove the words ''may apply for'' and add, in their place, the words ''will be issued''; and

■ c. In paragraph (h), remove the word ''non-administrative'' and add, in its place, the words ''a reason, other than administrative''.

PART 11—REQUIREMENTS FOR OFFICER ENDORSEMENTS

■ 7. The authority citation for part 11 continues to read as follows:

Authority: 14 U.S.C. 633; 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, and 2110; 46 U.S.C. chapter 71; 46 U.S.C. 7502, 7505, 7701, 8906, and 70105; Executive Order 10173; Department of Homeland Security Delegation No. 0170.1. Section 11.107 is also issued under the authority of 44 U.S.C. 3507.

§ 11.102 [Amended]

■ 8. In § 11.102—

■ a. In paragraph (b)(1), remove ''11.603;''.

■ b. In paragraph (b)(2), after ''11.304,'', add ''11.603,''.

§ 11.104 [Removed and Reserved]

■ 9. Remove and reserve § 11.104.

■ 10. Revise § 11.601 to read as follows:

§ 11.601 Applicability.

This subpart provides for endorsement as radio officers for employment on vessels, and for the issue of STCW endorsements for those qualified to serve as radio operators on vessels subject to the provisions on the Global Maritime Distress and Safety System (GMDSS) of Chapter IV of SOLAS. SOLAS is available from the *International Maritime Organization (IMO)*, 4 Albert Embankment, London SE1 7SR, England, telephone: +44 (0)20 7735 7611, *http://www.imo.org*.

Dated: July 30, 2009.

Stefan G. Venckus,

Chief, Office of Regulations and Administrative Law, United States Coast Guard.

[FR Doc. E9–18747 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 07–267; FCC 09–56]

Forbearance Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this Report and Order, the Commission adopts procedural rules to govern petitions for forbearance filed pursuant to section 10 of the Communications Act of 1934, as amended. The Commission has found that procedural rules are needed to specify parties' rights and obligations with regard to such petitions. The Commission's actions are designed to ensure that its procedures for handling forbearance petitions are front-loaded, actively managed, transparent, and fair.

DATES: Effective September 8, 2009 except § 1.54 which contains information collection requirements that have not been approved by OMB. The FCC will publish a document in the **Federal Register** announcing the effective date for those requirements.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Interested parties may contact Jonathan Reel, Wireline Competition Bureau, (202) 418–1580.

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order (Order) in WC Docket No. 07–267, FCC 09–56, adopted June 26, 2009, and released June 29, 2009. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *http://www.bcpiweb.com.* It is also available on the Commission's Web site at *http://www.fcc.gov.*

Synopsis of Report and Order

1. In November 2007, the Commission released a Notice of Proposed Rulemaking (the *Forbearance Procedures NPRM*) (73 FR 6888–01, February 6, 2008) initiating a rulemaking proceeding to establish procedural rules regarding the Commission's consideration of petitions for forbearance filed pursuant to section 10 of the Communications Act of 1934, as amended, (the Act). In this NPRM, the Commission sought comment on measures that had been proposed in a petition filed by Covad Communications Group, NuVox Communications, XO Communications, LLC, Cavalier Telephone Corp., and McLeodUSA Telecommunications Services, Inc. The Commission sought comment on, among other questions, whether all petitions for forbearance should be complete as filed; whether a petitioner for forbearance should have to demonstrate separately how it has satisfied each component of the forbearance standard; and whether the Commission must issue a written order on all forbearance proceedings. The Commission also asked whether the forbearance process was being used as Congress intended, how individual forbearance proceedings relate to industry-wide proceedings, and what burdens, including administrative and financial costs, forbearance proceedings place on stakeholders in the industry.

2. In this Order, the Commission adopts procedural rules regarding forbearance petitions that reflect the Commission's experience in addressing more than 120 forbearance petitions that have been filed under section 10 as well as the record in response to the *Forbearance Procedures NPRM.* In particular, the Commission adopts rules requiring that forbearance petitions be ''complete as filed.'' This is consistent with the principle that whenever a petitioner files a petition for forbearance, the petitioner bears the burden of proof with respect to establishing that the statutory criteria for granting forbearance are met. The Commission also adopts procedures to ensure that forbearance petitions are addressed in a timely, equitable, and predictable manner. Further, the Commission provides that a forbearance petition may no longer be withdrawn or significantly narrowed by the petitioner after the tenth business day after the due date for reply comments without Commission authorization. These actions and the other actions in the Order seek to implement procedures for handling forbearance petitions in a manner that is front-loaded, actively managed, transparent, and fair.

3. *Petitions Must be Complete as Filed.* In the *Forbearance Procedures NPRM,* the Commission sought comment on whether forbearance petitions should be required to be ''complete as filed.'' Here, the Commission concludes that section 10 petitions for forbearance must be complete as described below. Henceforth, the Commission requires forbearance petitions to state explicitly the scope of the relief requested; to address each prong of the statute as it applies to the rules or provisions from which the petitioner seeks relief; to identify any other proceedings pending before the Commission where the petitioner speaks to the relevant issues (or declare not to have spoken to the issue, if that is the case); and to comply with simple format requirements intended to facilitate our and the public's review of the petition.

4. The requirement does not prevent a petitioner from seeking additional data from third parties. At the time of filing, forbearance petitioners must identify the nature of the third-party information they need, the parties they believe possess it, and how the information relates to the petition. The requirement does not limit a petitioner's ability to respond to arguments and data in oppositions and comments with counter-arguments and responsive data. A petitioner may submit substantively new material, including new

information, data, studies, or arguments, at the request of the Commission, as well as in response to oppositions. The Commission may be expected to require updated data from a petitioner prior to reaching some determinations, and the filing requirement in no way prevents the Commission from seeking information or clarification from any source, or basing its forbearance decision on all timely-filed evidence.

5. *Scope.* A petitioner for forbearance must identify clearly in the petition the scope of the requested relief. In particular, the petition must state the following with specificity: (1) Each statutory provision, rule, or requirement from which forbearance is sought; (2) each carrier, or group of carriers, for which forbearance is sought; (3) each service for which forbearance is sought; (4) the geographic location, zone, or area in which forbearance is sought; and (5) any other factor, condition, or limitation relevant to determining the scope of the requested relief. The Commission's ability to make the determinations within the statutory time frame required is significantly compromised when a petition does not clearly state the relief sought.

6. *The Prima Facie Case.* A petition for forbearance must include in the petition the facts, information, data, and arguments on which the petitioner intends to rely to make the prima facie case for forbearance. Specifically, the *prima facie* case must show in detail how each of the statutory criteria are met with regard to each statutory provision or rule from which forbearance is sought. A petition for forbearance must take into account relevant Commission precedent. If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify the data or information, and the parties that possess it, and explain the relationship of the information to the *prima facie* case. When the petition is filed at the Commission, the petitioner must provide a copy of it to each party identified as possessing relevant data or information, and the relevant Bureau will respond to requests for third-party discovery on a case-by-case basis. Other than third-party information, a petition may not rely on data or information that is not made available, without charge, to the Commission staff and interested parties that agree to comply with any protective orders the Commission issues in the course of the proceeding.

7. *Relevant Proceedings.* A petition for forbearance must identify any proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition. Alternatively, the petition must state that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought, if that is the case.

8. *Format and Filing Requirements.* Petitions for forbearance must comply with the Commission's general filing requirements in 47 CFR 1.49. In addition, all petitions for forbearance must be e-mailed to *forbearance@fcc.gov* at the time of filing. All filings including all data related to a forbearance petition must be provided in a searchable format. The steps a filer must take to ensure its submission is searchable will vary by context. At a minimum, a party that submits large spreadsheets of data should submit electronic copies of those data formatted so as to allow Commission staff and other interested parties a meaningful opportunity to analyze those data. A forbearance petition must include (1) a plain, concise, written summary statement of the relief sought; (2) a full statement of the petitioner's prima facie case for relief; and (3) appendices that list (a) the scope of relief sought, (b) all relevant data, including market analysis, and (c) any supporting statements or affidavits.

9. *Burden of Proof.* The Commission concludes that the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition for forbearance. This has historically been the case in American jurisprudence. The burden of proof is on the proponent in both formal rulemaking and formal adjudication, but the Commission considers arguments whether a forbearance proceeding more closely resembles rulemaking or adjudication to be largely beside the point. Whatever passing similarity to other procedures petitions for forbearance may have, the essential nature of a petition for forbearance is that it is a petition for relief from regulation. The petitioner asks the Commission to forbear from enforcing against it one or more rules or statutory provisions, which the Commission will do if it determines that the petition meets the statutory criteria. The Commission requires petitioners to produce sufficient evidence and analysis to warrant the grant of a forbearance petition, and in this order states explicitly that the burden of proof is on forbearance petitioners at the outset and throughout the proceeding.

10. The Commission further clarifies that the ''burden of proof'' for the purpose of forbearance proceedings encompasses both the burden of production and the burden of persuasion. The burden of production in this context requires that the petitioner state a complete prima facie case in the petition, the precise requirements of which are discussed in the ''complete as filed'' section. The burden of persuasion requires that, in addition to stating a prima facie case, the petitioner's evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance. If the petitioner does not support the case for forbearance with sufficient evidence and persuasive arguments, the Commission cannot make an informed and reasoned determination that the statutory criteria are met. In determining whether a petitioner has met its burden of proof, the totality of the record will be taken into consideration. For example, the Commission will consider evidence filed in the record by third parties that is favorable to the petitioner's position as part of the petitioner's showing.

11. *Transparency.* After the rules adopted in this Order take effect, the Commission will post on its web site a timeline intended to identify the stages of review of forbearance petitions. The web page will also contain docket numbers, contact information, and a link to the Commission's Electronic Comment Filing System. Posting this information will promote a better understanding of how the Commission gives full and timely attention to the issues presented in a forbearance petition, and will establish a framework that describes how review of a forbearance petition should normally progress.

12. A general timeline necessarily oversimplifies the process, and the circumstances of individual cases will differ. Internal deadlines create no enforceable rights for private parties, and such targets should be understood rather as goals for internal Commission action. The timeline should therefore be viewed as a flexible tool, and the order and timing may vary. Generally, the later stages and times are intended to indicate procedural goals for the most complex petitions. The statutory obligation to determine each of section 10's three prongs takes precedence over the informal timeline, and the Commission's failure to adhere to a benchmark is not indicative of how it will resolve the issues raised in a proceeding.

13. *Filing and Initial Review.* Filing a petition starts the clock on the statutory time limit. The Bureau will review the petition upon receipt. A petition that on its face is incomplete or defective will be summarily denied. As a practical

matter, the initial review upon filing should determine whether the petition appears to be complete, coherent, and sufficiently specific to serve as a basis for comment. The legal standard for summary denial is whether the petition, viewed in the light most favorable to the petitioner, fails to meet the requirements for forbearance specified in the statute.

14. Summary denial on receipt gives petitioners an early opportunity to cure and refile, and respects interested parties' resources. Failure by the Bureau to summarily deny a petition upon receipt does not establish or even imply that the petition is ''complete as filed.'' It merely establishes that the petitioner has observed the filing procedures adopted today and that no fatal insufficiency is evident upon cursory review. Threshold questions about a petition's completeness may be sufficiently complex to require comment and consideration.

15. *Public Notice.* If a petition appears to be complete and coherent on its face, the Bureau will give public notice and post the petition on the forbearance page of the Commission's Web site. The notice will announce the pleading cycle, which will typically allow 30 days for comments and 15 days for replies, with longer cycles for the more complex petitions. The Bureau may issue a protective order, as needed. Motions for summary denial may be filed not later than the due date for comments, to which the petitioner may file an opposition not later than the due date for replies. In the interest of completing the record in one cycle, and consistent with our formal complaint rules, replies to oppositions to motions for summary denial will not be permitted. The Commission retains the flexibility to ensure that the time for comment on any individual forbearance petition is both adequate and not needlessly long.

16. *Motions for Summary Denial.* Commenters may use motions for summary denial to focus their attention on completeness and clarity, and should avoid conflating these threshold issues with their substantive arguments. A contention, for example, that a petition does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met might form the basis of a motion for summary denial. Because the Commission expects the arguments and scope of the relief sought to vary widely from petition to petition, the adequate granularity of data may likewise vary, and for that reason the Commission will judge on a case-by-case basis whether or not a petition for forbearance requires supporting data at, for example, the wire center level. Failure by the Bureau to deny a petition summarily does not establish that the petition is ''complete as filed.'' Although the Bureau may grant a motion for summary denial, it may instead use the record generated by the motion to better understand threshold issues early in the process. The Commission may address a motion for denial at any time, up to and including the statutory time limit for Commission action.

17. *Intermediate Period.* An intermediate period consisting roughly of months 3 through 10 follows the closing of the comment cycle. During this period, the Bureau will consider whether to grant or deny routine or less complex forbearance petitions that clearly meet, or clearly fail to meet, the statutory forbearance criteria. The Commission may be able to resolve such petitions within six months of their filing. For more complex petitions, the Bureau may actively develop the record where appropriate during this intermediate period, and will review comments, analyze data, and discuss the merits of the petition with the Commissioners and their staff.

18. *Circulation and Quiet Period.* The final period will generally consist roughly of months 11 and 12 in normal cases, or months 14 and 15 if the Commission requires an extension of time. In this Order, the Commission adopts an internal deadline of seven days prior to the statutory deadline for voting any forbearance order, whether on circulation or at an agenda meeting. An early vote gives a majority that votes against the circulated draft an opportunity to draft a replacement order prior to the statutory deadline. An early vote also will generally ensure that the Commission will be able to make the necessary determinations and release an order before the statutory deadline.

19. Each step described below is calculated against the statutory deadline, and not against the deadline for the vote, which the Commission determines, as set forth above, should occur seven days prior to the statutory deadline. The Bureau will circulate a draft order addressing a complex forbearance petition no later than 28 days prior to the statutory deadline, which is to say, 21 days prior to the voting deadline, unless all Commissioners agree to a shorter period. The Commission establishes a two-week quiet period before the statutory deadline (one week before the voting deadline) for forbearance petitions, which is analogous to the one-week quiet period before an agenda meeting. A public notice, posted on the Web site, will announce the beginning of the quiet period, which may occur earlier in the proceeding in cases where the Commission does not require the full statutory period to render a decision.

20. *Withdrawal of Forbearance Petitions.* The Commission concludes that it, rather than solely the petitioner, should decide whether or not a forbearance proceeding concludes with any action other than the issuance of a decision by the Commission. Henceforth, for the reasons set forth below, a petitioner may not withdraw a forbearance petition, nor may a petitioner narrow a petition so significantly as to amount to a withdrawal of a large portion of the forbearance relief originally requested by the petitioner after the date that its reply comments are due plus 10 business days, unless the Commission authorizes the withdrawal. A petitioner is free to withdraw or narrow a petition prior to such date. The Commission has a significant stake in the matter if it is to maintain control over its own agenda and apportion its resources in a way that serves the public interest. For similar reasons, Federal Rule of Civil Procedure 41 requires a complainant to get court permission before withdrawing a complaint if the withdrawal comes after the filing of an answer or motion for summary judgment.

21. Permitting parties to withdraw petitions in the late stages of a proceeding that are otherwise headed for denial could also distort the Commission's jurisprudence. Over time, Commission precedent could tilt toward orders that contain analysis and reasoning in support of forbearance petitioners, and away from orders that make a case against them. If petitioners are allowed to select the orders that the Commission adopts, they could inadvertently or deliberately push precedent in a direction favorable to themselves, and thus exert undue influence on regulatory policy.

22. *Application to Pending Petitions.* The new complete-as-filed rules take effect after this Order has been published in the **Federal Register** and subject to approval by the Office of Management and Budget. Other new requirements will apply to pending petitions, including rules that require a petitioner to seek permission from the relevant Bureau before filing new arguments or data (except in response to new arguments or data filed by commenters, to which the petitioner may respond by right); rules that limit when forbearance petitions may be withdrawn or narrowed as of right; rules that limit *ex parte* contacts in the final

weeks before a decision is due; and any other rule that ''would [not] impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'' In contrast to the new filing requirements, these rules do not apply to a petitioner's past actions and thus are not directly retroactive. Thus, they will take effect 30 days after publication of this Order in the **Federal Register**.

Final Regulatory Flexibility Analysis, WC Docket No. 07–267 (Forbearance Petitions Procedural Rules)

23. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) to this proceeding. *See* 73 FR 6888–01, February 6, 2008. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for and Objectives of the Report and Order

24. This Report and Order (Order) implements procedural rules governing petitions for forbearance filed pursuant to sections 10 of the Communications Act of 1934, as amended, (the Act). Pursuant to section 10, the Commission shall forbear from applying any statutory provision or regulation if it determines that: (1) Enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest. In determining whether forbearance is consistent with the public interest, the Commission also must consider ''whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'' The procedural rules adopted in this Order require that forbearance petitions must be ''complete as filed.'' The Order also clarifies that whenever a petitioner files a petition for forbearance, the petitioner bears the burden of proof with respect to establishing that the statutory criteria for granting forbearance are met. The rules adopted in this Order are needed to ensure that forbearance petitions are addressed in a manner that is actively managed, transparent, and fair.

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

25. No commenter responded directly to the IRFA. One commenter, SBA, specifically addresses the needs of small carriers. The Commission agrees with SBA that a complete-as-filed requirement will better enable all interested parties to present their views before the Commission; that establishment of a framework brings clarity to the forbearance process; and that, when the statutory language fails to indicate whether the petitioner must carry the burden of proof, the petitioner has the burden of proof because it is the petitioner that is requesting regulatory change.

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

26. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

27. The rules and guidance adopted by this Order will concern procedures relating to petitions for forbearance filed pursuant to section 10 of the Act. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of wireline and wireless telecommunications carriers. Therefore, in the Order, the Commission considers the impact of the rules on carriers. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

28. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses according to SBA data.

29. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

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

1. Wireline Carriers and Service Providers

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

32. *Incumbent LECs.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LECs. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

33. *Competitive LECs, Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 859 carriers have reported that they are engaged in the provision of either competitive access provider services or

competitive LEC services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are ''Other Local Service Providers.'' Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities.

34. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 330 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 309 have 1,500 or fewer employees and 21 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

2. Wireless Telecommunications Service Providers

35. Below, for those services subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

36. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the majority of firms can, again, be considered small.

37. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category ''Cellular and Other Wireless Telecommunications.'' Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, under this category and size standard, the majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data. The Commission has estimated that 260 of these are small under the SBA small business size standard.

38. *Paging.* The SBA has developed a small business size standard for the broad economic census category of ''Paging.'' Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. In addition, according to Commission data, 365 carriers have reported that they are engaged in the provision of ''Paging and Messaging Service.'' Of this total, the Commission estimates that 360 have 1,500 or fewer employees, and five have more than 1,500 employees. Thus, in this category the majority of firms can be considered small.

39. The Commission also notes that, in the *Paging Second Report and Order,* it adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. In this context, a small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. The Commission also notes that, currently, there are approximately 74,000 Common Carrier Paging licenses.

40. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A ''small business'' is an entity with average gross revenues of $40 million or less for each of the three preceding years, and a ''very small business'' is an entity with average gross revenues of $15 million or less for each of the three preceding years. The SBA has approved these small business size standards. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as ''very small business'' entities, and one that qualified as a ''small business'' entity.

41. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for ''Cellular and Other Wireless Telecommunications'' services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 432 carriers reported that they were engaged in the provision of wireless telephony. The Commission has estimated that 221 of these are small

under the SBA small business size standard.

42. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years. For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These standards defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA. No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as ''small'' or ''very small'' businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

43. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

44. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no more than 1,500 persons. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this second category and size standard, the majority of firms can, again, be considered small. Assuming this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard. In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.

45. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service and is subject to spectrum auctions. In the 220 MHz Third Report and Order, the Commission adopted a small business size standard for ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business size standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

46. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards ''small entity'' and ''very small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years, respectively. These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz

auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities.

47. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, the Commission adopted a small business size standard for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

48. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses—an entity that has average gross revenues of $40 million or less in the three previous calendar years. An additional size standard for ''very small business'' is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards. The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

49. *Wireless Cable Systems.* Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (''BRS''), formerly Multipoint Distribution Service (''MDS''), and the Educational Broadband Service (''EBS''), formerly Instructional Television Fixed Service (''ITFS''), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. The Commission estimates that the number of wireless cable subscribers is approximately 100,000, as of March 2005. Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. As described below, the SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating $13.5 million or less in annual receipts, appears applicable to MDS, ITFS and LMDS. Other standards also apply, as described.

50. The Commission has defined small MDS (now BRS) and LMDS entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, the Commission estimates that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

51. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). The Commission estimates that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small entities.

52. In the 1998 and 1999 LMDS auctions, the Commission defined a small business as an entity that has annual average gross revenues of less than $40 million in the previous three calendar years. Moreover, the Commission added an additional classification for a ''very small business,'' which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years. These definitions of ''small business'' and ''very small business'' in the context of the LMDS auctions have been approved by the SBA. In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, the Commission believes that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

53. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 1,030 LMDS licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licensees as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, the Commission concludes that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

54. *218–219 MHz Service.* The first auction of 218–219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* the Commission established a small business size standard for a ''small business'' as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and persons or entities that holds interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. The Commission cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum.

55. *24 GHz—Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of ''Cellular and Other Wireless Telecommunications'' companies. This category provides that such a company is small if it employs no more than 1,500 persons. According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year. Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, the Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

56. *24 GHz—Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for ''small business'' is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million. ''Very small business'' in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these small business size standards. These size standards will apply to the future auction, if held.

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

57. The rules adopted in this Order require that petitions for forbearance must be complete as filed as set forth in new section 1.54 ''Petitions for forbearance must be complete as filed.'' Section 1.54 requires that petitions for forbearance must identify the requested relief, including each provision, rule, or requirement from which forbearance is sought; each carrier, or group of carriers, for which forbearance is sought; each service for which forbearance is sought; each geographic location, zone, or area for which forbearance is sought; and any other factor, condition, or limitation relevant to determining the scope of the requested relief. Section 1.54 also requires that petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance and must specify how each of the statutory criteria is met with regard to each provision or rule from which forbearance is sought. If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify: the nature of the data or information; the parties believed to have or control the data or information; and the relationship of the data or information to facts and arguments presented in the petition. A petition for forbearance must identify any other petition, rulemaking, or waiver proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition. Alternatively, the petition must declare that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought.

58. In addition, petitions for forbearance must comply with the ministerial filing requirements in section 1.49. Petitions for forbearance must be e-mailed to a temporary repository at *forbearance@fcc.gov* at the time for filing. All filings related to a forbearance petition, including all data, must be provided in a searchable format. Petitions for forbearance must include: (1) A plain, concise, written summary statement of the relief sought; (2) a full statement of the petitioner's prima facie case for relief; (3) appendices that list: (A) the scope of relief sought as required in section 1.53(b); (B) all supporting data upon which the petition intends to rely, including a market analysis; and (C) any supporting statements or affidavits. To be searchable, a spreadsheet containing a significant amount of data must be capable of being manipulated to allow meaningful analysis.

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

59. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

60. Although the Order imposes compliance or reporting requirements, nothing in the record suggests that small carriers are disadvantaged by the new procedural requirements. In fact, small entities are disadvantaged by the lack of procedural rules governing consideration of forbearance petitions, because they have had to expend significant resources to respond to the scattershot arguments that have been made by much larger entities that have sought and often received forbearance in recent years. The SBA filed comments in support of the new information requirement that petitions for forbearance must be complete as filed.

F. Report to Congress

61. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. A copy of the Order and FRFA (or

summaries thereof) will also be published in the **Federal Register.**

Final Paperwork Reduction Act of 1995 Analysis

62. The Report and Order contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. The OMB, the general public, and other Federal agencies are invited to comment on the new and modified information collection requirements contained in this proceeding. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2005, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4) (SBPRA), the Commission has considered how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission found that the new and modified requirements must apply fully to small entities (as well as to others) to protect consumers and further other goals, as described in the Report and Order.

Congressional Review Act

63. The Commission will include a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

64. Accordingly, *it is ordered,* pursuant to sections 1, 4(i), 4(j), 5(c), 10, 201, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 155(c), 160, 201, and 303(r), that the Report and Order in WC Docket No. 07–267 *is adopted,* and that part 1 of the Commission's rules, 47 CFR part 1, *is amended* as set forth in Appendix B in the Report and Order.

65. *It is further ordered* that the rules and the requirements of this Report and Order *shall become effective* September 8, 2009 except § 1.54 which contains information collection requirements that have not been approved by OMB. The FCC will publish a document in the **Federal Register** announcing the effective date for those requirements.

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

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Communications common carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

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

PART 1—PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1 is revised to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(j), 160, 201, 225, and 303.

■ 2. Section 1.49 is amended by:

■ A. Removing the word ''and'' from paragraph (f)(1)(ii);

■ B. Removing the period at the end of paragraph (f)(1)(iii) and adding ''; and'' in its place; and

■ C. Adding paragraph (f)(1)(iv) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

* * * * *

(f)(1) * * *

(iv) Petition for forbearance proceedings.

* * * * *

■ 3. Add undesignated center heading below § 1.52 to read as follows:

Forbearance Proceedings

■ 4. Add new §§ 1.54 through 1.59 to read as follows:

§ 1.54 Petitions for forbearance must be complete as filed.

(a) *Description of relief sought.* Petitions for forbearance must identify the requested relief, including:

(1) Each statutory provision, rule, or requirement from which forbearance is sought.

(2) Each carrier, or group of carriers, for which forbearance is sought.

(3) Each service for which forbearance is sought.

(4) Each geographic location, zone, or area for which forbearance is sought.

(5) Any other factor, condition, or limitation relevant to determining the scope of the requested relief.

(b) *Prima facie case.* Petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance.

(1) A petition for forbearance must specify how each of the statutory criteria is met with regard to each statutory provision or rule, or requirement from which forbearance is sought.

(2) If the petitioner intends to rely on data or information in the possession of third parties, the petition must identify:

(i) The nature of the data or information.

(ii) The parties believed to have or control the data or information.

(iii) The relationship of the data or information to facts and arguments presented in the petition.

(3) The petitioner shall, at the time of filing, provide a copy of the petition to each third party identified as possessing data or information on which the petitioner intends to rely.

(c) *Identification of related matters.* A petition for forbearance must identify any proceeding pending before the Commission in which the petitioner has requested, or otherwise taken a position regarding, relief that is identical to, or comparable to, the relief sought in the forbearance petition. Alternatively, the petition must declare that the petitioner has not, in a pending proceeding, requested or otherwise taken a position on the relief sought.

(d) *Filing requirements.* Petitions for forbearance shall comply with the filing requirements in § 1.49.

(1) Petitions for forbearance shall be e-mailed to *forbearance@fcc.gov* at the time for filing.

(2) All filings related to a forbearance petition, including all data, shall be provided in a searchable format. To be searchable, a spreadsheet containing a significant amount of data must be capable of being manipulated to allow meaningful analysis.

(e) *Contents.* Petitions for forbearance shall include:

(1) A plain, concise, written summary statement of the relief sought.

(2) A full statement of the petitioner's *prima facie* case for relief.

(3) Appendices that list:

(i) The scope of relief sought as required in § 1.54(a);

(ii) All supporting data upon which the petition intends to rely, including a market analysis; and

(iii) Any supporting statements or affidavits.

(f) *Supplemental information.* The Commission will consider further facts and arguments entered into the record by a petitioner only:

(1) In response to facts and arguments introduced by commenters or opponents.

(2) By permission of the Commission.

§ 1.55 Public notice of petitions for forbearance.

(a) Filing a petition for forbearance initiates the statutory time limit for consideration of the petition.

(b) The Commission will issue a public notice when it receives a properly filed petition for forbearance. The notice will include:

(1) A statement of the nature of the petition for forbearance.

(2) The scope of the forbearance sought and a description of the subjects and issues involved.

(3) The docket number assigned to the proceeding.

(4) A statement of the time for filing oppositions or comments and replies thereto.

§ 1.56 Motions for summary denial of petitions for forbearance.

(a) Opponents of a petition for forbearance may submit a motion for summary denial if it can be shown that the petition for forbearance, viewed in the light most favorable to the petitioner, cannot meet the statutory criteria for forbearance.

(b) A motion for summary denial may not be filed later than the due date for comments and oppositions announced in the public notice.

(c) Oppositions to motions for summary denial may not be filed later than the due date for reply comments announced in the public notice.

(d) No reply may be filed to an opposition to a motion for summary denial.

§ 1.57 Circulation and voting of petitions for forbearance.

(a) If a petition for forbearance includes novel questions of fact, law or policy which cannot be resolved under outstanding precedents and decisions, the Chairman will circulate a draft order no later than 28 days prior to the statutory deadline, unless all Commissioners agree to a shorter period.

(b) The Commission will vote on any circulated order resolving a forbearance petition not later than seven days before the last day that action must be taken to prevent the petition from being deemed granted by operation of law.

§ 1.58 Forbearance petition quiet period prohibition.

The prohibition in § 1.1203(a) on contacts with decisionmakers concerning matters listed in the Sunshine Agenda shall also apply to a petition for forbearance for a period of 14 days prior to the statutory deadline under 47 U.S.C. 160(c) or as announced by the Commission.

§ 1.59 Withdrawal or narrowing of petitions for forbearance.

(a) A petitioner may withdraw or narrow a petition for forbearance without approval of the Commission by filing a notice of full or partial withdrawal at any time prior to the end of the tenth business day after the due date for reply comments announced in the public notice.

(b) Except as provided in paragraph (a) of this section, a petition for forbearance may be withdrawn, or narrowed so significantly as to amount to a withdrawal of a large portion of the forbearance relief originally requested by the petitioner, only with approval of the Commission.

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BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1533; MB Docket No. 09–70; RM–11534]

Television Broadcasting Services; Amarillo, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants a petition for rulemaking filed by Amarillo Junior College District, the licensee of noncommercial educational station KACV–DT, DTV channel *8, Amarillo, Texas requesting the substitution of DTV channel *9 for DTV channel *8 at Amarillo.

DATES: This rule is effective August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 09–70, adopted July 13, 2009, and released July 14, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

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

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Texas, is amended by adding DTV channel *9 and removing DTV channel *8 at Amarillo.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–18262 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 0808041043–9036–02]

RIN 0648–XQ73

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid, and Butterfish Fisheries; Total Allowable Catch (TAC) Harvested for Loligo Squid Trimester II

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces that, effective 0001 hours, August 6, 2009, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,500 lb of *Loligo* squid per trip at any time, and may only land *Loligo* once on any calendar day until September 1, 2009, when the Trimester III quota becomes available. This action is based on the determination that 90 percent of the Trimester II *Loligo* squid quota is projected to be harvested by August 6, 2009. Regulations governing the *Loligo* squid fishery require publication of this notification to advise vessel and dealer permit holders that no TAC is available for the directed fishery for *Loligo* squid harvested for the duration of Trimester II.

DATES: Effective 0001 hrs local time, August 6, 2009, through August 31, 2009.

FOR FURTHER INFORMATION CONTACT: William Whitmore, Fishery Management Specialist, (978) 281–9182.

SUPPLEMENTARY INFORMATION: Regulations governing the *Loligo* squid fishery are found at 50 CFR 648.20. The regulations require annual specification of optimum yield, allowable biological catch, and in-season adjustments of trimester quotas. The 2009 TAC allocated for Trimester II (74 FR 6244, February 6, 2009) is 3,208 mt. Trimester III begins on September 1, 2009, continues through December 31, 2009, and has a quota of 7,550 mt.

The regulations at § 648.22 require the Administrator, Northeast Region, NMFS (Regional Administrator), to monitor the *Loligo* squid fishery during each of three trimesters as described in the Fishery Management Plan (FMP) for the Mackerel, Squid, and Butterfish fisheries and, based upon dealer reports, state data, and other available information, to determine when the harvest of *Loligo* squid is projected to reach 90 percent of the trimester TAC. When such a determination is made, NMFS is required to publish notification in the **Federal Register** of this determination. Effective upon a specific date, NMFS must notify vessel and dealer permit holders that vessels are prohibited from fishing for, catching, possessing, transferring, or landing more than 2,500 lb (1.3mt) of *Loligo* squid per trip or calendar day for the remainder of the closure period.

The Regional Administrator has determined, based upon dealer reports and other available information, that 90 percent of the Trimester II TAC for the 2009 fishing year is projected to be harvested. Therefore, effective 0001 hrs local time, August 6, 2009, federally permitted vessels may not fish for, catch, possess, transfer, or land more than 2,500 lb (1.3mt) of *Loligo* squid per trip or calendar day through August 31, 2009. Effective August 6, 2009, federally permitted dealers are also advised that they may not purchase *Loligo* squid from federally permitted vessels that harvest more than 2,500 lb (1.3 mt) of *Loligo* squid from through 2400 hrs local time, August 31, 2009.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

The Assistant Administrator for Fisheries, NOAA (AA), finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest. This action closes the *Loligo* squid fishery for Trimester II until September 1, 2009, under current regulations. The regulations at § 648.22 require such action to ensure that *Loligo* squid vessels do not exceed the 2009 TAC. Trimester II of the *Loligo* squid fishery opened at 0001 hours on May 1, 2009. Data indicating the *Loligo* squid fleet will have landed at least 90 percent of the 2009 Trimester II TAC have only recently become available. If implementation of this closure is delayed to solicit prior public comment, the quota for this trimester will be exceeded, thereby undermining the conservation objectives of the FMP. The AA further finds, pursuant to 5 U.S.C 553(d)(3), good cause to waive the 30 day delayed effectiveness period for the reasons stated above.

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

Dated: July 31, 2009.

Kristen C. Koch,

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

[FR Doc. E9–18838 Filed 8–3–09; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 74, No. 150
Thursday, August 6, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 983

[Doc. No. AO–FV–08–0147; AMS–FV–08–0051; FV08–983–1]

Pistachios Grown in California; Secretary's Decision and Referendum Order on Proposed Amendment of Marketing Order No. 983

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule and referendum order.

SUMMARY: This decision proposes amendments to Marketing Agreement and Order No. 983 (order), which regulates the handling of pistachios grown in California, and provides growers with the opportunity to vote in a referendum to determine if they favor the changes. The amendments are based on proposals by the Administrative Committee for Pistachios (Committee), which is responsible for local administration of the order. These amendments would: Expand the production area covered under the order to include Arizona and New Mexico in addition to California; authorize the Committee to reimburse handlers for a portion of their inspection and certification costs in certain situations; authorize the Committee to recommend research projects; modify existing order authorities concerning aflatoxin and quality regulations; modify the authority for interhandler transfers of order obligations; redesignate several sections of the order; remove previously suspended order provisions, and make other related changes. The amendments are intended to improve the operation and functioning of the marketing order program.

DATES: The referendum will be conducted from August 10 through August 22, 2009. The representative period for the purpose of the referendum is September 1, 2008, through July 31, 2009.

FOR FURTHER INFORMATION CONTACT: Martin Engeler, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 2202 Monterey Street, Suite 102–B, Fresno, California 93721; Telephone: (559) 487–5110, Fax: (559) 487–5906, or e-mail: *Martin.Engeler@ams.usda.gov*; or Laurel May, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–1509, Fax: (202) 720–8938, or e-mail: *Laurel.May@ams.usda.gov.*

Small businesses may request information on this proceeding by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., Stop 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, e-mail: *Jay.Guerber@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on July 15, 2008, and published in the July 18, 2008, issue of the **Federal Register** (73 FR 41298), and a Recommended Decision issued on April 29 and published in the May 5, 2009, issue of the **Federal Register** (74 FR 20630).

This action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and is therefore excluded from the requirements of Executive Order 12866.

Preliminary Statement

The proposed amendments are based on the record of a public hearing held on July 29 and 30, 2008, in Fresno, California, to consider such amendments to the order. The hearing was held pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act'', and the applicable rules of practice and procedure governing the formulation of marketing agreements and orders (7 CFR Part 900).

The Notice of Hearing was published in the **Federal Register** on July 18, 2008 (73 FR 41298), and contained amendment proposals submitted by the Committee.

The amendments included in this decision would add new sections to the order which would result in numerical redesignation of several sections of the order. The redesignated sections would allow the related provisions to be grouped together in the order. The amendments included in this decision would:

1. Expand the production area to include the States of Arizona and New Mexico. The production area covered under the order is currently limited to the State of California. This proposal would revise existing § 983.26, Production area, and redesignate it as § 983.25. It would also result in corresponding changes being made to existing § 983.11, Districts; § 983.21, Part and subpart; and existing § 983.32, Establishment and membership. Existing sections 983.21 and 983.32 would also be redesignated as § 983.20 and § 983.41, respectively.

2. Authorize the Committee to reimburse handlers for travel and shipping costs related to aflatoxin inspection, under certain circumstances. This proposal would amend existing § 983.44, Inspection, certification and identification, and redesignate it as § 983.56.

3. Add a new § 983.46, Research, that would authorize the Committee to engage in research projects with the approval of USDA. This proposed amendment would also require corresponding changes to existing § 983.34, Procedure, to establish voting requirements for Committee recommendations concerning research. It would also require corresponding changes to existing § 983.46, Modification or suspension of regulations, and § 983.54, Contributions. The existing § 983.34, § 983.46, and § 983.54 would also be redesignated as § 983.43, § 983.59, and § 983.72, respectively.

4. Provide broad authority for aflatoxin regulations by revising existing § 983.38, Aflatoxin levels, and redesignating it as § 983.50. This proposal would also require corresponding changes to existing § 983.40, and redesignating that section as § 983.52. It would also require corresponding changes to § 983.1, Accredited laboratory.

5. Provide broad authority for quality regulations by revising existing § 983.39, Minimum quality levels, and

redesignating it as § 983.51. It would also remove provisions from that section concerning specific quality regulations that are currently suspended. This amendment would also require corresponding changes by removing currently suspended language in § 983.6, Assessed weight; revising § 983.7, Certified pistachios; removing existing § 983.19, Minimum quality requirements and § 983.20, Minimum quality certificate; revising existing § 983.31, Shelled pistachios; revising existing § 983.41, Testing of minimal quantities, and removing currently suspended language in that section; revising existing § 983.42, Commingling; and revising existing § 983.45, Substandard pistachios. Sections 983.31, 983.41, 983.42, and 983.45 would be redesignated as sections 983.30, 983.53, 983.54, and 983.57, respectively.

6. Add a new § 983.58, Interhandler Transfers. This proposal would modify existing authority under the order by expanding the range of marketing order obligations that may be transferred between handlers when pistachios are transferred between handlers. This proposal would require a corresponding change to existing § 983.53, Assessments, and would redesignate § 983.53 as § 983.71.

7. As a result of the proposed amendments and corresponding changes to the order summarized above, numerous administrative changes to the order would also be required. Such changes include numerical redesignations to several sections of the order, changes to cross references of section numbers in regulatory text as a result of the numerical redesignations, and removal of obsolete provisions. The title of order would be revised to include the States of Arizona and New Mexico. In addition, a change would be made to amend existing § 983.70 and redesignate it as § 983.92.

In addition to the proposed amendments to the order, AMS proposed to make any such additional changes as may be necessary to the order to conform to any amendment that may be adopted. To the extent necessary, conforming changes have been made to the amendments. These conforming changes have been identified in the above list of proposed amendments.

Upon the basis of evidence introduced at the hearing and the record thereof, the Administrator of AMS on April 29, 2009, issued a Recommended Decision published in the **Federal Register** on May 5, 2009 (74 FR 20630). An opportunity to file written exceptions was provided through June 4, 2009. None were received.

Small Business Considerations

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612) (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions so that small businesses will not be unduly or disproportionately burdened. Marketing orders and amendments thereto are unique in that they are normally brought about through group action of essentially small entities for their own benefit.

Small agricultural service firms, which include handlers regulated under the order, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000. Small agricultural producers have been defined as those with annual receipts of less than $750,000.

There are approximately 24 handlers and approximately 800 producers of pistachios in the State of California. It is estimated that approximately 50 percent of the processing handlers had annual receipts of less than $7,000,000, according to information presented at the hearing. In addition, based on the number of producers, the size of the 2007 crop, and the average producer price per pound data reported by the National Agricultural Statistics Service (NASS), the average producer revenue for the 2007 crop was $702,000. It is estimated that 85% of the producers in California produced less than $750,000 worth of pistachios and would thus be considered small businesses according to the SBA definition.

Based on information presented at the hearing, it is estimated that there are approximately 40 to 50 growers of pistachios in Arizona and approximately 30 growers in New Mexico. It is also estimated that there are 2 handlers in Arizona and 3 handlers in New Mexico. Although no official data is available, based on hearing testimony it is estimated that the majority of producers in Arizona and New Mexico are small businesses according to SBA's definition. It is also estimated that all of the handlers in New Mexico are small businesses and one of the handlers in Arizona is a small business.

California accounts for the vast majority of pistachio acreage and production in the U.S. According to data from the National Agricultural Statistics Service (NASS), California's total acreage in 2007 was reported at 176,400 acres. While no 2007 acreage data is available from NASS for Arizona and New Mexico, in 2006, Arizona acreage was reported at 2,500 acres while New Mexico acreage was reported at 1,350 acres in 2002. Two witnesses from New Mexico testified that they estimate acreage in New Mexico to be about 450 acres in 2007. Pistachios are also grown in small quantities in Texas, Utah, and Nevada. However, witnesses testified that pistachios produced in those States are considered to be the result of hobby farming and are not commercially significant in volume. California, Arizona, and New Mexico account for over 99.99 percent of domestic pistachio production and essentially all of the production used for commercial purposes, according to the record.

The order regulating the handling of pistachios grown in the State of California was established in 2004. The primary feature of the order is a quality provision that requires pistachios to be sampled and tested for aflatoxin prior to shipment to domestic markets. Such shipments of pistachios may not exceed a tolerance level for aflatoxin. Information collection and dissemination is also conducted under the order. The program is funded through assessments on handlers according to the quantity of pistachios handled. The order is administered by an industry committee of handlers and growers, and is designed to support both large and small pistachio handlers and growers. Committee meetings where regulatory recommendations and other decisions are made are open to the public. All members are able to participate in Committee deliberations, and each Committee member has an equal vote. Others in attendance at meetings are also allowed to express their views.

The Committee met on March 6, 2008, and requested that USDA conduct a public hearing to consider proposed amendments to the order. USDA reviewed the request and determined to proceed to a hearing. A hearing was conducted on July 29 and 30, 2008, in Fresno, California. The Committee's meeting and the hearing were both open to the public and all that attended were able to participate and express their views.

The proposed amendments recommended by the Committee would: Expand the production area to include the States of Arizona and New Mexico; authorize the Committee to reimburse handlers for certain inspection costs;

authorize research activities under the order; provide broad authority for aflatoxin regulation under the order, provide broad authority for quality regulation under the order; provide authority for interhandler transfer of marketing order obligations; and make corresponding administrative changes to the order as a result of the aforementioned proposed changes.

The proposed amendments are intended to improve the operation and functioning of the marketing order program. Record evidence indicates that the proposals are intended to benefit all producers and handlers under the order, regardless of size. All grower and handler witnesses at the hearing supported the proposed amendments and while acknowledging the additional cost implications, they stated that they expected the benefits to outweigh the costs.

A description of the proposed amendments and their anticipated economic impact on small and large entities is discussed below.

Evaluation of the Potential Economic Impacts of the Proposed Amendments

The key economic issues to examine in considering the proposed amendments to the marketing order are the benefits and costs to growers and handlers of the proposed expansion of the production area and the consequences of that expansion. The most significant change in terms of its potentially significant and immediate impact is the fact that if the production area is expanded to include Arizona and New Mexico, the pistachio handlers in those two States would become regulated under the order and would have to meet the same aflatoxin certification requirements that apply to California handlers.

Aflatoxin Requirements

California handlers currently must have all pistachio lots destined for the domestic market tested and certified that they do not exceed a maximum aflatoxin tolerance. To comply with the standard, California handlers arrange for a sample to be taken from each lot that is to be shipped domestically and to have that sample tested for aflatoxin. Lots that meet the standard receive written certifications that allow shipment to the domestic market. Lots that exceed the aflatoxin tolerance cannot be shipped domestically. Handlers may rework the lots to remove contaminated nuts and then can begin the certification process again. There are costs associated with each of these steps, which are currently borne by California handlers and would be borne by handlers in the other two States, if the order is amended.

Before considering cost-related details, it is important to examine the benefits associated with mandatory aflatoxin certification. Various grower and handler witnesses testified that they expected significant benefits to accrue from the mandatory requirements enforced through the marketing order, and increased consumer confidence in the quality of U.S. pistachios. Arizona and New Mexico handler witnesses indicated that they would willingly comply with all of the steps involved in meeting the aflatoxin standards. Grower witnesses from Arizona and New Mexico indicated awareness that at least part of the increased handler costs from aflatoxin certification would be passed onto them, but that they expected the net effect to be strongly positive. Grower witnesses from Arizona and New Mexico also stated they did not expect to have to undertake any significant changes in their pistachio production operations as a result of coming under the authority of the marketing order. Witnesses said that they believed that they would have overall improved returns and higher sales than would be the case without the marketing order regulation. They expected the benefits of the proposed amendments to far outweigh the costs.

A 2005 benefit cost analysis of Federal marketing order mandatory aflatoxin requirements for California was submitted as evidence at the hearing. The analysis, prepared by agricultural economists at the University of California-Davis, was entitled ''Economic Consequences of Mandated Grading and Food Safety Assurance: *Ex Ante* Analysis of the Federal Marketing Order for California Pistachios'' (Richard S. Gray and others, University of California, Giannini Foundation Monograph 46, March 2005). In present-value terms, over a 20-year horizon, the benefits to producers in the study's baseline scenario were estimated to be $75.3 million. The study reported a ''most likely scenario'' benefit cost ratio of nearly 6:1, with a range from about 4:1 to 9:1 under alternative scenarios representing low and high aflatoxin event impacts, respectively, on the pistachio market.

One witness noted that, depending on compliance cost and aflatoxin event assumptions under alternative scenarios in the study, the expected benefit cost ratio from implementation of mandatory aflatoxin standards under the California marketing order ranged between 5:1 and 17:1. Several grower and handler witnesses suggested that these significant benefit cost ratios for the California marketing order would also likely apply if the order were expanded to include Arizona and New Mexico.

The following section examines the cost impacts of the mandatory aflatoxin requirements in an expanded marketing order.

Differences in Aflatoxin Inspection and Certification Costs

Aflatoxin inspection and certification costs can be divided into the costs of: (1) Inspector travel time to pistachio handler's premises; (2) time required for the inspector to draw samples from lots designated for domestic shipment; (3) cost of shipping samples to the testing laboratory; (4) aflatoxin analysis (testing cost); and (5) value of the destroyed pistachios used in the sampling and analysis.

Tables 1–3 that follow present estimated costs for representative handlers in California, Arizona, and New Mexico. Each table is designed to summarize handler costs for the lots being tested, including each of the five cost elements listed above. For clarity of the cost comparisons, the lot size to be sampled is assumed to be 50,000 pounds in the representative scenarios for all three States. The 50,000-pound lot size is most appropriate for California's handler plants, which are generally larger than the handler plants in Arizona and New Mexico. The impact in terms of higher unit cost for smaller lot sizes is discussed below.

Table 1 is a representation of the current aflatoxin certification cost situation in California, which is the production area of the current Federal marketing order for pistachios. It serves as a benchmark with which to compare the costs in the other two States, Arizona and New Mexico, which would be included under the proposed expanded production area. Witnesses from the pistachio industry in each of the three States submitted as evidence the data used in the three tables, and stated that the data was representative of the situation that exists or would be faced by handlers in those States.

Witnesses pointed out that inspector travel costs and sample shipment costs were the most variable costs across the States. Inspector travel costs consist of the mileage reimbursement that inspectors need to be paid by the handlers, plus the time spent traveling to the handler's location. In California, inspectors are regularly in the plants, and there is no additional travel time associated with aflatoxin sampling. Witnesses testified that New Mexico inspector travel costs could be as high as $485 per lot due to the large distances involved, but that the figure of $432.50

was the most representative. Data presented at the hearing indicated that Arizona inspector travel cost could be as high as $100 per lot, but that a lower figure of $32.70 was more likely due to the closer proximity of Arizona Plant Services inspectors, who may be certified to take the sample.

TABLE 1—CALIFORNIA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant	.....	.....	No inspector travel time; inspector regularly in plant.
Inspector Sampling Time	$70.00	$0.0014	[Cost of sampler time: 2 hours) @ $35/hour = $70]; [2 hours to draw 100 samples for one lot[2]].
Value of Pistachio Sample	$44.00	$0.0009	[10 kg (22-lb.) weight of sample from 100 sub-samples]; [22 lbs. @ $2.00 per pound = $44].
Shipping Cost to Laboratory[1]	.....	.....	Onsite labs in plants; no shipping cost.
Aflatoxin Testing Cost[2]	$90.00	$0.0018	$90 lab fee to determine aflatoxin level of sample.
Total Cost	$204.00	$0.0041	
Pct. of price received by handler	.....	0.2%	Industry estimate of CA handler sale price per pound = $2.00.
Pct. of price received by grower	.....	0.3%	NASS estimate of 2007 CA grower price per pound = $1.35.

[1] DFA laboratory in Fresno, CA.
[2] Aflatoxin analysis done in onsite laboratory; imputed cost of $90 is based on cost in outside laboratory. Source: Testimony at pistachio Federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 2—ARIZONA PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant	$32.70	$0.0007	[24 miles[1] @ $0.40 per mile = $9.60]; [Cost of sampler time: 40 min. (0.66 hours) @ $35/hour = $23.10].
Inspector Sampling Time	$70.00	$0.0014	[Cost of sampler time: 2 hours @ $35/hour = $70]; [2 hours to draw 100 samples for one lot[2]].
Value of Pistachio Sample	$60.50	$0.0012	[10 kg (22-lb.) weight of sample from 100 sub-samples]; [22 lbs. @ $2.75 per pound = $60.50].
Shipping Cost to Laboratory[3]	$200.00	$0.0040	Shipping cost per 10 kg sample.
Aflatoxin Testing Cost	$90.00	$0.0018	$90 lab fee to determine aflatoxin level of sample.
Total Cost	$453.20	$0.0091	
Pct. of price received by handler	.....	0.3%	Industry estimate of AZ handler sale price per pound = $2.75.
Pct. of price received by grower	.....	0.7%	USDA/NASS estimate of 2007 CA grower price per pound = $1.35 (AZ price not available).

[1] 12 miles each way from pistachio handler plant in Bowie, AZ to the San Simon, AZ location of Arizona Plant Services inspectors (certified samplers).
[2] Three lots sampled per visit over a 6-hour period.
[3] DFA laboratory in Fresno, CA; handler witness expected to use overnight shipping, estimated at $200 per 10 kg sample.
Source: Computed by USDA, based on evidence presented at pistachio Federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

TABLE 3—NEW MEXICO PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Inspector Travel Time to Plant	$432.50	$0.0087	[600 miles[1] @ $0.40 per mile = $240]; [Cost of sampler time: 5.5 hours[2] @ $35/hour = $192.50].
Inspector Sampling Time	$70.00	$0.0014	[Cost of sampler time: 2 hours @ $35/hour = $70]; [2 hours to draw 100 samples for one lot].

TABLE 3—NEW MEXICO PISTACHIOS: COST SCENARIO FOR SAMPLING AND AFLATOXIN TESTING FOR REPRESENTATIVE HANDLER—Continued

	50,000-pound lots		Description of cost elements
	Dollars per lot	Dollars per pound	
Value of Pistachio Sample	$44.00	$0.0009	[10 kg (22-lb.) weight of sample from 100 sub-samples]; [22 lbs. @ $2.00 per pound = $44].
Shipping Cost to Laboratory [3]	$105.00	$0.0021	Shipping cost per 10 kg sample [4].
Aflatoxin Testing Cost	$90.00	$0.0018	$90 lab fee to determine aflatoxin level of sample.
Total Cost	$741.50	$0.0148	
Pct. of price received by handler	.....	0.7%	Industry estimate of NM handler sale price per pound = $2.00.
Pct. of price received by grower	.....	1.1%	USDA/NASS estimate of 2007 CA grower price per pound = $1.35 (NM price not available).

[1] Average of round trip travel distances to Alamagordo, NM, pistachio handler plant from two NM inspector (certified sampler) locations—Portales (416 miles round trip) and Farmington (782 miles).
[2] Average of driving time estimates to two inspector locations: (4 + 7) / 2 = 5.5 hours.
[3] DFA laboratory in Fresno, CA.
[4] Average of estimated range of shipping costs = ($90 + $120) / 2 = $105.
Source: Computed by USDA, based on evidence presented at pistachio Federal marketing order hearing, July 29–30, 2008, in Fresno, CA.

Two cost elements that are uniform across the three States are sampling time and testing cost. The estimated time that it takes an inspector to draw a 10 kg (22 pound) sample for aflatoxin testing of a 50,000 pound lot, based on 100 sub-samples, is 2 hours. At a standard hourly rate of $35 per hour, two hours of sampling time will cost the handler $70. The testing cost for a laboratory to determine the aflatoxin level from a sample is $90.

Witnesses indicated that the cost for the 22 pounds of pistachios used in the sample (handler sales revenue foregone) was $2.00 per pound ($44 total) in California and New Mexico and $2.75 in Arizona (about $61 total).

Given all of the assumptions that went into developing the cost summary in Table 1, the estimated cost per lot for a California handler for aflatoxin certification is $204, which is less than one half cent per pound (about four tenths of a cent). This represents 0.2 percent of the $2.00 pistachio value per pound at the handler level (estimate provided by industry witnesses) and 0.3 percent of the 2007 grower price per pound for California pistachios, estimated by NASS at $1.35 per pound. A California pistachio industry witness pointed out that the unit price would be even lower with larger lot sizes and that the average lot size for ''failed lots'' in a recent year under the marketing order (those that exceeded the maximum aflatoxin tolerance) was nearly 67,000 pounds.

Table 2 shows that a representative Arizona handler would pay twice as much as a California handler—$453 per lot, or nearly one cent per pound (about nine tenths of a cent). The data in Table 3 indicated that a New Mexico handler would pay even more for aflatoxin certification—$742 per 50,000 pound lot, or about 1.5 cents per pound. Thus the certification costs for the smaller plants in Arizona and New Mexico would be between two and four times higher, if lot sizes were the same.

Typical lot sizes may be smaller in Arizona and New Mexico; witnesses indicated that lot sizes could vary between 10,000 and 50,000 pounds. An Arizona handler witness presented evidence indicating that 40,000 pounds would be a more likely typical lot size, and that the sample size and related cost factors would be the same. With a smaller lot size, the Arizona handler cost per pound rises from nine tenths of a cent (50,000 pound lot) to 1.1 cents (40,000 pound lot). This cost per pound is nearly 3 times higher than the cost for a California handler with a 50,000 pound lot, but the percentage of the estimated handler sales price remains under one half of one percent (0.4%).

A New Mexico handler witness characterized their own operation as being quite a bit smaller than the main Arizona handler and most California handlers. If the typical lot size for a small New Mexico handler was 10,000 pounds, then the sample size would be smaller (13.2 pounds) and the inspector sampling time declines from two hours to one hour. The total cost would decline modestly, from $742 for a 50,000 pound lot to $689 for a 10,000 pound lot. However, since the costs are spread over fewer pounds, the unit cost for certification would rise to nearly seven cents per pound, about 3 percent of the handler sales price. If the small handler had a typical lot size of 30,000 pounds (the midpoint between 10,000 and 50,000 pounds) the certification cost would be about 2.5 cents per pound, just over one percent of the handler sale price.

However, the New Mexico handler witness indicated that they would try to organize their pistachio handling operation to keep the lot sizes for sampling and testing large enough to keep costs down. The 50,000 pound lot example shown in Table 3 therefore provides a reasonable representation of small handler certification costs. The higher costs are due largely to the less developed aflatoxin testing infrastructure than is available in California, and related issues such as greater distances for inspector travel.

Additional costs are incurred if a lot exceeds the maximum aflatoxin tolerance. Witnesses estimated that in all three States the cost for reworking a lot to remove the contaminated nuts would be 25 cents per pound. After reworking the lot a handler would incur another round of the sampling and testing costs highlighted in the tables.

Grower witnesses stated that the aflatoxin certification costs as presented by handler and other industry witnesses, and illustrated by the three tables, appeared to be reasonable representations of the cost of compliance with the aflatoxin requirements under the marketing order.

Proposed Reimbursement To Account for Handler Cost Differences

The significant cost differences highlighted above is the reason that

pistachio industry witnesses from all three States supported a proposed amendment to authorize the Committee to reimburse handlers in more remote locations within the production area for the excess costs due to lack of access to inspection and certification services. Reimbursing handlers for the excess costs would eliminate any differential impact and would equalize the aflatoxin certification costs across the proposed expanded production area.

Although the precise details of reimbursement would be established through the informal rulemaking process upon recommendation of the Committee if such authority were granted, the following example illustrates one way to estimate the amount of reimbursement that may occur. With a 50,000 pound lot size, Table 3 shows the cost per lot for a New Mexico handler is about $742. The New Mexico handler would be expected to pay only the portion of the costs that are the same across the three States ($70 for inspector sampling, plus $90 testing cost, plus $44 in revenue foregone from destroyed pistachios, for a total cost per lot of $204). The handler represented by Table 3 would receive a reimbursement per lot of $538 ($742 minus $204).

Using different cost assumptions, a pistachio industry witness provided an example with a somewhat higher estimate of the likely cost ($605 per lot) that the Committee would reimburse New Mexico handlers. The witness estimated that with ten sampling trips per year, and one lot sampled per trip, the New Mexico reimbursements would total $6,050. With an anticipated total of 100 lots tested in Arizona in the example presented by the witness, and with a reimbursement rate of $235 per lot, the total Arizona cost would be $23,500. The sum for the two States would be about $30,000.

Based on similar assumptions used in developing the tables, the total current cost of marketing order aflatoxin certification for California handlers (excluding the Committee assessment) was estimated by an industry witness to be $530,000. Based on this example, a $30,000 reimbursement would be issued by the Committee to the Arizona and New Mexico handlers. The reimbursement would represent about a 6 percent increase above the $530,000 currently paid by the California handlers. The witness also stated that when the reimbursement system is implemented, all handlers of like-size operations would have comparable inspection costs.

All California handler and grower witnesses expressed their support for such a reimbursement provision. In addition, all of the Arizona and New Mexico handler and grower witnesses also testified in favor of such a reimbursement.

Handler and grower witnesses indicated that the expected benefits from the operation of the expanded marketing order would substantially exceed costs.

Other Proposed Amendments

The addition of production, post harvest, and nutrition research authority to the order would have no immediate cost impact on the industry. If the proposal is adopted, it would allow the Committee to recommend research activities to USDA. If approved, the projects would be funded through handler assessments. It is likely that program assessments would increase in order to fund any projects recommended, which would increase costs to handlers. However, the order limits the total assessment that can be implemented under the order so that the entire assessment cannot exceed one half of one percent of the average price received by producers in the preceding crop year. To the extent that funds for research would only represent a portion of the assessment funds, the cost of any research that may be conducted would necessarily be less than one half of one percent of the average price received by producers. In addition, since assessments are collected from handlers based on the volume of pistachios handled, any cost associated with research projects would be proportionate to the size of the handlers.

Witnesses testified that the Committee would not undertake any research activities unless they expected the benefits to outweigh the costs. One witness testified that a presentation at a Symposium for Agricultural Research held on June 18 and 19, 2008, in Sacramento, California indicated that a benefit/cost ratio for agricultural research in California has been estimated at 30.7 to 1.

Handler and grower witnesses made positive comments in support of other proposed order amendments, including the granting of broad authority for aflatoxin standards and for other quality regulations. Witnesses stated that there would be no immediate impact from the granting of these authorities, because there are no industry plans for changes in regulations. However, handler and grower witnesses stated that having such authority would be quite helpful to the future of the pistachio industry, and that if the authorities were exercised in the future, they expected that it would be done in a way that assured that benefits would outweigh costs. Since unanimity of the Committee would generally be required to make such changes, they expressed confidence that only regulations would be established that had very broad industry consensus. They expected additional improvements in product quality and improved returns to growers and handlers from the use of any such future regulations.

One other proposed amendment, relating to interhandler transfers, merits discussion in the context of economic impact on handlers and growers, particularly small ones. When the marketing order was promulgated in 2004, authority was given for interhandler transfers of noncertified pistachios. Evidence presented at the hearing indicates that the proposed amendment formalizes that authority and expands it to include other marketing order requirements, including the payment of assessments on hulled and dried pistachios, when that processing is done by the producer. Under the marketing order, the entity which hulls and dries pistachios is responsible for assessments and inspections. This provision was included because in California producers normally deliver pistachios to a handler (processor) for hulling and drying as well as the subsequent handling functions.

However, conditions in Arizona and New Mexico are different due to the limited processing capacity of some handlers, the lack of processing access of producers, and the small size of some producing operations. It is necessary in these conditions for some producers to process (hull and dry) their pistachios prior to delivery to a handler. The hulling and drying is part of the harvest process, and it is not the intent of these producers to perform any other handling functions. The proposal would therefore allow the transfer of responsibility for assessments, inspections and other marketing order requirements to the handler who places the pistachios into the stream of commerce.

According to evidence presented at the hearing, this amendment would allow a small number of producers who hull and dry their own production, but perform no additional handling functions (estimated at less than ten), to limit their responsibility to filing a form at the time of pistachio delivery. This proposal would more clearly delineate the responsibilities of handlers and the small number of affected producers. Both would continue their current practices in virtually all cases, and the proposal would neither increase nor decrease returns. If the proposal is not accepted, small grower/handlers would

assume an additional paperwork burden associated with the role of a handler, according to testimony. This proposal has the effect of assisting small business operations by removing them from paperwork and other burdens.

Handler Assessment Costs

Under the marketing order, handlers pay assessments to the Committee for costs associated with administering the program. Following is an evaluation of the impact these costs would have on handlers in Arizona and New Mexico if they are included under the order.

The assessment rate authorized under the order is limited to one-half of one percent (.005) of the average grower price received in the preceding crop year. The current assessment rate under the order is $.0007 per pound, or .07 cents per pound. This compares to an estimated average grower price for the 2007 crop year of $1.35 per pound. The assessment rate for the 2007 crop year was .05 percent (5/100ths of one percent) of the grower price.

Although there are no NASS data available regarding New Mexico pistachio production, information presented by witnesses at the hearing indicates average annual production in New Mexico could be in the range of 300,000 to 350,000 pounds. At an assessment rate of $.0007, this would equate to a total annual assessment ranging from $210 to $245 for all New Mexico handlers combined. Production from Arizona was 7 million pounds in 2007, according to NASS data. At the $.0007 per pound assessment rate, this would equate to a total annual assessment of $4,900 for all Arizona handlers combined. Assessments under the order present a cost to handlers, but as can be seen from the foregoing example, the cost is minimal. In addition, the costs are applied to handlers in proportion to the quantity of pistachios handled, so there is no differential impact anticipated for small and large handlers.

Paperwork Reduction Act

Information collection requirements for Part 983 are currently approved by the Office of Management and Budget (OMB) under OMB No. 0581–0215, ''Pistachios Grown in California.'' The information requirements generated by the proposed amendments would result in an increase in burden, which has been submitted to OMB for approval under OMB No. 0581–NEW. Upon approval, we will request that this collection be merged into OMB No. 0581–0215.

The estimated burden is as follows:

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .225 hours per response.

Respondents: Producers and handlers of pistachios grown in Arizona and New Mexico.

Estimated Number of Respondents: 85.

Estimated Number of Responses per Respondent: 1.51.

Estimated Total Annual Burden on Respondents: 29 hours.

The Recommended Decision provided an opportunity to submit comments on the proposed information collection requirements. None were received.

As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule. All of these amendments are designed to enhance the administration and functioning of the marketing order to the benefit of the industry.

While the implementation of these requirements may impose some additional costs on handlers, the costs are minimal and uniform on all handlers. Some of these costs may be passed on to growers. However, these costs would be offset by the benefits derived by the operation of the marketing order. In addition, the meetings regarding these proposals as well as the hearing date were widely publicized throughout the existing and proposed addition to the pistachio production area and all interested persons were invited to attend the meetings and the hearing and participate in Committee deliberations on all issues. All Committee meetings and the hearing were public forums and all entities, both large and small, were able to express views on these issues. The Committee itself is composed of members representing handlers and producers. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

AMS is committed to complying with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Civil Justice Reform

The amendments to Marketing Agreement and Order 983 proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect. If adopted, the proposed amendments would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this proposal.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United Sates in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

Findings and Conclusions

The findings and conclusions, rulings, and general findings and determinations included in the Recommended Decision set forth in the May 5, 2009, (74 FR 20630) issue of the **Federal Register** are hereby approved and adopted.

Marketing Agreement and Order

Annexed hereto and made a part hereof is the document entitled ''Order Amending the Order Regulating the Handling of Pistachios Grown in California, Arizona, and New Mexico.'' This document has been decided upon as the detailed and appropriate means of effectuating the foregoing findings and conclusions.

It is hereby ordered, that this entire decision be published in the **Federal Register**.

Referendum Order

It is hereby directed that a referendum be conducted in accordance with the procedure for the conduct of referenda (7 CFR part 900.400–407) to determine whether the annexed order amending the order regulating the handling of pistachios grown in California, Arizona, and New Mexico is approved or favored

by producers, as defined under the terms of the order, who during the representative period were engaged in the production of pistachios in the production area (California, Arizona, and New Mexico).

The representative period for the conduct of such referendum is hereby determined to be September 1, 2008 through July 31, 2009.

The agents of the Secretary to conduct such referendum are hereby designated to be Kurt Kimmel and Jennifer Robinson, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax (559) 487–5906, or e-mail: *Kurt.Kimmel@ams.usda.gov* or *Jen.Robinson@ams.usda.gov,* respectively.

List of Subjects in 7 CFR Part 983

Pistachios, Marketing agreements and orders, Reporting and recordkeeping requirements.

Dated: July 29, 2009.

Rayne Pegg,

Administrator, Agricultural Marketing Service.

Order Amending the Order Regulating the Handling of Pistachios Grown in California, Arizona, and New Mexico [1]

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary to the findings and determinations that were previously made in connection with the issuance of the marketing order; and all said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

(a) Findings and Determinations Upon the Basis of the Hearing Record

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601–612), and the applicable rules of practice and procedure effective thereunder (7 CFR part 900), a public hearing was held upon proposed further amendment of Marketing Agreement and Order No. 983, regulating the handling of pistachios grown in California. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The marketing agreement and order, and as hereby proposed to be amended, and all of the terms and conditions thereof, would tend to effectuate the declared policy of the Act;

(2) The marketing agreement and order, as hereby proposed to be amended, regulate the handling of pistachios grown in the production area in the same manner as, and are applicable only to, persons in the respective classes of commercial and industrial activity specified in the marketing agreement and order upon which a hearing has been held;

(3) The marketing agreement and order, as hereby proposed to be amended, are limited in their application to the smallest regional production area which is practicable, consistent with carrying out the declared policy of the Act, and the issuance of several orders applicable to subdivisions of the production area would not effectively carry out the declared policy of the Act;

(4) The marketing agreement and order, as hereby proposed to be amended, prescribe, insofar as practicable, such different terms applicable to different parts of the production area as are necessary to give due recognition to the differences in the production and marketing of pistachios grown in the production area; and

(5) All handling of pistachios grown in the production area as defined in the marketing agreement and order, is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects such commerce.

Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, all handling of pistachios grown in California, Arizona, and New Mexico shall be in conformity to, and in compliance with the terms and conditions of the said order as hereby proposed to be amended as follows:

The provisions of the proposed marketing agreement and order amending the order contained in the Recommended Decision issued on April 29, 2009, and published in the **Federal Register** on May 5, 2009, (74 FR 20630) will be and are the terms and provisions of this order amending the order and are set forth in full below.

PART 983—[AMENDED]

1. The authority citation for 7 CFR part 983 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. The heading for part 983 is revised to read as follows:

PART 983—PISTACHIOS GROWN IN CALIFORNIA, ARIZONA, AND NEW MEXICO

3. Revise § 983.1 to read as follows:

§ 983.1 Accredited laboratory.

An *accredited laboratory* is a laboratory that has been approved or accredited by the U.S. Department of Agriculture.

4. Lift suspension of § 983.6, published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007 and revise the section to read as follows:

§ 983.6 Assessed weight.

Assessed weight means pounds of inshell pistachios, with the weight computed at 5 percent moisture, received for processing by a handler within each production year: *Provided,* That for loose kernels, the actual weight shall be multiplied by two to obtain an inshell weight; *Provided further,* That the assessed weight may be based upon quality requirements for inshell pistachios that may be recommended by the Committee and approved by the Secretary.

5. Lift suspension of § 983.7 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and revise the section to read as follows:

§ 983.7 Certified pistachios.

Certified pistachios are those that meet the inspection and certification requirements under this part.

6. Revise § 983.8 to read as follows:

§ 983.8 Committee.

Committee means the Administrative Committee for Pistachios established pursuant to § 983.41.

§ 983.11 [Amended]

7. Amend § 983.11 by adding a paragraph (a)(4) to read as follows:

§ 983.11 Districts.

(a) * * *

(4) *District 4* consists of the States of Arizona and New Mexico.

* * * * *

§ 983.19 [Removed and Reserved]

8. Lift suspension of § 983.19 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and remove the section.

§ 983.20 [Removed and Reserved]

9. Lift suspension of § 983.20 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, and remove the section.

[1] This order shall not become effective unless and until the requirements of § 900.14 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders have been met.

§ 983.21 [Redesignated as § 983.20]

10. Redesignate § 983.21 as § 983.20, and revise it to read as follows:

§ 983.20 Part and subpart.

Part means the order regulating the handling of pistachios grown in the States of California, Arizona and New Mexico, and all the rules, regulations and supplementary orders issued thereunder. The aforesaid order regulating the handling of pistachios grown in California, Arizona and New Mexico shall be a subpart of such part.

§ 983.22 [Redesignated as § 983.21]

11. Redesignate § 983.22 as § 983.21.

§ 983.23 [Redesignated as § 983.22]

12. Redesignate § 983.23 as § 983.22, and revise it to read as follows:

§ 983.22 Pistachios.

Pistachios means the nuts of the pistachio tree of the genus and species *Pistacia vera* grown in the production area, whether inshell or shelled.

§ 983.24 [Redesignated as § 983.23]

13. Redesignate § 983.24 as § 983.23.

§ 983.25 [Redesignated as § 983.24]

14. Redesignate § 983.25 as § 983.24.

§ 983.26 [Redesignated as § 983.25]

15. Redesignate § 983.26 as § 983.25, and revise it to read as follows:

§ 983.25 Production area.

Production Area means the States of California, Arizona, and New Mexico.

§§ 983.27 through 983.30 [Redesignated as §§ 983.26 through 983.29]

16. Redesignate §§ 983.27 through 983.30 as §§ 983.26 through 983.29, respectively.

§ 983.31 [Redesignated as § 983.30]

17. Lift suspension of § 983.31 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.31 as § 983.30, and revise the section to read as follows:

§ 983.30 Substandard pistachios.

Substandard pistachios means pistachios, inshell or shelled, which do not meet regulations established pursuant to §§ 983.50 and 983.51.

§ 983.53 [Redesignated as § 983.71]

18. Redesignate § 983.53 as § 983.71, and revise paragraph (a) to read as follows:

§ 983.71 Assessments.

(a) Each handler who receives pistachios for processing in each production year, except as provided in § 983.58, shall pay the committee on demand, an assessment based on the *pro rata* share of the expenses authorized by the Secretary for that year attributable to the assessed weight of pistachios received by that handler in that year.

* * * * *

§ 983.54 [Redesignated as § 983.72]

19. Redesignate § 983.54 as § 983.72, and revise the section to read as follows:

§ 983.72 Contributions.

The committee may accept voluntary contributions but these shall only be used to pay for committee expenses unless specified in support of research under § 983.46. Furthermore, research contributions shall be free of additional encumbrances by the donor and the committee shall retain complete control of their use.

§ 983.55 [Redesignated as § 983.73]

20. Redesignate § 983.55 as § 983.73.

§ 983.56 [Redesignated as § 983.74]

21. Redesignate § 983.56 as § 983.74, and amend it by removing the reference to ''§ 983.53'' and adding in its place ''§ 983.71'' in paragraph (a)(1).

§ 983.57 [Redesignated as § 983.75]

22. Redesignate § 983.57 as § 983.75, and revise it to read as follows:

§ 983.75 Implementation and amendments.

The Secretary, upon the recommendation of a majority of the committee, may issue rules and regulations implementing or modifying §§ 983.64 through 983.74 inclusive.

§§ 983.58 through 983.64 [Redesignated as §§ 983.80 through 983.86]

23. Redesignate §§ 983.58 through 983.64 as §§ 983.80 through 983.86, respectively.

24. Move the undesignated center heading ''MISCELLANEOUS PROVISIONS'' to precede § 983.80.

§ 983.65 [Redesignated as § 983.87]

25. Redesignate § 983.65 as § 983.87, and revise it to read as follows:

§ 983.87 Effective time.

The provisions of this part, as well as any amendments, shall become effective at such time as the Secretary may declare, and shall continue in force until terminated or suspended in one of the ways specified in § 983.88 or § 983.89.

§§ 983.66 through 983.69 [Redesignated as §§ 983.88 through 983.91]

26. Redesignate §§ 983.66 through 983.69 as §§ 983.88 through 983.91, respectively.

§ 983.70 [Redesignated as § 983.92]

27. Redesignate § 983.70 as § 983.92, and revise it to read as follows:

§ 983.92 Exemption.

Any handler may handle pistachios within the production area free of the requirements in §§ 983.50 through 983.58 and § 983.71 if such pistachios are handled in quantities not exceeding 5,000 dried pounds during any production year. The Secretary, upon recommendation of the committee, may issue rules and regulations changing the 5,000 pound quantity applicable to this exemption.

§ 983.41 [Redesignated]

28. Lift suspension of § 983.41 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.41 as § 983.53, and revise the section to read as follows:

§ 983.53 Testing of minimal quantities.

(a) *Aflatoxin.* Handlers who handle less than 1 million pounds of assessed weight per year have the option of utilizing both of the following methods for testing for aflatoxin:

(1) The handler may have an inspector sample and test his or her entire inventory of hulled and dried pistachios for the aflatoxin certification before further processing.

(2) The handler may segregate receipts into various lots at the handler's discretion and have an inspector sample and test each specific lot. Any lots that are found to have less aflatoxin than the level established by the committee and approved by the Secretary can be certified by an inspector to be negative as to aflatoxin. Any lots that are found to have aflatoxin exceeding the level established by the committee and approved by the Secretary may be tested after reworking in the same manner as specified in § 983.50.

(b) *Quality.* The committee may, with the approval of the Secretary, establish regulations regarding the testing of minimal quantities of pistachios for quality.

§ 983.42 [Redesignated as § 983.54]

29. Lift suspension of § 983.42 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.42 as § 983.54, and revise the section to read as follows:

§ 983.54 Commingling.

Certified lots may be commingled with other certified lots, but the commingling of certified and uncertified lots shall cause the loss of certification for the commingled lots.

§ 983.43 [Redesignated as § 983.55]

30. Redesignate § 983.43 as § 983.55.

§ 983.44 [Redesignated as § 983.56]

31. Redesignate § 983.44 as § 983.56, and revise it to read as follows:

§ 983.56 Inspection, certification and identification.

Upon recommendation of the committee and approval of the Secretary, all pistachios that are required to be inspected and certified in accordance with this part shall be identified by appropriate seals, stamps, tags, or other identification to be affixed to the containers by the handler. All inspections shall be at the expense of the handler, *Provided,* That for handlers making shipments from facilities located in an area where inspection costs for inspector travel and shipment of samples for aflatoxin testing would otherwise exceed the average of those same inspection costs for comparable handling operations located in Districts 1 and 2, such handlers may be reimbursed by the committee for the difference between their respective inspection costs and such average, or as otherwise recommended by the committee and approved by the Secretary.

§ 983.45 [Redesignated as § 983.57]

32. Lift the suspension of § 983.45 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.45 as § 983.57, and revise the section to read as follows:

§ 983.57 Substandard pistachios.

The committee shall, with the approval of the Secretary, establish such reporting and disposition procedures as it deems necessary to ensure that pistachios which do not meet the aflatoxin and quality requirements established pursuant to §§ 983.50 and 983.51 shall not be shipped for domestic human consumption.

§ 983.46 [Redesignated as § 983.59]

33. Redesignate § 983.46 as § 983.59, and revise it to read as follows:

§ 983.59 Modification or suspension of regulations.

(a) In the event that the committee, at any time, finds that by reason of changed conditions, any regulations issued pursuant to §§ 983.50 through 983.58 should be modified or suspended, it shall, pursuant to § 983.43, so recommend to the Secretary.

(b) Whenever the Secretary finds from the recommendations and information submitted by the committee or from other available information, that a regulation should be modified, suspended, or terminated with respect to any or all shipments of pistachios in order to effectuate the declared policy of the Act, the Secretary shall modify or suspend such provisions. If the Secretary finds that a regulation obstructs or does not tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such regulation.

(c) The Secretary, upon recommendation of the committee, may issue rules and regulations implementing §§ 983.50 through 983.58.

§§ 983.47 through 983.51 [Redesignated as §§ 983.64 through 983.68]

34. Redesignate §§ 983.47 through 983.51 as §§ 983.64 through 983.68, respectively.

35. Move the undesignated center heading ''REPORTS, BOOKS, AND RECORDS'' to precede § 983.64.

§ 983.52 [Redesignated as § 983.70]

36. Redesignate § 983.52 as § 983.70.

37. Move the undesignated center heading ''EXPENSES AND ASSESSMENTS'' to precede § 983.70.

38. Add a new § 983.58 to read as follows:

§ 983.58 Interhandler transfers.

Within the production area, any handler may transfer pistachios to another handler for additional handling, and any assessments, inspection requirements, aflatoxin testing requirements, and any other marketing order requirements with respect to pistachios so transferred may be assumed by the receiving handler. The committee, with the approval of the Secretary, may establish methods and procedures, including necessary reports, to maintain accurate records for such transfers.

§ 983.32 [Redesignated as § 983.41]

39. Redesignate § 983.32 as § 983.41, amend the section by removing the words ''eleven (11)'' from the introductory paragraph and adding in their place the words ''twelve (12),'' and by revising paragraph (b) to read as follows:

§ 983.41 Establishment and membership.

(a) * * *

(b) *Producers.* Nine members shall represent producers. Producers within the respective districts shall nominate four producers from District 1, three producers from District 2, one producer from District 3, and one producer from District 4. The Secretary, upon recommendation of the committee, may reapportion producer representation among the districts to ensure proper representation.

* * * * *

§ 983.33 [Redesignated as § 983.42]

40. Redesignate § 983.33 as § 983.42, and amend the section by removing the word ''grower'' and adding in its place the word ''producer'' in paragraph (a), removing the reference to ''§ 983.32'' and adding in its place ''§ 983.41'' in paragraph (j), and by removing the reference to ''§§ 983.32, 983.33, and 983.34'' and adding in its place ''§§ 983.41, 983.42, and 983.43'' in paragraph (n).

§ 983.34 [Redesignated as § 983.43]

41. Redesignate § 983.34 as § 983.43, and revise paragraph (a) of that section to read as follows:

§ 983.43 Procedure.

(a) *Quorum.* A quorum of the committee shall be any seven voting committee members. The vote of a majority of members present at a meeting at which there is a quorum shall constitute the act of the committee: *Provided,* That:

(1) Actions of the committee with respect to the following issues shall require twelve (12) concurring votes of the voting members regarding any recommendation to the Secretary for adoption or change in:

(i) Quality regulation;

(ii) Aflatoxin regulation;

(iii) Research under § 983.46; and

(2) Actions of the committee with respect to the following issues shall require eight (8) concurring votes of the voting members regarding recommendation to the Secretary for adoption or change in:

(i) Inspection programs;

(ii) The establishment of the committee.

* * * * *

§ 983.35 [Redesignated as § 983.44]

42. Redesignate § 983.35 as § 983.44.

§ 983.36 [Redesignated as § 983.45]

43. Redesignate § 983.36 as § 983.45.

§ 983.37 [Redesignated as § 983.47]

44. Redesignate § 983.37 as § 983.47.

45. Move the undesignated center heading ''MARKETING POLICY'' to precede § 983.47.

§ 983.38 [Redesignated as § 983.50]

46. Lift the suspension of § 983.38 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.38 as § 983.50, and revise the section to read as follows:

§ 983.50 Aflatoxin regulations.

The committee shall establish, with the approval of the Secretary, such aflatoxin sampling, analysis, and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. No handler shall ship, for human consumption, pistachios that exceed an aflatoxin level established by the committee with approval of the Secretary. All domestic shipments must be covered by an aflatoxin inspection certificate.

47. Move the undesignated center heading ''REGULATIONS'' to precede § 983.50.

§ 983.39 [Redesignated as § 983.51]

48. Lift suspension of § 983.39 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.39 as § 983.51, and revise the section to read as follows:

§ 983.51 Quality regulations.

For any production year, the committee may establish, with the approval of the Secretary, such quality and inspection requirements applicable to pistachios to be shipped for domestic human consumption as will contribute to orderly marketing or be in the public interest. In such production year, no handler shall ship pistachios for domestic human consumption unless they meet the applicable requirements as evidenced by certification acceptable to the committee.

§ 983.40 [Redesignated as § 983.52]

49. Lift suspension of § 983.40 published on December 7, 2007 (72 FR 69141) and effective on December 10, 2007, redesignate § 983.40 as § 983.52, and revise the section to read as follows:

§ 983.52 Failed lots/rework procedure.

(a) *Substandard pistachios.* Each lot of substandard pistachios may be reworked to meet aflatoxin or quality requirements. The committee may establish, with the Secretary's approval, appropriate rework procedures.

(b) *Failed lot reporting.* If a lot fails to meet the aflatoxin and/or the quality requirements of this part, a failed lot notification report shall be completed and sent to the committee within 10 working days of the test failure. This form must be completed and submitted to the committee each time a lot fails either aflatoxin or quality testing. The accredited laboratories shall send the failed lot notification reports for aflatoxin tests to the committee, and the handler, under the supervision of an inspector, shall send the failed lot notification reports for the lots that do not meet the quality requirements to the committee.

50. Add a new § 983.46, preceded by an undesignated center heading, to read as follows:

Research

§ 983.46 Research.

The committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving research designed to assist or improve the efficient production and postharvest handling of quality pistachios. The committee, with the approval of the Secretary, may also establish or provide for the establishment of projects designed to determine the effects of pistachio consumption on human health and nutrition. Pursuant to § 983.43(a), such research projects may only be established with 12 concurring votes of the voting members of the committee. The expenses of such projects shall be paid from funds collected pursuant to §§ 983.71 and 983.72.

[FR Doc. E9–18538 Filed 8–5–09; 8:45 am]
BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1493

RIN 0551–AA73

Facility Guarantee Program

AGENCY: Foreign Agricultural Service and Commodity Credit Corporation, USDA.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: This advanced notice of proposed rulemaking (ANPR) solicits comments on options to reform the USDA, Commodity Credit Corporation (CCC), Facility Guarantee Program (FGP). The purpose of the ANPR is to invite suggestions on improvements and changes to be made in the implementation and operation of the FGP, with the intent of improving the FGP's effectiveness and efficiency and lowering costs.

DATES: Comments on this notice must be received by October 5, 2009 to be assured consideration.

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

- *E–Mail: FGP.ANPR@fas.usda.gov.*
- *Fax:* (202) 720–2495, Attention: ''FGP/ANPR Comments.''
- *Mail to:* P. Mark Rowse, Director, Office of Trade Programs, Credit Programs Division, Foreign Agricultural Service, U.S. Department of Agriculture, Stop 1025, Washington, DC 20250–1025.
- *Hand Delivery or Courier:* 1250 Maryland Avenue, SW., Washington, DC 20024.

All comments received will be available for public inspection at the above address during regular business hours.

FOR FURTHER INFORMATION CONTACT: P. Mark Rowse, Director, Credit Programs Division, at the address stated above or by telephone: (202) 720–6211.

SUPPLEMENTARY INFORMATION:

Background

The FGP is currently authorized by the Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Act), as amended. Under the FGP, CCC provides payment guarantees to facilitate the financing of manufactured goods and services exported from the United States to improve or establish agriculture-related facilities in emerging markets. By supporting such facilities, the FGP is designed to enhance sales of U.S. agricultural commodities and products to emerging markets where the demand for such commodities and products may be limited due to inadequate storage, processing, handling or distribution capabilities for such products.

Under the FGP, CCC guarantees a loan established by a U.S. bank (or, less typically, by a U.S. exporter) to an importer's bank. The eligible importer's bank issues a dollar-denominated letter of credit in favor of the exporter. The eligible U.S. bank, working with the exporter, extends credit to finance the sale of equipment, goods or services for an FGP approved project.

As a Participant to the Organization for Economic Cooperation and Development's (OECD) Arrangement on Officially Supported Export Credits, the United States has agreed to adopt the terms and conditions of that Arrangement for the FGP. The Arrangement can be found on the OECD's Web site at: *http://www.oecd.org/topic/0,3373,en_2649_34169_1_1_1_1_37431,00.html.*

Project Eligibility

USDA does not designate specific projects but instead solicits proposals from exporters. Private sector importers, exporters and the banking sector should determine which projects are commercially viable. The FGP will support the financing of projects that

focus on improvements to the storage, processing, handling or distribution of agricultural commodities. The exporter, with information from the importer, must make a reasonable economic argument that the project will primarily benefit U.S. agricultural commodity exports.

Payment and Coverage

CCC requires a minimum 15 percent initial payment by the importer to the exporter prior to the export of the goods or services. After the initial payment is deducted from the net contract value, the FGP guarantee covers a portion of the facility base value (historically 95 percent) and a portion of the interest for a repayment term of up to 10 years, depending on the country. By financing less than 100 percent of the net contract value, CCC encourages risk-sharing by the exporter or the exporter's assignee.

Participation Criteria

The CCC must qualify FGP participants before accepting guarantee applications. An exporter must have a business office in the United States and must not be debarred or suspended, or otherwise excluded, from any U.S. government program. Financial institutions must be approved by the CCC.

The CCC evaluates the ability of each country and each approved foreign bank to service CCC-guaranteed debt. For programming purposes, a credit limit is established for each obligor country. Banks within the approved obligor country are reviewed and individual bank credit lines are established. New banks may be added or existing approved bank levels may be increased or decreased as appropriate, based on available information.

Defaults/Claims

If the foreign bank fails to make any payment as agreed under the FGP guaranteed transaction, the exporter or assignee must submit a notice of default to the CCC. A claim for loss also may be filed, and the CCC will promptly pay claims found to be in good order. For CCC audit purposes, the U.S. exporter must obtain documentation to show that the commodity arrived in the eligible country, and must maintain all transaction documents for 5 years from the date of completion of all payments.

Fees

The issuance of the guarantee is subject to a fee paid by the applicant. Fees are based on the risk grade of the obligor country, tenor of the guarantee (length of credit period), and terms for principal payment installments, whether 6 months or annually.

Statutory Authority and Revisions

The FGP is authorized by section 1542 of the Food, Agriculture, Conservation, and Trade Act of 1990, as amended (1990 Act). Section 1542(a) of the 1990 Act, as amended, provides that CCC make available, for fiscal years 1996 through 2012, not less than $1 billion in direct credits or export credit guarantees for exports to emerging markets. A portion of such credit guarantees must, in accordance with section 1542(b) of the 1990 Act, be made available for the export of goods and services for agricultural facilities.

Guarantees are to be made available if the Secretary of Agriculture determines that such guarantees will primarily promote the export of U.S. agricultural commodities and products thereof. Specifically, eligible projects must provide for (1) the establishment or improvement of agricultural facilities in emerging markets, or (2) the provision of services or U.S. products goods in emerging markets, by U.S. persons, to improve handling, marketing, processing, storage, or distribution of imported agricultural commodities or products in such markets. The phrase ''establishment or improvement of facilities'' allows for varied types of projects ranging from the sale of equipment (e.g., refrigeration, processing, transportation) and other goods needed to alleviate impediments to increasing export sales of U.S. agricultural commodities, to providing services, such as equipment installation, testing, and training to facilitate achievement of the same purposes.

Section 1542(b) further requires CCC to give priority to projects that (1) encourage the privatization of the agricultural sector in emerging markets, (2) benefit private farms or cooperatives in emerging markets, and (3) are supported by nongovernmental persons who agree to assume a relatively larger share of the costs.

Section 1542(f) of the 1990 Act defines ''emerging market'' as any country that the Secretary of Agriculture determines (1) is taking steps towards a market-oriented economy through food, agriculture, or rural business sectors of the economy of the country and (2) has the potential to provide a viable and significant market for U.S. agricultural commodities or their products.

The Food, Conservation, and Energy Act of 2008 extended the authority for the FGP through fiscal year 2012, and amended section 1542(b) by providing for a ''Construction Waiver'' that would allow the Secretary of Agriculture to waive the requirement for U.S. goods used in the construction of the facility if the Secretary determines that U.S. goods are not available or the use of U.S. goods is not practicable.

Regulatory History

CCC published an FGP interim rule on March 1, 1993 (58 FR 11786), in response to the 1990 Act. However, the interim rule was deleted effective November 18, 1994, when CCC revised 7 CFR 1493 and issued a final rule on the GSM–102 and GSM–103 programs, and the program was not made operational before its authority expired on September 30, 1995. Congress changed the targeting of the FGP in the Federal Agriculture Improvement and Reform Act of 1996 to countries determined by the Secretary of Agriculture to be emerging markets. On August 8, 1997, a new interim rule with request for comment was issued that provided for facility payment guarantees to be issued by the CCC. To date, no final rule has been issued for the FGP and the comments received related to the 1997 interim rule were never addressed by CCC.

Comments

CCC is soliciting the responses of interested parties to the following specific questions concerning options under consideration for the FGP. Interested parties may choose to address any or all of the questions listed or provide other comments. CCC's aim is to streamline the FGP's application process and to improve upon the program's effectiveness and efficiency. Additional program information is available on our Web site at: *http://www.fas.usda.gov/excredits/ecgp.asp.*

1. Application and Review Process

—Should CCC simplify or eliminate the preliminary review stage of the application process?
—Should CCC simplify/reduce the information required by 7 CFR 1493.240(a)(20) that is intended to ensure that the facility being financed will primarily promote the exports of U.S. agricultural commodities?
—What information should CCC require to ensure that the facility being financed will primarily promote the exports of U.S. agricultural commodities?
—Should CCC continue to require an analysis of project outputs as required by 7 CFR 1493.240(a)(21)?
—In what way could 7 CFR 1493.240(a)(21) be simplified?
—Should CCC continue to require per 7 CFR 1493.240(a)(5) that letters of interest from U.S. and foreign banks

be submitted at the time of initial application?

—What documentation should an applicant submit to CCC to establish evidence that the initial 15 percent down payment requirement has been met?

2. Coverage

—What coverage should CCC offer under the FGP (principal and interest)?

—Should CCC continue to require a risk share partner? If not, please explain why a risk share partner is unnecessary.

3. Construction Waiver

With the enactment of the Food, Conservation, and Energy Act of 2008, the Secretary of Agriculture may waive the requirement for U.S. goods used in the construction of the facility if the Secretary determines that U.S. goods are not available or the use of U.S. goods is not practicable.

—What documentation should CCC require the applicant provide to support a request for a determination that U.S. goods are unavailable?

—What documentation should CCC require the applicant provide to support a request for a determination that the use of goods from the United States is not practicable?

—How does CCC incorporate delivery lead time of the goods in a determination of non-availability?

—Should pricing of goods be a determinant of practicability?

—Should practicability take into consideration the compatibility of U.S. goods with local inputs?

Consideration of Comments:

Additional comments on other program modifications to the FGP that are responsive to the principles outlined herein are encouraged. CCC will carefully consider all comments submitted by interested parties. After consideration of the comments received, CCC will consider what changes should be made to the FGP. Some of the changes described above would require solicitation and consideration of comments received from interested parties via the rulemaking process. Other changes might be adopted by changing internal policies and procedures. Comments received will help CCC to determine the extent and scope of any future rulemaking.

Signed at Washington, DC, on July 24, 2009.

Suzanne Hale,

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

[FR Doc. E9–18801 Filed 8–5–09; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

Proposed New Restricted Category Special Purpose Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed policy statement.

SUMMARY: This notice announces the availability of and request comments on the proposed inclusion of three new restricted category special purpose operations under Title 14 of the Code of Federal Regulations (14 CFR) 21.25(b)(7).

DATES: Comments must be received on or before September 8, 2009.

ADDRESSES: Send all comments on the proposed new restricted categories to: Federal Aviation Administration, Aircraft Certification Service, Aircraft Engineering Division, Certification Procedures Branch, AIR–110, 950 L'Enfant Plaza, SW., Fifth Floor, Washington, DC 20024. ATTN.: Mr. Graham Long, Section Manager. You may hand deliver comments to: Federal Aviation Administration, 950 L'Enfant Plaza, SW., Fifth Floor, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Federal Aviation Administration, Aircraft Engineering Division, Aircraft Certification Service, Certification Procedures Branch (AIR 110), 950 L'Enfant Plaza, SW., Fifth Floor, Washington, DC 20024. ATTN.: Mr. Graham Long, Section Manager. Telephone: (202) 385–6319; fax: (202) 385–6475; or by e-mail: *9-AWA-AVS-AIR-110-GNL2@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on the proposed new restricted categories for special purpose operations by submitting such written data, views, or arguments, as they desire to the above address. Comments received on the proposed new restricted categories may be examined, before and after the comment closing date, at 950 L'Enfant Plaza, SW., Fifth Floor, Washington, DC 20024, weekdays except Federal holidays, between 8:30 a.m. and 4:30 p.m. The Director of the Aircraft Certification Service will consider all communications received on or before the closing date before issuing the final decision.

Background

We are considering three new restricted category special purpose operations under 14 CFR 21.25(b)(7). Approval of these new special purpose operations would improve the usability of restricted category aircraft in support of the public welfare and aviation safety. The three proposed special purpose operations are (a) Alaskan Fuel Hauling, (b) Upset Recovery Training, and (c) Flying Qualities Demonstrator.

(a) Alaskan Fuel Hauling would provide a means to transport fuel to isolated individuals or locations, such as villages, towns and mining operations, within the State of Alaska. Currently, in rural Alaska there are numerous remote villages, mining camps, and individuals that have no practical access except by air. During the winter months, transportation of fuel to remote locations is limited to small quantities hauled by ground on trail access vehicles or by aircraft owners carrying fuel for their own use. During the summer, where stream access is available, there is the option of hauling limited quantities of fuel by small boats. The allowance for transportation of flammable liquids, by aircraft, when other means of transportation are impractical is specified in Title 49 of the Code of Federal Regulations (49 CFR) 175.310.

(b) Upset Recovery Training would provide an avenue for the use of aircraft with modified flight controls to be used to train air carrier pilots in upset recoveries. Airborne simulation can provide aircraft dynamic responses that simulate larger, heavier transport aircraft, and result in improved safety through more-realistic upset recovery training for air carrier pilots. The use of large transport aircraft for Upset Recovery Training is costly, and would increase the risk level of training. It is also impractical to certificate these modified aircraft in compliance with the requirements of their standard category type certificate.

(c) Flight control system design and development can be more-effectively carried out using airborne simulation. The optimizations of flight control and feel characteristics can be conducted in a real-world environment at an early stage in the design and development of the aircraft. Flying qualities of unique

and novel aircraft can be evaluated, and the effects of aircraft configuration changes may be observed and measured. A Flying Qualities Demonstrator would enable the use of aircraft with modified flight controls to be used in the demonstration and development of flying qualities and flight controls. It is impractical to certificate these modified aircraft in compliance with the requirements of their standard category type certificate. Approval of these flight operations will be in compliance with the restricted category operating limitations specified in 14 CFR 91.313.

How To Obtain Copies:

You may get a copy of our proposal from the Internet at: *http://www.faa.gov/aircraft/draft_docs/.*

You may also request a copy from Mr. Graham Long. See the section entitled **FOR FURTHER INFORMATION CONTACT** for the complete address.

Issued in Washington, DC, on July 24, 2009.

Susan J. M. Cabler,

Assistant Manager, Aircraft Engineering Division, Aircraft Certification Service.

[FR Doc. E9–18573 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2009–0707; Directorate Identifier 2009–CE–035–AD]

RIN 2120–AA64

Airworthiness Directives; Air Tractor, Inc. Models AT–802 and AT–802A Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2006–08–09, which applies to all Air Tractor, Inc. (Air Tractor) Models AT–802 and AT–802A airplanes. AD 2006–08–09 currently requires you to repetitively inspect (using the eddy current method) the two outboard fastener holes in both of the wing main spar lower caps at the center splice joint for cracks and repair or replace any cracked spar cap. Since we issued AD 2006–08–09, we have determined we need to clarify the applicability of Models AT–802 and AT–802A airplanes affected serial number (SN) ranges. Additionally, we propose to add an option of modifying the wing main spar lower caps to extend the safe life limit on the affected airplanes. Consequently, this proposed AD would keep the actions of AD 2006–08–09, clarify the applicability of Models AT–802 and AT–802A affected SN ranges, and add a modification option to extend the safe life limit. We are proposing this AD to detect and correct cracks in the wing main spar lower cap at the center splice joint, which could result in failure of the spar cap and lead to wing separation and loss of control of the airplane.

DATES: We must receive comments on this proposed AD by September 21, 2009.

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

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

For service information identified in this proposed AD, contact Air Tractor, Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564–5616; fax: (940) 564–5612; e-mail: *airmail@airtractor.com;* Internet: *http://www.airtractor.com.*

FOR FURTHER INFORMATION CONTACT: Andy McAnaul, Aerospace Engineer, ASW–150, FAA San Antonio MIDO–43, 10100 Reunion Pl., Ste. 650, San Antonio, Texas 78216; telephone: (210) 308–3365; fax: (210) 308–3370.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments regarding this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number, ''FAA–2009–0707; Directorate Identifier 2009–CE–035–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

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

Discussion

Since 2000, we have issued several airworthiness directives (ADs) related to the wing spar inspection and safe life on Air Tractor AT–400, AT–500, AT–600, and AT–800 series airplanes.

In 2001, we issued AD 2001–10–04, Amendment 39–12230 (66 FR 27014, May 16, 2001) to lower the safe life for the wing lower spar cap on Air Tractor AT–400, AT–500, and AT–800 series airplanes. This AD allowed for inspection (using eddy current methods) of the wing lower spar cap for airplanes that were at or over the lower safe life and for which parts were not available. Later that same year we revised that AD to remove AT–800 series airplanes from the applicability that were equipped with the factory-supplied computerized fire gate (part number 80540) and engaged in full-time firefighting.

In 2002, we issued AD 2002–11–05, Amendment 39–12766 (67 FR 37967, May 31, 2002) to further reduce the safe life for certain AT–400 series airplanes and certain AT–500 series airplanes that either incorporate or have incorporated Marburger winglets.

After receiving reports of fatigue cracking found on three Model AT–802A airplanes that were below the reduced safe life established in AD 2002–11–05, we issued AD 2006–08–09, Amendment 39–14565 (71 FR 27784, May 12, 2006). AD 2006–08–09 currently requires the following on Air Tractor Models AT–802 and AT–802A airplanes:

- Repetitively inspecting (using the eddy current method) the two outboard fastener holes in both of the wing main spar lower caps at the center splice joint for cracks; and
- Repairing or replacing any cracked spar cap.

Since we issued AD 2006–08–09, we have determined we need to clarify the applicability of Models AT–802 and AT–802A airplanes affected SN ranges. The manufacturer, Air Tractor, shared a common SN range for the Models AT–802 and AT–802A. Sometimes service information listed only one of the models with a starting or ending SN within an SN range, depending on which model was produced with that specific SN, even though the service information applied to both models.

Additionally, we propose to add an option of modifying the wing main spar

lower caps to extend the safe life limit on the affected airplanes.

This condition, if not corrected, could result in failure of the spar cap and lead to wing separation and loss of control of the airplane.

Relevant Service Information

We have reviewed the following Snow Engineering Co. service information:

- Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002;
- Process Specification #204, Rev. C, dated November 16, 2004;
- Service Letter #215, page 5, titled ''802 Spar Inspection Holes and Vent Tube Mod,'' dated November 19, 2003;
- Service Letter #240, dated September 30, 2004;
- Service Letter #244, dated April 25, 2005;
- Drawing Number 20975, Sheet 2, Rev. A, dated September 1, 2004;
- Drawing Number 20975, Sheet 3, dated January 6, 2005; and
- Drawing Number 20995, Sheet 2, Rev. C., dated September 28, 2004.

The service information describes procedures for:

- Repetitively inspecting (using the eddy current method) the two outboard fastener holes in both of the wing main spar lower caps at the center splice joint for cracks; and
- Repairing or replacing any cracked spar cap.

FAA's Determination and Requirements of the Proposed AD

We are proposing this AD because we evaluated all information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This proposed AD would supersede AD 2006–08–09 with a new AD that would incorporate the actions in the previously-referenced service information. This proposed AD would require you to use the service information described previously to perform these actions.

Differences Between This Proposed AD and the Service Information

Sometimes service information lists only one of the models with a starting or ending SN within an SN range, depending on which of those models was produced with that SN, even though the service information applies to both models. The requirements of this proposed AD, if adopted as a final rule, would take precedence over the provisions in the service information.

Costs of Compliance

We estimate that this proposed AD would affect 187 airplanes in the U.S. registry.

We estimate the following costs to do the proposed inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
$500 to $800	Not applicable	$500 to $800	$93,500 to $149,600.

We estimate the following costs to do any necessary repairs for two spars that may be required based on the results of the proposed inspection or the modification as an option. We have no way of determining the number of airplanes that may need this repair:

Labor cost (two spars)	Parts cost (two spars)	Total cost (two spars) per airplane
225 work-hours × $80 per hour = $18,000	$7,500	$25,500

We estimate the following costs to do any necessary spar cap replacement (two spars) that would be required based on the results of the proposed inspection. We have no way of determining the number of airplanes that may need this replacement:

Labor cost (two spars)	Parts cost (two spars)	Total cost (two spars) per airplane
495 work-hours × $80 per hour = $39,600	$39,100	$78,700

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 2006–08–09, Amendment 39–14565 (71 FR 27784, May 12, 2006), and adding the following new AD:

Air Tractor, Inc.: Docket No. FAA–2009–0707; Directorate Identifier 2009–CE–035–AD.

Comments Due Date

(a) We must receive comments on this airworthiness directive (AD) action by September 21, 2009.

Affected ADs

(b) This AD supersedes AD 2006–08–09, Amendment 39–14565.

Applicability

(c) This AD affects Model AT–802 and AT–802A airplanes, all serial numbers (SNs) beginning with –0001, that are:

(1) Certificated in any category;

(2) Engaged in agricultural dispersal operations, including those airplanes that have been converted from fire fighting to agricultural dispersal or airplanes that convert between fire fighting and agricultural dispersal;

(3) Not equipped with the factory-supplied computerized fire gate (part number (P/N) 80540); and

(4) Not engaged in only full-time fire fighting.

Unsafe Condition

(d) This AD results from our determination that we need to clarify the applicability of Models AT–802 and AT–802A airplanes affected serial number (SN) ranges. Additionally, we are adding an option to modify the wing main spar lower caps to extend the safe life limit on the affected airplanes. We are issuing this AD to detect and correct cracks in the wing main spar lower cap at the center splice joint, which could result in failure of the spar cap and lead to wing separation and loss of control of the airplane.

Compliance

(e) For Models AT–802 and AT–802A airplanes, SNs –0001 through –0091, do the following actions, unless already done, using the wing main spar lower cap hours time-in-service (TIS) schedule found in Table 1 of this AD to do the initial and repetitive inspections:

(1) Install access cover plates following Snow Engineering Co. Service Letter #215, page 5, titled ''802 Spar Inspection Holes and Vent Tube Mod,'' dated November 19, 2003.

(2) Eddy current inspect for cracks the center splice joint outboard two fastener holes in both the right and left wing main spar lower caps following Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002.

TABLE 1—INSPECTION TIMES

SNs	Condition	Initially inspect	Repetitively inspect thereafter at intervals not to exceed
(i) AT–802 and AT–802A, SNs –0001 through –0091.	As manufactured	Upon accumulating 1,700 hours TIS after April 21, 2006 (the effective date of AD 2006–08–09) or within the next 50 hours TIS after April 21, 2006 (the effective date of AD 2006–08–09), whichever occurs later.	850 hours TIS.
(ii) AT–802 and AT–802A, serial numbers SNs –0001 through –0091.	Modified with cold-worked fastener holes following Service Letter #244, dated April 25, 2005.	If performing the cold-working procedure in Service Letter #244, dated April 25, 2005, it includes the initial eddy current inspection.	1,700 hours TIS.

(f) One of the following must do the eddy current inspections required in paragraph (e)(2) of this AD:

(1) A level 2 or 3 inspector certified in eddy current inspection using the guidelines established by the American Society for Nondestructive Testing or MIL–STD–410; or

(2) A person authorized to perform AD work and who has completed and passed the Air Tractor, Inc. training course on eddy current inspection on wing lower spar caps.

(g) If cracks are found during any inspection required in paragraph (e)(2) of this AD, repair or replace any cracked spar cap before further flight after the inspection in which cracks are found. For repair or replacement, do whichever of the following that applies:

(1) For cracks that can be repaired by incorporating the modification specified in paragraph (j) of this AD, do the actions following the procedures in paragraph (j) of this AD before further flight after the inspection in which cracks are found.

(2) For cracks that cannot be repaired by incorporating the modification specified in paragraph (j) of this AD, replace the lower spar caps and associated parts listed following the procedures identified in paragraph (h) of this AD before further flight after the inspection in which cracks are found.

(h) For all AT–802 and AT–802A airplanes, replace the wing main spar lower caps, the center joint splice blocks and hardware, the wing attach angles and hardware, and install the steel web splice plate (P/N 21106–1 for SNs –0001 through –0091, and P/N 20094–2 for all SNs beginning with –0092). Do the replacement upon accumulating the safe life hours TIS on the wing main spar lower caps as listed in Table 2 of this AD or within 50 hours TIS after April 21, 2006 (the effective date of AD 2006–08–09), whichever occurs later. For SNs –0001 through –0091, you may extend the safe life hours TIS of the wing main spar lower caps to 8,000 hours TIS before doing the replacement if you modified your wing as specified in paragraph (j) of this AD.

(1) Use the following service information for replacement:

(i) For airplane Models AT–802 and AT–802A, SNs –0001 through –0091, follow

Snow Engineering Co. Drawing Number 20975, Sheet 3, dated January 6, 2005; and Process Specification #204, Rev. C, dated November 16, 2004.

(ii) For airplane Models AT–802 and AT–802A, SNs beginning with –0092, follow Drawing Number 20975, Sheet 2, Rev. A, dated September 1, 2004; and Process Specification #204, Rev. C, dated November 16, 2004.

(2) The following presents the safe life and replacement times as required in paragraph (h) of this AD:

TABLE 2—SAFE LIFE AND REPLACEMENT TIMES

SNs	Wing spar lower cap safe life
AT–802–0001 through AT–802–0059	4,132 hours TIS.
AT–802–0060 through AT–802–0091	4,188 hours TIS.
All beginning with AT–802–0092	8,163 hours TIS.
AT–802A–0001 through AT–802A–0059	4,969 hours TIS.
AT–802A–0060 through AT–802A–0091	4,531 hours TIS.
All beginning with AT–802A–0092	8,648 hours TIS.

(i) After replacing the wing main spar lower caps and hardware, installing the web splice plate, and cold working the fastener holes by following Snow Engineering Co. Drawing Number 20975, Sheet 3, dated January 6, 2005 (SNs –0001 through –0091); or Sheet 2, Rev. A, dated September 1, 2004 (all SNs beginning with –0092); and Process Specification #204, Rev. C, dated November 16, 2004, the new safe life for the wing main spar lower caps is as follows:

TABLE 3—NEW SAFE LIFE FOR WING MAIN SPAR LOWER CAPS

SNs	Wing spar lower cap safe life
All beginning with AT–802–0001	8,163 hours TIS.
All beginning with AT–802A–0001	8,648 hours TIS.

(j) For Models AT–802 and AT–802A airplanes, SNs –0001 through –0091, in lieu of replacing the wing main spar lower cap at the safe life hours TIS listed in Table 2 in paragraph (h) of this AD, you may extend the safe life of the wing main spar lower caps by doing the following actions. Between 3,200 hours TIS and the safe life hours TIS for your airplane currently listed in Table 2 of this AD, do the following, unless already done:

(1) Modify the wing by installing P/N 20997–2 web plate and P/N 20985–1 and 20985–2 extended 8-bolt splice blocks following Snow Engineering Co. Drawing 20995, Sheet 2, Rev. C, dated September 28, 2004.

(2) Cold-work the outboard two fastener holes in both the left and right hand lower spar caps at the center splice following Snow Engineering Co. Service Letter #240, dated September 30, 2004.

(3) Do an eddy current inspection of the wing center splice joint outboard two fastener holes in both the right and left wing main spar lower caps for cracks at the time of modification following Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002.

(4) If, before the effective date of this AD, an airplane has already been modified following paragraph (j)(1) of this AD but did not receive cold working in the outboard two fastener holes in both the left and right hand lower spar caps following paragraph (j)(2) of this AD, do the following:

(i) Initially do an eddy current inspection within the next 2,400 hours TIS after the modification, using the procedure in paragraph (j)(3) of this AD, and repetitively thereafter at intervals not to exceed every 1,200 hours TIS until the wing spar lower cap reaches 8,000-hour TIS safe life.

(ii) At any time after the modification, you may do the cold working in the outboard two fastener holes in both the left and right hand lower spar caps following paragraph (j)(2) of this AD to terminate the repetitive eddy current inspections required in paragraph (j)(4)(i) of this AD.

(5) If you have modified your airplane following paragraph (j)(1) of this AD prior to 3,200 hours TIS, you must do the following to reach the extended 8,000-hour TIS safe life:

(i) If you did not cold work in the outboard two fastener holes in both the left and right hand lower spar caps following paragraph (j)(2) of this AD, you must do the repetitive eddy current inspections following paragraph (j)(4)(i) of this AD until you accumulate 4,800 hours TIS after the modification on the wing spar lower cap. Upon accumulation of 4,800 hours TIS after the modification on the wing spar lower cap, do the repetitive eddy current inspections at intervals not to exceed every 600 hours TIS until you reach the extended safe life of 8,000-hour TIS.

(ii) If you did cold work the outboard two fastener holes in both the left and right hand lower spar caps following paragraph (j)(2) of this AD, upon accumulation of 4,800 hours TIS after the modification on the wing spar lower cap do the repetitive eddy current inspections at intervals not to exceed every 600 hours TIS until you reach the 8,000-hour TIS safe life.

(6) For the initial and repetitive eddy current inspections required in paragraphs (j)(3), (j)(4)(i), (j)(5)(i) and (j)(5)(ii) of this AD, follow the instructions as specified in Snow Engineering Co. Process Specification #197, page 1, revised June 4, 2002; pages 2 through 4, dated February 23, 2001; and page 5, dated May 3, 2002. For any cracks found, follow the instructions for repair or replacement as specified in paragraph (g) of this AD.

(k) If any cracks are found as a result of any inspection required in paragraphs (e)(2), (j)(3), (j)4)(i), (j)(5)(i), and (j)(5)(ii) of this AD, report any cracks you find within 10 days after the cracks are found or within 10 days after April 21, 2006 (the effective date of AD 2006–08–09), whichever occurs later.

(1) Include in your report the aircraft SN, aircraft hours TIS, wing spar cap hours TIS, crack location and size, corrective action taken, and a point of contact name and phone number. Send your report to Andrew McAnaul, Aerospace Engineer, ASW–150 (c/o MIDO–43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; telephone: (210) 308–3365; facsimile: (210) 308–3370.

(2) The Office of Management and Budget (OMB) approved the information collection requirements contained in this regulation under the provisions of the Paperwork Reduction Act and assigned OMB Control Number 2120–0056.

Special Permit Flight

(l) Under 14 CFR part 39.23, we are allowing special flight permits for the purpose of compliance with this AD under the following conditions:

(1) Only operate in day visual flight rules (VFR).

(2) Ensure that the hopper is empty.

(3) Limit airspeed to 135 miles per hour (mph) indicated airspeed (IAS).

(4) Avoid any unnecessary g-forces.

(5) Avoid areas of turbulence.

(6) Plan the flight to follow the most direct route.

Alternative Methods of Compliance (AMOCs)

(m) The Manager, Fort Worth Airplane Certification Office, ASW–150, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14

CFR 39.19. Send information to ATTN: Andy McAnaul, Aerospace Engineer, ASW–150, FAA San Antonio MIDO–43, 10100 Reunion Pl., Ste. 650, San Antonio, Texas 78216; telephone: (210) 308–3365; fax: (210) 308–3370. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(n) AMOCs approved for AD 2006–08–09 are not approved for this AD.

Related Information

(o) To get copies of the service information referenced in this AD, contact Air Tractor, Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564–5616; fax: (940) 564–5612; e-mail: *airmail@airtractor.com*; Internet: *www.airtractor.com*. To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov.*

Issued in Kansas City, Missouri, on July 31, 2009.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–18815 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–0319]

RIN 1625–AA00

Safety Zone; Sea World December Fireworks, Mission Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a safety zone upon the navigable waters of Mission Bay near San Diego, California in support of the Sea World December Fireworks. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before September 8, 2009.

ADDRESSES: You may submit comments identified by docket number USCG–2009–0319 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Petty Officer Shane Jackson, Waterways Management, U.S. Coast Guard Sector San Diego at telephone 619–278–7262, e-mail *Shane.E.Jackson@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

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

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2009–0319), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert ''USCG–2009–0319'' in the Docket ID box, press Enter, and then click on the balloon shape in the Actions column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* select the Advanced Docket Search option on the right side of the screen, insert USCG–2009–0319 in the Docket ID box, press Enter, and then click on the item in the Docket ID column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

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

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time

and place announced by a later notice in the **Federal Register**.

Background and Purpose

Sea World is sponsoring the Sea World December Fireworks, which will include a fireworks presentation launched from a barge in Mission Bay. The safety zone would extend in a 600 foot radius around the barge, which would be in an approximate position of 32°46′03″ N, 117°13′11″ W. This temporary safety zone is necessary to provide for the safety of the crew, spectators, participants, and other vessels and users of the waterway.

Discussion of Rule

The Coast Guard proposes to establish a safety zone that will be enforced from 8 p.m. to 10 p.m. on December 12, 2009. The safety zone would cover a 600 foot radius around the barge in an approximate position of 32°46′03″ N, 117°13′11″ W. The safety zone is necessary to provide for the safety of the crew, spectators, participants, and other vessels and users of the waterway. Persons and vessels would be prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

Regulatory Analyses

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

Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. The safety zone would last only two hours during one day, and is limited to a relatively small geographic area. For these reasons, the Coast Guard expects the economic impact of this rule to be minimal.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. The safety zone would affect the following entities some of which may be small entities: The owners and operators of pleasure craft engaged in recreational activities on the affected portion of Mission Bay. This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: The safety zone would be small in size and effective for a short time. Further, the safety zone would be in effect during a period late in the evening when vessel traffic is low, and vessel traffic could pass safely around the safety zone.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, call or e-mail Petty Officer Shane Jackson, Waterways Management, U.S. Coast Guard Sector San Diego at telephone 619–278–7262, e-mail *Shane.E.Jackson@uscg.mil.* The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant

energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

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

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

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under **ADDRESSES**. We expect this proposed rule to be categorically excluded from requirements for further environmental documentation under figure 2–1, paragraph (34)(g), of the Instruction because the rule would establish a safety zone. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add temporary § 165.T11–227 to read as follows:

§ 165.T11–227 Safety zone; Sea World Labor Day Fireworks, Mission Bay, San Diego, California.

(a) *Location.* The following area is a safety zone: All waters of Mission Bay, from surface to bottom, within a 600 foot radius around the fireworks launch barge in an approximate position of 32°46′03″ N, 117°13′11″ W (NAD 83).

(b) *Enforcement Period.* This section will be enforced from 8 p.m. to 10 p.m. on December 12, 2009. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

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

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

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Sector San Diego Command Center. The Command Center may be contacted on VHF–FM Channel 16.

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

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

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

Dated: July 22, 2009.

T.H. Farris,

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

[FR Doc. E9–18755 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–15–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 95

[ET Docket No. 08–59; FCC 09–57]

Medical Body Area Network (MBAN)

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Commission seeks comment on allocating spectrum and establishing service and technical rules for the operation of Medical Body Area Network (or MBAN) systems using body sensor devices. MBAN systems would provide a flexible platform for the wireless networking of multiple body sensors used for monitoring a patient's physiological data, primarily in health care facilities. Use of MBAN systems hold the promise of improved safety, quality, and efficiency of patient care by reducing or eliminating a wide array of hardwired, patient-attached cables used by present monitoring technologies. This Notice of Proposed Rulemaking reflects the Commission's continuing desire to foster the availability and use of advanced medical devices using wireless technologies, which, in turn, should help to improve the health and well-being of the American public.

DATES: Comments must be filed on or before October 5, 2009, and reply comments must be filed on or before November 4, 2009.

ADDRESSES: You may submit comments, identified by ET Docket No. 08–59, by any of the following methods:

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

■ *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/*. Follow the instructions for submitting comments.

■ *E-mail:* [Optional: Include the E-mail address only if you plan to accept comments from the general public.] Include the docket number(s) in the subject line of the message.

■ *Mail:* [Optional: Include the mailing address for paper, disk or CD–ROM submissions needed/requested by your Bureau or Office. Do not include the Office of the Secretary's mailing address here.]

■ *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Gary Thayer, Office of Engineering and Technology, (202) 418–2290, e-mail: *Gary.Thayer@fcc.gov*, TTY (202) 418–2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making*, ET Docket No. 08–59, FCC 09–57, adopted June 29, 2009, and released June 29, 2009. The full text of this document is available for public inspection and copying during regular business hours in the Commission's Reference Information Center, Portals II, 445 12th Street, SW., (Room CY–A257), Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563 or via e-mail *FCC@BCPIWEB.com*. The full text may also be downloaded at: *http://www.fcc.gov*.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

■ *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov*. Filers should follow the instructions provided on the Web site for submitting comments.

■ For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov*, and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

■ *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

■ The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

■ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

■ U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

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Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone: (202) 488–5300, fax: (202) 488–5563, or via e-mail *http://www.bcpiweb.com*.

Summary of Notice of Proposed Rulemaking

1. In the Notice of Proposed Rulemaking (NPRM), the Commission seeks comment on allocating spectrum and establishing service and technical rules for the operation of Medical Body Area Network (or MBAN) systems using body sensor devices. The NPRM reflects the Commission's continuing efforts to foster the availability and use of advanced medical devices using wireless technologies which, in turn, should help to improve the health and well-being of the American public.

2. MBAN systems, as contemplated by the NPRM, could provide a flexible platform for the wireless networking of multiple body sensors used for monitoring a patient's physiological data, primarily in health care facilities as well as in other health care monitoring situations. Use of MBAN systems hold the promise of improved safety, quality, and efficiency of patient care by reducing or eliminating a wide array of hardwired, patient-attached cables used by present monitoring technologies.

3. Given these significant health care benefits offered by MBAN systems, the Commission tentatively concludes that providing spectrum for MBAN operations would serve the public interest.

4. Against this backdrop, the Commission addresses a petition filed by GE Healthcare (hereinafter the ''GEHC petition'') to allocate up to 40 megahertz of spectrum in the 2360–2400 MHz band, which is used on a primary basis by Federal and non-Federal Aeronautical Mobile Telemetry (AMT), Federal Radiolocation, and non-Federal Amateur services. In addition, the Commission seeks comment on an alternative recommendation by the Aerospace and Flight Test Radio Coordinating Council (AFTRCC) to accommodate MBAN operations in the 2300–2305 MHz and 2395–2400 MHz bands. Finally, the Commission seeks comment on whether other bands such as the 2400–2483.5 MHz or 5150–5250 MHz bands could be used to support MBAN operations.

5. The Commission also addresses several spectrum compatibility concerns with respect to incumbent operations in accommodating MBAN operations. Thus, the Commission seeks comment on the potential for interference caused either to incumbents, or to MBAN systems, and how any such concerns might be mitigated. In addition, the Commission seeks comment more generally on whether allocating spectrum and establishing rules to allow

the operation of MBAN systems for the purposes described herein would serve the public interest.

6. Finally, the Commission seeks comment on what licensing approaches would be appropriate for MBAN operations in the various frequency bands under consideration, as well as service and technical rules for MBAN operation. This includes a discussion of whether MBANs should be authorized on a licensed basis under part 95, a ''licensing-lite'' approach under part 90, or an unlicensed basis under part 15. The tentative service and technical rules discussed in the NPRM follow the general framework of the recently adopted rules for the MedRadio Service.

A. Frequency Allocation

1. 2300–2305 MHz and 2360–2400 MHz Frequency Bands

7. The Commission seeks comment on whether to allow MBAN operations on up to 40 megahertz of spectrum in the 2360–2400 MHz band on a secondary basis. This option reflects the initial recommendation set forth in the GEHC petition. In this context, the Commission recognizes the necessity of affording interference protection to incumbent primary users, particularly AMT operations. In addition, the NPRM considers the potential for interference to MBAN devices and the attendant risk to patients using MBAN systems.

8. The Commission also seeks additional comment on the amount of spectrum required to support MBAN operations, and what factors (including the number and types of incumbent users) should be taken into account in determining the amount of spectrum required.

9. Regarding the potential for interference from MBAN devices to incumbent operations, the Commission seeks comment on whether the potential for sharing between MBAN systems and incumbent AMT and radiolocation operations could be facilitated if geographic exclusion zones were to be established around AMT test flight sites in the 2360–2395 MHz band to protect those sites from harmful interference. In addition to or in lieu of exclusion zones, MBAN operators and AMT licensees may be able to coordinate their operations. The Commission further observes in the NPRM that sharing between MBAN systems and incumbents AMT and radiolocation operations could be facilitated if MBAN operations in the 2360–2390 MHz band, which is allocated for AMT operations, are limited to indoor use within health care facilities as defined in the WMTS. The Commission believes that this requirement would limit the incidence of MBAN operations and effectively reduce the likelihood that they would occur near AMT flight test sites. Because MBAN systems would be used indoors, building structures would attenuate MBAN signals and further reduce the likelihood of interference to AMT. Thus, the Commission seeks comment on whether permitting MBAN systems to operate in the 2360–2395 MHz band under the limitations proposed would provide interference protection to incumbent users.

10. Regarding interference from AMT to MBAN operations, the Commission seeks comment on whether MBAN devices could avoid receiving interference from AMT or other incumbent users by employing a contention-based protocol or some other techniques. In this regard, the Commission seeks comment on whether transmissions from incumbent stations, as well as flight test stations using future technologies (which might include the use of high-power, omnidirectional uplink and downlink transmissions) could adversely affect the operation of MBAN devices—possibly resulting in adverse effects to patients.

11. To address recommendations made in comments filed by AFTRCC, the Commission seeks comment on limiting MBAN operations to the 2300–2305 MHz and 2395–2400 MHz bands. It specifically seeks comment on the ability of MBAN devices to utilize these two blocks of spectrum that are separated by 90 megahertz. The Commission also seeks comment on whether it should consider a secondary allocation for MBAN operations in these two bands, or if allocating these bands on a primary basis would allow MBAN devices to more effectively use the spectrum since they would not have to avoid AMT users. The Commission seeks comment as to whether MBAN operations can exist compatibly with the incumbent Amateur service users in the 2300–2305 MHz and 2390–2400 MHz bands. The Commission further seeks comment as to whether, in the 2390–2395 MHz band it should consider allowing MBAN and AMT operations to operate on a co-primary basis and what the sharing rules between them should be. Additionally, the Commission seeks comment on whether any additional MBAN spectrum would be needed if it were to reallocate the 2390–2395 MHz band to remove the AMT allocation in order to provide a total of up to 15 megahertz of spectrum for use by MBAN operations on a primary basis.

12. To the extent that MBAN operation might ultimately be authorized in any portion of the 2300–2305 MHz or 2360–2400 MHz bands, the Commission proposes including a new U.S. footnote to the Table of Allocations in part 2 of the rules for the specific band. The Commission would also require that MBANs not cause harmful interference to and accept interference from Federal and non-Federal stations operating in accordance with the Table of Frequency Allocations. The Commission seeks comment on this approach.

2. 2400–2483.5 MHz Frequency Band

13. The Commission seeks comment on whether MBAN devices could operate in the 2400–2483.5 MHz band. The 2400–2483.5 MHz band is used by Industrial, Scientific and Medical (ISM) equipment operating under part 18 of the Commission's rules. Any equipment or services operating in ISM bands are obliged to accept interference from ISM equipment. In its petition, GEHC has asserted that manufacturers could leverage available technology used for ISM equipment in this band to develop low-cost MBAN devices.

14. In addition to present use by ISM, the Commission observes that various radio services are also allocated in this band. Among these, the 2400–2417 MHz band is allocated to the Amateur service on a primary basis. The 2417–2450 MHz band is allocated to the Amateur service on a secondary basis, and to the Federal radiolocation service on a secondary basis. Such Federal operations may be authorized on a non-interference basis, but may not constrain the implementation of any non-Federal operations. The 2450–2483.5 MHz band is allocated to the non-Federal fixed and mobile services on a primary basis, and to the non-Federal radiolocation service on a secondary basis. The Federal radiolocation service is also permitted in this band on condition that harmful interference is not caused to non-Federal services. The 2400–2483.5 MHz band is also used by unlicensed devices operating under Part 15 of the Commission's Rules. These unlicensed devices include WiFi, cordless phones, and Bluetooth, among various other types of uses.

15. The Commission seeks comment on whether the widespread success of the unlicensed devices described in the preceding paragraph would provide manufacturers the opportunity to leverage these technologies for the development of low cost MBAN devices within the 2400–2483.5 MHz band. More particularly, the Commission seeks comment as to whether MBAN devices could be certified and operate under the current part 15 rules, whether

a new subpart under part 15 might be required, or whether it should consider licensed operation of MBAN devices under part 95 of the Commission's rules. If it is determined that licensed operation is appropriate, would the technical and service rules discussed for the 2360–2400 MHz band be applicable for MBAN operation in the 2400–2483.5 MHz band? If not, what technical and service rules would apply? What amount of bandwidth would MBAN devices require to operate in this band and in what portion of the band would they operate? The Commission also seeks comment regarding whether MBAN operations can exist compatibly with the incumbent Amateur service users who operate in this band.

16. The Commission also cautions that any MBAN equipment operating in these bands would have no protection from interference from ISM equipment operating under part 18 of the rules or other low power transmitters operating under part 15 of the rules. The Commission seeks information as to whether the ISM bands are still used by medical telemetry devices, and comment as to whether MBAN operations would fit within this category of use.

3. Other Frequency Bands

17. The Commission seeks comment on whether there are other frequency bands where MBAN manufacturers could leverage existing technologies to implement such devices and achieve economies of scale. For example, the Commission seeks comment on whether the 5150–5250 MHz band offers similar opportunities for MBAN operation as may be achievable in or near the 2400 MHz band as described. The 5150–5250 MHz band is allocated to the Federal and non-Federal aeronautical radionavigation service. The band is also allocated to the non-Federal fixed-satellite service. In addition to these allocated services, the band is also used by unlicensed national information infrastructure (U–NII) devices operating under subpart E of the Commission's part 15 rules.

18. U–NII devices use digital modulation techniques and provide a wide array of high data rate mobile and fixed communications applications. U–NII devices operating in the 5250–5350 MHz and 5470–5725 MHz bands must employ Dynamic Frequency Selection (DFS) to avoid operating on the same channels as radars. However, the 5150–5250 MHz band does not require DFS and is limited to indoor operation only, which would appear to be consistent with GEHC's proposed MBAN devices.

19. With respect to the 5150–5250 MHz band, the Commission seeks comment as to whether MBAN devices could be certified and operate under the current part 15 rules, whether a new subpart under part 15 might be required, or whether it should consider licensed operation of MBAN devices under part 95 of the Commission's rules. If it is determined that licensed operation is appropriate, would the technical and service rules discussed below for the 2360–2400 MHz band be applicable for MBAN operation in the 5150–5250 MHz band? If not, what technical and service rules would apply? What amount of bandwidth would MBAN devices require to operate in this band and in what portion of the band would they operate? Can MBAN devices operate compatibly with the incumbent services in the 5150–5250 MHz band? Should MBAN operations be limited to indoor locations, similar to the indoor restriction to U–NII devices in § 15.407(e)?

B. Service and Technical Rules

20. The tentative rules discussed in the NPRM focus upon the overall framework of the MedRadio Service in part 95, but with modified power and emission bandwidth requirements to accommodate the anticipated bandwidth and EIRP needs of MBAN operations that might apply in the 2360–2400 MHz band. At the same time, the Commission seeks comment on other approaches, such as under part 90 or part 15, that might be feasible. The Commission takes this approach in the NPRM because the 2360–2400 MHz band was specifically addressed in the GEHC petition and in both the comments and reply comments, The Commission notes that, in any event, similar rules would also be required if MBAN operations were to be authorized in either the 2400–2483.5 MHz or the 5150–5250 MHz bands under consideration.

1. Service Rules

21. *Licensing.* The Commission seeks comment on whether medical device operations should be authorized in part 95 of our rules, thus providing for license-by-rule operation pursuant to Section 307(e) of the Communications Act (Act). Under this approach, medical devices would operate in the band on a shared, non-exclusive basis with respect to each other and without the need for MBAN systems to be individually licensed. As the Commission determined when it adopted the MedRadio Service rules, this approach minimizes regulatory burdens and facilitates the expeditious deployment of new generations of beneficial wireless medical devices that can improve the quality of life for countless Americans, thus serving the public interest, convenience and necessity. The Commission seeks comment on whether the rules for MBANs should be included in subpart I of part 95, which authorizes the MedRadio Service, or whether the rules for MBANs should be included in a new subpart under part 95.

22. Alternatively, the Commission seeks comment on whether MBAN operations should be licensed on a non-exclusive basis under part 90. In this context, the Commission also seeks comment on whether it would be feasible to establish geographic exclusion zones around AMT operational areas as an interference avoidance mechanism. At the same time, the Commission seeks comment on whether the use of such exclusion zones could frustrate the widespread use of MBAN devices—particularly, for example, if such exclusion zones were so large as to encompass major metropolitan areas where MBAN operations might be prohibited. As discussed elsewhere in the *NPRM*, frequency coordination also could facilitate sharing between the incumbent operations and MBAN devices. Frequency coordination is required for WMTS operations authorized under part 95, but does not involve as many sites as could be required for MBAN and AMT coordination. Another licensing approach that the Commission would consider for MBAN operation that includes coordination is non-exclusive licensing under part 90. Under that approach, MBAN operations would be licensed on a non-exclusive basis with respect to each other for ten year license terms. The Commission seeks comment on whether it should consider using the same approach here as it does with wireless broadband services in the 3650–3700 MHz band, *i.e.*, eligible entities would apply for non-exclusive nationwide licenses and subsequently register individual stations with the Commission. If the Commission were to adopt this approach, should it require that licensees register each individual MBAN system or, alternatively, require them to register the individual health care facility at which the licensee would be allowed to operate multiple MBAN systems? What type of licensing and registration information for MBAN operations would facilitate coordination with incumbent services? What would be the relative benefits and disadvantages of licensing under part 90

compared with the license-by-rule approach under part 95?

23. *Definitions.* The Commission seeks comment on the definitions to apply to MBAN systems and body sensor devices. Because MBAN systems may be comprised of sensors that perform not only monitoring functions but also diagnostic and therapeutic functions, definitions for MBAN and body sensor networks should be consistent with definitions already in the Commission's part 95 rules for wireless medical telemetry and body-worn devices. The Commission seeks comment on the following proposed definitions:

- Medical body area device—a medical sensing device that is placed on or in close proximity to the human body for the purpose of measuring and recording physiological parameters and other patient information or performing diagnostic or therapeutic functions via radiated bi- or unidirectional electromagnetic signals. These devices may only communicate as part of a medical body area network.
- Medical body area network (MBAN)—a low-power independent network comprised of multiple medical body area devices that transmit or receive either non-voice medical data of a patient or related device control commands. Transmissions to and from these multiple medical body area devices are routed through a hub, which is placed on or in close proximity to the patient's body, and which may communicate with a remote monitoring location.
- MBAN transmitter—A transmitter that operates as part of a Medical Body Area Network, and is located either on the human body or in close proximity to it.
- MBAN control transmitter—A MBAN transmitter, which is designed to be placed on or in close proximity to the patient's body, that serves as a hub to control and coordinate communications with body area devices, and which may also communicate with a remote monitoring location.

24. The Commission requests comment as to whether these definitions would be too broad or too narrow and whether alternative definitions should be used. The Commission asks whether other components of wireless MBAN systems should also be identified and defined. The Commission is not proposing to include medical implant devices as part of MBAN systems, although it recognizes that such devices could be used for monitoring, diagnostic or therapeutic purposes. Parties that believe medical implant devices should be allowed as part of MBAN operations should address how such devices would co-exist with body sensor devices and the technical rules that would apply to their operation. The Commission also seeks comment on whether any other current definitions included in the MedRadio Service rules need to be modified to accommodate wireless MBAN devices.

25. *Permissible Communications and Operator Eligibility.* The Commission proposes to establish requirements for permissible communications and operator eligibility that are generally the same as those in place for the MedRadio Service. The MedRadio rules provide that a MedRadio device may be used by persons for diagnostic and therapeutic purposes, but only to the extent that such devices have been provided to a human patient under the direction of a duly authorized health care professional. Furthermore, transmissions are limited to non-voice data signals. The Commission expects, based on representations made in the GEHC petition, that wireless body sensor devices configured as a MBAN would be used primarily for monitoring patient data. The Commission believes it would be prudent to provide flexibility so that MBAN systems can also be used for performing diagnostic or therapeutic functions. The Commission seeks comment on whether these requirements would be appropriate for MBAN operations.

26. In the MedRadio proceeding, the Commission declined to explicitly limit the use of some frequencies to life-critical and time-sensitive applications, as the comments of some parties suggested, while allowing other frequencies to be used for non-life-critical, non-time sensitive applications. The Commission concluded that the ultimate decision on which frequency band to use for each type of application was best left to health care professionals and medical device manufacturers, in concert with FDA-required risk management processes, as it would result in better and more flexible use of this scarce spectrum resource. The Commission seeks comment on whether a similar approach is appropriate for MBAN devices—*i.e.*, permitting health care professionals and medical device manufacturers, in concert with FDA-required risk management processes, to decide whether MBAN devices should be used for life-critical and time-sensitive applications even though these devices would not receive interference protection from radiocommunication services with a higher allocation status. Commenters who believe that the Commission should not allow MBAN devices for life-critical and time-sensitive applications should suggest how the Commission should define these terms and types of applications.

27. The Commission also notes that the current MedRadio Service rules do not allow programmer/control transmitters to relay information to a receiver that is not included with a MedRadio implant or body-worn device. However, the MedRadio Service rules do allow programmer/control transmitters to be interconnected with other telecommunications systems including the public switched telephone network. The Commission seeks comment on whether, and if so why, similar requirements should also apply here. The Commission also seeks comment on how spectrum might be used to perform backhaul from a single patient-based MBAN control transmitter to a monitoring station that receives and processes MBAN body sensor data from multiple patients and what spectrum should be used for that purpose.

28. The Commission seeks comment on whether communications between MBAN body sensors, or other intra-MBAN network communications, should be allowed, and whether there should be a requirement that each external MBAN control transmitter be limited to controlling the body sensor transmitters for a single patient. Alternatively, the Commission asks whether it should permit groups of MBAN body sensors for multiple patients to be coordinated by one central MBAN control transmitter and if so, whether any special protocols or other requirements should be applied to such communications.

2. Technical Rules

29. *Channelization.* The Commission seeks comment on adopting rules for MBAN operations that do not specify a particular channeling plan, thereby following the general approach used with the MedRadio Service. Under this approach, the ''channel'' occupied by a MBAN transmitter or transmission would be loosely defined as any continuous segment of spectrum that is equal to the largest bandwidth used by any MBAN transmitter that participates in a given single patient MBAN communications session. In this context, a MBAN ''communication session'' would be defined (analogous to the definition of a MedRadio communication session) as a collection of transmissions that may or may not be continuous and that take place between two or more MBAN devices in a single patient network.

30. One benefit of this approach would be that networked MBAN devices could transmit on any center frequency

within the MBAN band so long as the maximum emission bandwidth, out-of-band, and spurious emission limits adopted herein are met. This approach would also afford the flexibility for MBAN devices to subdivide the authorized frequency band(s) into ad-hoc device ''channels'' that could be tailored by manufacturers to meet device-specific spectrum requirements for a variety of medical monitoring, diagnostic and therapeutic functions. The Commission seeks comment on whether to apply the MedRadio approach of specifying only the maximum permitted bandwidth, but not any particular channel plan, with respect to MBAN devices in their authorized frequency band(s). In particular, the Commission seeks comment on whether the potential benefits described above might be outweighed by an increased risk of adverse mutual interactions between multiple MBAN devices or MBAN devices and incumbent users using differing center frequencies and bandwidths and whether there are other factors that should be considered under this option.

31. Alternatively, the Commission seeks comment on whether a specific channeling plan would be needed. If so, what form might it take and what are the advantages that it would obtain over the proposed approach?

32. *Exclusion Zones.* The Commission recognizes that the current record contains conflicting information relating to the appropriate models to be used for evaluating the potential for interference to AMT operations from MBAN devices and establishing the size of exclusion zones to protect those operations. Therefore, the Commission seeks comment on the feasibility of using exclusion zones as a means to prevent interference to incumbent operations in the 2360–2390 MHz band and, if exclusion zones are to be used, the appropriate radius to use for such exclusion zones. The Commission states that it is not convinced at this time that either the GEHC or AFTRCC analysis is appropriate for determining interference potential and the utility or size of exclusion zones. Thus, the Commission seeks comment on the analytic methodology that should be used and the assumptions that should be employed, including the methodologies and analyses used by AFTRCC and GEHC for determining an exclusion zone radius. The Commission also invites comment on other methodologies and analyses, including assumptions on which they rely, that could be used. The Commission also seeks comment on whether it is appropriate to use either interference criteria described herein, which are primarily intended for satellite and terrestrial sharing in the adjacent frequency band, for AMT and MBAN operations and invite suggestions for alternative approaches for determining the radius of potential exclusion zones. The Commission provides in Appendix A of the NPRM additional parameters for MBAN and AMT systems that parties should address, as appropriate, to support further technical analyses.

33. The Commission also seeks comment on whether exclusion zones could always preclude operation of MBAN devices at some locations. If so, would it be in the public interest to preclude these technologies from certain health care facilities based on their location? Or should health care facilities located within an exclusion zone be permitted to coordinate MBAN use with AMT operations in that zone?

34. If exclusion zones were to be established, what criteria should be used to identify those AMT sites in need of protection? Should only AMT test sites that now actually use the 2360–2390 MHz band be protected, or also those test sites that do not presently use the band but might prospectively do so? If protection were to be required of sites that AFTRCC claims are ''entitled'' to, but do not currently use the 2360–2390 MHz band, how would the sites which are ''entitled'' to be protected be determined? Once existing test sites were determined, how would future test sites be protected if MBAN devices are already operating within the area that will be designated as a new exclusion zone? With respect to making these determinations, the NPRM notes that the Commission (for non-Federal users) and NTIA (for Federal users) maintain separate data bases containing geographic location and frequency information on users authorized to operate transmitters throughout the radio spectrum. Thus, if an exclusion zone approach permitting MBAN operation were to be adopted, the Commission would anticipate relying, to the extent possible, upon the information contained in the relevant Commission and NTIA data bases as a baseline for identifying facilities that require protection. If the Commission ultimately decides to protect sites that are not currently licensed to use the 2360–2390 MHz band, how would information on exclusion zones be accurately maintained and timely updated in the Commission's rules? The Commission seeks comment on these matters.

35. The NPRM seeks comment on whether the distance for MBAN operations should be measured from the specified center point that establishes the incumbent's area of operation or whether it should be measured from the edge of that area? How should incumbent sites be accounted for that are in close proximity to each other such that their areas of operation may overlap each other? Should further information be collected about incumbent operational locations and how should it be gathered? Regarding information about Federal sites, the Commission notes that it would intend to consult with NTIA about how to identify this information and make it available. The Commission also seeks comment on how it should account for future installations if a healthcare facility that is using MBANs is located in an area that would become part of an exclusion zone for the new site.

36. *Frequency Coordination.* With respect to protecting AMT operations from MBAN interference in portions of the 2360–2400 MHz band, the Commission recognizes that coordination may be useful because MBAN operations might otherwise be excluded from large geographic areas that encompass medical facilities. In such cases coordination would provide a means for the parties to work together on some type of sharing arrangement for given locations. Thus, the Commission seeks comment on whether coordination of MBAN systems is needed and should be required and, if so, under what circumstances. The Commission also seeks comment on whether it should require AMT or other incumbent licensees to participate in frequency coordination with operators of MBAN systems in any portions of the band. If so, what approaches would be feasible, and what parties would be responsible for ensuring that such coordination takes place?

37. For example, the Commission acknowledges the suggestion made in the GEHC petition that the Commission could require frequency coordination and device registration for MBAN operations such as is used for coordination of WMTS operation. There, the Commission designated a private entity to serve as the WMTS frequency coordinator and that entity maintains a database of all WMTS equipment in operation.

38. However, in the case of MBAN systems, users may not need to coordinate their operations among themselves as do WMTS users, particularly if MBAN devices ultimately rely on a contention-based protocol as discussed below to promote intra-service sharing. Regarding coordination of MBAN operations with incumbent

users, the Commission also notes that MBAN devices would operate on a secondary basis, and a significantly large number of primary users must be accorded interference protection. Thus, the Commission seeks comment on whether the WMTS model would be feasible here. Parties supporting this approach should address what criteria would be used to determine if a MBAN system could operate without causing interference, what type of information should be contained in a database, who would have access to the database and on what terms, and how the Commission would designate a database administrator.

39. Alternatively, the Commission could license MBAN operations on a non-exclusive basis under part 90, and would be responsible for facilitating coordination. For example, licensees in the Wireless Broadband Service in the 3650–3700 MHz band are permitted to operate anywhere outside of specified 150 km protection zones around incumbent non-Federal primary earth station facilities. Those wishing to operate within the protection zones must negotiate with the affected incumbents directly. To ensure compatibility with Federal stations, the Commission coordinates operations with NTIA through the Frequency Assignment Subcommittee of the Interdepartment Radio Advisory Committee for any station that requests registration of a site closer than 80 km from three specified radio location sites. The Commission further notes that our Universal Licensing System has the capability of screening for any terrestrial applications that might propose site coordinates located within the 80 km coordination zone and flag that application for any necessary coordination.

40. The Commission notes that, in the present case proposed by GEHC, the circumstances under which Federal and non-Federal AMT spectrum use is coordinated is substantially different than those at 3650–3700 MHz. AFTRCC is the designated coordinator of all non-Federal AMT use, and is recognized as such by both the Commission and NTIA. Consequently, any Federal and non-Federal use of the 2360–2395 MHz band is referred to AFTRCC and coordination with them must be completed prior to operation. In addition, the Commission coordinates non-Federal use of this spectrum with NTIA. If the Commission were to follow this approach, any MBAN operation in the 2360–2395 MHz band segment would be referred to AFTRCC and to NTIA, which might delay deployment. At the same time, because the Commission would have the licensing and coordination information readily available, it could intercede in resolving disagreements more easily, as needed. Regarding spectrum sharing among MBAN operations, coordination under a non-exclusive licensing scheme does not appear to provide any additional benefits compared to the WMTS model. The Commission seeks comment on whether such an approach would be feasible here. Commenters should address the relative advantages and disadvantages of the approaches they support.

41. *Frequency Monitoring (Contention-based Spectrum Access Protocols).* The Commission recognizes that low power operation and spread spectrum or similar technology may enable MBAN devices to operate in very close proximity to one another without any mutual interference and mitigate the potential for one body sensor network to block another's access to the spectrum. The Commission also notes that GEHC claims that contention protocols could be applied as a way for MBAN devices to successfully coexist within the band, and also as a way to protect MBAN devices from interference from the primary AMT systems. The Commission invites comment on these observations and whether any rules should be adopted to ensure such sharing. In particular, it seeks comment on whether a contention-based protocol should be applied to MBAN transmitting devices, and if so, how such a protocol might be developed. If the Commission were to adopt a requirement for a contention-based protocol, it invites comment as to whether it should rely upon the general definition of *contention-based protocol* recently adopted by the Commission for the operation of wireless devices under part 90 of the rules in the 3650 MHz band, which reads as follows.

> ''*Contention-based protocol.* A protocol that allows multiple users to share the same spectrum by defining the events that must occur when two or more transmitters attempt to simultaneously access the same channel and establishing rules by which a transmitter provides reasonable opportunities for other transmitters to operate. Such a protocol may consist of procedures for initiating new transmissions, procedures for determining the state of the channel (available or unavailable), and procedures for managing retransmissions in the event of a busy channel.''

42. The Commission encourages commenters supporting implementation of a contention-based protocol to discuss what kinds of contention protocols should or should not be utilized, and to explain in detail why or why not. How should such protocols be defined? Should the protocol be open-source or proprietary? Should more than one protocol be permitted? Should the same protocol be required for all devices, and how would this be accomplished? How should such protocols be established—by rule, by industry standard setting procedures, or other approaches? Would any of these protocols be expected to interact either favorably or adversely with incumbent users?

43. *Transmitter Power, Emission Bandwidth, and Duty Cycle.* As recommended by GEHC, the Commission would limit individual MBAN devices to a maximum transmit power of 1 mW equivalent isotropic radiated power (EIRP) measured in a 1 megahertz bandwidth, and a maximum emission bandwidth of 1 megahertz. In explaining this recommendation, GEHC indicates that, as presently conceived, a typical MBAN system would be comprised of a single network per patient/person with a gateway-hub device coordinating transmissions from multiple body worn sensors. It estimates that the suggested power and bandwidth limits would be sufficient to allow short burst messaging, which in turn would facilitate low power consumption from duty cycles less than 25 percent.

44. While GEHC emphasizes the use of MBAN systems for monitoring patient physiological data, the Commission recognizes that the definition that it proposed for MBAN systems would also allow the operation of two or more networked medical devices to perform diagnostic and therapeutic functions. The Commission seeks comment on whether the power/bandwidth limits proposed above—which reflect GEHC's recommendations—would be appropriate for such other purposes. The Commission specifically asks whether another combination of power and duty cycle limits would provide a better balance between affording interference protection to incumbent users and achieving sufficiently reliable MBAN system performance. The Commission requests that commenters suggesting other bandwidths should fully discuss their relative benefits and potential disadvantages in light of the considerations discussed herein. With respect to transmitter duty cycles, the Commission seeks comment on whether GEHC's assumption of a 25 percent factor adequately characterizes operations that would be expected from real-world devices. For example, would the duty factor of MBAN transmitters used for diagnostic or therapeutic purposes, instead of patient monitoring, be more likely to require higher, lower,

or the approximately the same duty cycles and, if so, should this be accounted for in the maximum duty cycle specification? What would be the relative advantages or disadvantages of specifying versus not specifying specific duty cycle limits for MBAN transmitters in the rules? Is a duty cycle limit needed to allow the functioning of a contention-based spectrum access protocol and, if so, what is the maximum duty cycle that should be allowed in order to support such a protocol? Should the duty cycle apply to individual MBAN transmitters, whether located in a medical body area device or the MBAN control transmitter, or to the aggregate duty cycle of all transmitters comprising an MBAN, as the terms are proposed to be defined above?

45. *Channel aggregation.* To the extent that device manufacturers might wish to aggregate multiple transmission channels in a single device, the Commission seeks comment on requiring only that the total emission bandwidth used by all devices in any single patient MBAN communication session not exceed the maximum authorized bandwidth of 1 megahertz. Thus, for example, a single MBAN body sensor could be designed to operate nominally on two channels, each occupying up to 500 kHz (*i.e.,* one-half the maximum authorized emission). In essence, this would also carry forward the existing channel use provisions of the MedRadio Service. As an additional example, the Commission further notes that this provision would not preclude full duplex or half duplex communications; provided that the total amount of bandwidth utilized by all of the channels employed by collection of a single patient, networked MBAN devices during a communications session does not exceed the maximum authorized 1 megahertz emission bandwidth. The Commission also requests comment on allowing any lesser emission bandwidths to be employed so long as the device complies with all other EIRP and unwanted emission limits. The Commission seeks comment on all of these issues.

46. *Unwanted emissions.* The MedRadio rules under part 95 set forth limits on unwanted emissions from medical transmitting devices operating in the 401–406 MHz band. Those provisions include limits on both in-band and out-of-band radiation. Specifically, emissions on frequencies 500 kHz or less above or below any particular authorized bandwidth [are] required to be attenuated by at least 20 dB below the transmitter output power. In addition, emissions more than 500 kHz above or below any particular authorized bandwidth [are] required to be attenuated to a level no greater than the following signal strengths at 3 m: (a) between 30–88 MHz, 100 μV/m, (b) between 88–216 MHz, 150 μV/m, (c) between 216–960 MHz, 200 μV/m, and (d) 960 MHz and above, 500 μV/m. The Commission seeks comment on the appropriateness of applying the same general limits on MBAN operations in the 2300–2305 MHz and 2360–2400 MHz bands. If parties suggest other out-of-band emission limits for devices operating in this band, they should provide sufficient technical justification to support those limits. Under any approach, the Commission seeks to provide an RF environment that would be adequate to protect incumbent operations while fostering efficient spectrum use by MBAN devices.

47. *Frequency stability.* Following the MedRadio rules, the Commission would require that MBAN transmitters maintain a frequency stability of +/ − 100 ppm of the operating frequency over the range: (1) 25 °C to 45 °C in the case of MBAN transmitters; and (2) 0 °C to 55 °C in the case of MBAN control transmitters. The Commission seeks comment on these stability criteria.

48. *Antenna locations.* The Commission seeks comment on whether it would be appropriate to restrict the use of MBAN transmitting antennas to indoor locations in certain frequency bands. For example, in light of the concerns discussed above regarding the interference potential between AMT and MBAN systems, should MBAN operations that might be permitted in the 2360–2390 MHz band be limited to indoor use (within healthcare facilities)? This would be similar to the WMTS approach noted herein, where transmitting antennas are restricted to indoor locations only. Alternatively, would it be more practical in other frequency bands to follow the approach of the present MedRadio rules by which temporary outdoor antennas are permitted? The Commission invites commenters to address the relative advantages and disadvantages of either approach for MBAN use in any of the frequency bands under consideration in this proceeding.

49. *RF safety.* The Commission notes that portable devices are subject to § 2.1093 of the rules, pursuant to which an environmental assessment must be prepared under § 1.1307. These rule sections also govern existing MedRadio devices. Devices covered by these rules are subject to routine environmental evaluation for RF exposure prior to equipment authorization. The Commission further notes, however, that in our ongoing RF safety proceeding (ET Docket No. 03–137) it anticipates dealing with proposed changes in our rules regarding human exposure to RF electromagnetic fields in a more comprehensive fashion. Thus, for the purposes of the instant proceeding and the Commission's pending action in the RF safety proceeding in ET Docket No. 03–137, the Commission only seeks comment here on whether MBAN transmitters should be deemed as portable devices subject to §§ 2.1093 and 1.1307 of the Commission's existing rules. To the extent that MBAN devices are deemed portable devices, they would then be subject to our RF exposure rules for such devices.

50. *Miscellaneous provisions.* The Commission also seeks comment on various rule provisions regarding equipment certification, authorized locations, station identification, station inspection, disclosure policy, labeling requirements and marketing limitations that mirror the existing MedRadio rules.

51. First, the Commission seeks comment on whether it should require that each authorized MBAN transmitter be certificated, except for such transmitters that are not marketed for use in the United States, but which otherwise comply with the applicable technical requirements and are operated in the United States by individuals who have traveled to the United States from abroad.

52. The Commission also seeks comment on whether to specifically require that all non-implanted MBAN transmitter apparatus be made available for inspection upon request by an authorized FCC representative. Under such a provision, persons operating MBAN transmitters would be required to cooperate reasonably with duly authorized FCC representatives in the resolution of interference.

53. The Commission request comment on requiring that manufacturers of MBAN transmitters include an appropriate disclosure statement analogous to that for MedRadio transmitters with each MBAN transmitting device. Such a statement would disclose the provision of the rules under which the device is authorized, along with a statement that the transmitter must not cause harmful interference to stations authorized to operate on a primary basis in the band, and must accept interference that may be caused by such stations, including interference that may cause undesired operation. Such a statement would also indicate that the transmitter shall be used only in accordance with the FCC rules, and that analog and digital voice communications are prohibited. The

Commission seeks comment on this proposal.

54. The Commission further seeks comment on whether to require that MBAN control transmitters (if allocated on a secondary basis) be labeled and bear the following statement in a conspicuous location on the device: ''This device may not interfere with stations authorized to operate on a primary basis and must accept any interference received, including interference that may cause undesired operation.'' Where a MBAN control transmitter is constructed in two or more sections connected by wire and marketed together, the statement specified in this section would be required to be affixed only to the main control unit. The Commission also seeks comment on whether to require that MBAN transmitters be identified with a serial number. Under that plan, the Commission would allow the FCC ID number associated with the transmitter and the information required by § 2.925 of the FCC rules to be placed in the instruction manual for the transmitter in lieu of being placed directly on the transmitter.

55. Finally, with respect to marketing limitations, the Commission seeks comment on whether it should specify that MBAN transmitters may be marketed and sold only for those permissible uses described in the NPRM.

C. Other Matters and Conclusion

56. As noted in the *Background* discussion of the NPRM, BSI (Broadcast Sports, Inc.) filed comments in which it proposes an ''Event Radio Service'' as an alternative to the GEHC proposal for use of the 2360–2400 MHz band. The Commission finds that BSI has not provided sufficient clarity to consider such an allocation or related service rules. On its face, the BSI proposal appears to be intended to preserve the ability to obtain access to additional spectrum for video coverage of sports events that can already be obtained under STAs. There is no evidence, however, to support the proposition that an allocation for MBANS would constrain the ability to obtain STAs for video coverage of sports events. Moreover, special temporary authority is precisely the proper instrument for authorizing temporary operations at specific locations. Furthermore, the Commission is not persuaded that an allocation of spectrum and service rules limited to video coverage of sports events represents the most efficient use of this spectrum nor best serves the public interest as compared with devices that may have significant benefits for health care. Accordingly, the Commission declines to propose BSI's alternative allocation for an Event Radio service.

57. The Commission seeks comment on all of the matters discussed in this NPRM, and encourages commenters to address any other relevant matters of concern that might serve to illuminate the record in this proceeding.

Initial Regulatory Flexibility Analysis

58. As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rule Making (NPRM).* Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in this *NPRM.* The Commission will send a copy of this *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2]

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

59. The Commission seeks comment on the feasibility of allocating spectrum for the operation of Medical Body Area Network (or MBAN) systems using body sensor devices. Under the service and technical rules proposed herein, the Commission envisions that MBAN systems could provide a flexible platform for the wireless networking of multiple body sensors used for monitoring physiological patient data in health care facilities. Use of MBAN systems should result in improved safety, quality, and efficiency of patient care by reducing or eliminating a wide array of hardwired, patient-attached cables used by present monitoring technologies.

B. Legal Basis

60. The proposed action is authorized under Sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Would Apply

61. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[3] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[4] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[5] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[6]

62. Nationwide, there are a total of approximately 27.2 million small businesses, according to the SBA.[7] A ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''[8] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[9] The term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.''[10] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[11] The Commission estimates that, of this total, 84,377 entities were ''small governmental jurisdictions.''[12] Thus, it estimates that

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

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

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

[4] 5 U.S.C. 601(6).

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

[6] Small Business Act, 15 U.S.C. 632 (1996).

[7] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' *http://web.sba.gov/faqs* (accessed Jan. 2009).

[8] 5 U.S.C. 601(4).

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

[10] 5 U.S.C. 601(5).

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

[12] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total

Continued

most governmental jurisdictions are small.

63. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[13] Prior to that time, such firms were within the now-superseded categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' [14] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[15] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[16] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[17] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[18] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[19] Thus, we estimate that the majority of wireless firms are small.

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

64. The 2300–2305 MHz, 2360–2400 MHz, 2400–2500 MHz and 5150–5250 MHz bands are used by various Federal and non-Federal radiocommunication services. Thus, the Commission seeks comment related to the potential for interference caused either to incumbents, or to MBAN systems, and how any such concerns might be mitigated.

65. The Commission thus seeks comment on allowing MBAN operations in any of the bands on a secondary basis, subject to the further condition that harmful interference is not caused to primary services allocated in the bands, or on allowing MBAN operations on a primary basis in the 2300–2305 MHz and 2390–2400 MHz bands. We would further propose to provide for such use by including a U.S. footnote to the Table of Allocations in Part 2 of the Rules for the specific band segments.[20]

66. The Commission also seeks comment on various provisions regarding equipment certification, authorized locations, station identification, station inspection, disclosure policy, labeling requirements and marketing limitations that mirror the existing MedRadio rules.

67. First, the Commission seeks comment on whether it should require that each MBAN transmitter must be certificated except for such transmitters that are not marketed for use in the United States, but which otherwise comply with the applicable technical requirements and are operated in the United States by individuals who have traveled to the United States from abroad.

68. The Commission also seeks comment on whether to provide that all non-implanted MBAN transmitter apparatus be made available for inspection upon request by an authorized FCC representative. Under such a provision, persons operating MBAN transmitters would be required to cooperate reasonably with duly authorized FCC representatives in the resolution of interference.

69. The Commission seeks comment on whether to require that manufacturers of MBAN transmitters include with each transmitting device (if allocated on a secondary basis) an appropriate disclosure statement analogous to that for MedRadio transmitters with each MBAN transmitting device.[21] Such a statement would disclose the provision of the rules under which the device is authorized, along with a statement that the transmitter must not cause harmful interference to stations authorized to operate on a primary basis in the band, and must accept interference that may be caused by such stations, including interference that may cause undesired operation. Such statement would also indicate that the transmitter shall be used only in accordance with the FCC Rules, and that analog and digital voice communications are prohibited.

70. The Commission further seeks comment on whether to require that MBAN control transmitters (if allocated on a secondary basis) be labeled and shall bear the following statement in a conspicuous location on the device: ''This device may not interfere with stations authorized to operate on a primary basis and must accept any interference received, including interference that may cause undesired operation.'' Where a MBAN control transmitter is constructed in two or more sections connected by wire and marketed together, the statement specified in this section would be required to be affixed only to the main control unit. The Commission also seeks comment on whether to require that MBAN transmitters be identified with a serial number. Under that plan, it would allow the FCC ID number associated with the transmitter and the information required by § 2.925 of the FCC Rules to be placed in the instruction manual for the transmitter in lieu of being placed directly on the transmitter.

71. Finally, with respect to marketing limitations, the Commission seeks comment on requiring that MBAN transmitters intended for operation in any portions of the 2360–2400 MHz band may be marketed and sold only for those permissible uses.

72. *Licensing.* The Commission seeks comment on whether medical device operations in any portion of the frequency bands under consideration should be authorized under the MedRadio Service in part 95 of our Rules, thus providing for license-by-rule

number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

[13] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[14] U.S. Census Bureau, 2002 NAICS Definitions, ''517211 Paging''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*; U.S. Census Bureau, 2002 NAICS Definitions, ''517212 Cellular and Other Wireless Telecommunications''; *http://www.census.gov/epcd/naics02/def/NDEF517.HTM.*

[15] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[16] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005).

[17] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[18] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005).

[19] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.''

[20] *See* 47 CFR 2.106.

[21] For example, under the MedRadio rules, each transmitter must include a statement that ''This transmitter is authorized by rule under the MedRadio Service. This transmitter must not cause harmful interference to stations authorized to operate on a primary basis in the 2360–2400 MHz band, and must accept interference that may be caused by such stations, including interference that may cause undesired operation. This transmitter shall be used only in accordance with the FCC Rules governing the MedRadio Service. Analog and digital voice communications are prohibited. Although this transmitter has been approved by the Federal Communications Commission, there is no guarantee that it will not receive interference or that any particular transmission from this transmitter will be free from interference.''

operation [22] pursuant to section 307(e) of the Communications Act (Act).[23] Under this approach, medical devices would operate in the band on a shared, non-exclusive basis with respect to each other and without the need for MBAN systems to be individually licensed. As the Commission determined when it adopted the MedRadio Service rules, this approach minimizes regulatory burdens and facilitates the expeditious deployment of new generations of beneficial wireless medical devices that can improve the quality of life for countless Americans, thus serving the public interest, convenience and necessity.

73. Alternatively, the Commission also seeks comment on whether MBAN operations should be licensed on a non-exclusive basis under part 90. Under that approach, MBAN operations would be licensed on a non-exclusive basis with respect to each other for ten year license terms. The Commission seeks comment on whether it should consider using the same approach here as we do with wireless broadband services in the 3650–3700 MHz band, *i.e.*, eligible entities would apply for non-exclusive nationwide licenses and subsequently register individual stations with the Commission.[24] If this approach were to be adopted, the Commission also seeks comment on whether it should require that licensees register each individual MBAN system or, alternatively, require them to register the individual health care facility at which the licensee would be allowed to operate multiple MBAN systems. In this regard, the Commission seeks comment on what type of licensing and registration information for MBAN operations would facilitate coordination with incumbent services; and what would be the relative benefits and disadvantages of licensing under part 90 compared with the license-by-rule approach under part 95.

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

74. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[25]

75. The Commission also invites commenters to address the validity of the competing interference modeling studies that have already been placed into the record by GEHC and AFTRCC. Each party reaches opposite, alternative conclusions concerning whether MBAN operation would pose an undue interference risk to AMT operations in the 2360–2395 MHz band. The Commission asks commenters to address which aspects of these interference models would be appropriate, or not, to be relied upon under the particular factual circumstances herein. For example, should interference potential be evaluated in this instance by reference to worst-case static models or by other statistical simulations such as the Monte Carlo approach type relied upon by GEHC? Why or why not? Would some other interference modeling approaches give results providing a greater degree of confidence in their merit?

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

76. None.

Ordering Clauses

77. Pursuant to Sections 4(i), 301, 302, 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 301, 302, 303(e), 303(f) and 303(r), this *Notice of Proposed Rule Making is adopted.*

78. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–18859 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

[22] *See* 47 CFR 95.401 (d).

[23] Under Section 307(e) of the Act, the Commission may authorize the operation of radio stations by rule without individual licenses in certain specified radio services when the Commission determines that such authorization serves the public interest, convenience, and necessity. The services set forth in this provision for which the Commission may authorize operation by rule include: (1) The Citizens Band Radio Service, (2) the Radio Control Service, (3) the Aviation Radio Service, and (4) the Maritime Radio Service. *See* 47 USC 307(e)(1).

[24] *See* 47 CFR 90.1307.

[25] *See* 5 U.S.C. 603(c).

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1532; MB Docket No. 08–153; RM–11477]

Television Broadcasting Services; Bangor, ME

AGENCY: Federal Communications Commission.

ACTION: Dismissal.

SUMMARY: The Commission dismisses the pending rulemaking petition filed by Community Broadcasting Service (''Community Broadcasting''), the licensee of WABI–DT, digital channel 19, Bangor, Maine, which requests the substitution of channel 12 for digital channel 19 at Bangor. Community Broadcasting's proposed channel substitution requires coordination and concurrence with the Canadian government because the proposed facility is located within the Canadian coordination zone. The Canadian government has indicated that Community Broadcasting's proposed channel substitution is not acceptable. Therefore, the Commission dismisses Community Broadcasting's petition for rulemaking.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Order,* MB Docket No. 08–153, adopted July 13, 2009, and released July 14, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act

of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

This document is not subject to the Congressional Review Act. (The Commission, is, therefore, not required to submit a copy of this *Order* to the Government Accountability Office, pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A) since this proposed rule is dismissed, herein.)

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–18254 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1534; MB Docket No. 09–122; RM–11544]

Television Broadcasting Services; Bangor, ME

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Community Broadcasting Service (''Community Broadcasting''), the licensee of WABI–DT, digital channel 19, Bangor, Maine. Community Broadcasting requests the substitution of channel 13 for digital channel 19 at Bangor.

DATES: Comments must be filed on or before August 21, 2009, and reply comments on or before August 31, 2009.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Michelle A. McClure, Esq., Fletcher, Heald & Hildreth, PLC, 1300 North 17th Street, 11th Floor, Arlington, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, *adrienne.denysyk@fcc.gov*, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 09–122, adopted July 13, 2009, and released July 14, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Maine, is amended by adding DTV channel 13 and removing DTV channel 19 at Bangor.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–18255 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1544; MB Docket No. 09–123; RM–11546]

Television Broadcasting Services; New Haven, CT

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Connecticut Public Broadcasting, Inc. (''CPBI''), the licensee of noncommercial educational television station WEDY(TV), digital channel *6, New Haven, Connecticut. CPBI requests the substitution of digital channel *41 for channel *6 at New Haven.

DATES: Comments must be filed on or before August 21, 2009, and reply comments on or before August 31, 2009.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Steven C. Schaffer, Esq., Schwartz, Woods & Miller, 1233 20th Street, NW., Suite 610, Washington, DC 20036–7322.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, *joyce.bernstein.com*, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 09–123, adopted July 13, 2009, and released July 16, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the

Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com*. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Connecticut, is amended by adding DTV channel *41 and removing DTV channel *6 at New Haven.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–18257 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1543; MB Docket No. 09–125; RM–11548]

Television Broadcasting Services; Biloxi, MS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by WLOX License Subsidiary, LLC (''WLOX''), the permittee of station WLOX(TV), digital channel 13, Biloxi, Mississippi. WLOX requests the substitution of its pre-transition digital channel 39 for its allotted post-transition channel 13 at Biloxi.

DATES: Comments must be filed on or before August 21, 2009, and reply comments on or before August 31, 2009.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Jennifer A. Johnson, Esq., Covington & Burling LLP, 1201 Pennsylvania Avenue, NW., Washington, DC 20004–2401.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, joyce.bernstein.com, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 09–125, adopted July 14, 2009, and released July 16, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *www.BCPIWEB.com*. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Mississippi, is amended by adding DTV channel 39 and removing DTV channel 13 at Biloxi.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–18259 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–1537; MB Docket No. 09–124; RM–11547]

Television Broadcasting Services; Columbus, OH

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by WSYX Licensee, LLC (''WSYX''), the licensee of station WSYX–DT, DTV channel 13, Columbus, Ohio. WSYX requests the substitution of DTV channel 48 for channel 13 at Columbus.

DATES: Comments must be filed on or before August 21, 2009, and reply comments on or before August 31, 2009.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Clifford M. Harrington, Esq., Pillsbury Winthrop Shaw Pittman LLP, 2300 N Street, NW., Washington, DC 20037–1128.

FOR FURTHER INFORMATION CONTACT: David J. Brown, *david.brown@fcc.gov,* Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rulemaking, MB Docket No. 09–124, adopted July 13, 2009, and released July 15, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rulemaking is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Ohio, is amended by adding DTV channel 48 and removing DTV channel 12 at Columbus.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–18261 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 15, 32, 42, 45, and 52

[FAR Case 2008–011; Docket 2009–0029; Sequence 1]

RIN 9000–AL41

Federal Acquisition Regulation; FAR Case 2008–011; Government Property

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to revise coverage in regard to Government property and its associated clauses. These changes are to add clarity and correction to the previous FAR rule for Part 45, Government Property, published under Federal Acquisition Circular 2005–17, FAR case 2004–025.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before October 5, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2008–011 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov*.

Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2008–011'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with FAR Case 2008–011. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''FAR Case 2008–011'' on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2008–011 in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov*, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Jeritta A. Parnell, Procurement Analyst, at (202) 501–4082 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR case 2008–011.

SUPPLEMENTARY INFORMATION:

A. Background

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council revised Federal Acquisition Regulation (FAR) contract property management requirements as a final rule under Federal Acquisition Circular 2005–17 (72 FR 27364, May 15, 2007). The new regulation amended, updated and revised the FAR Part 45, Government Property, and associated clauses related to the management and disposition of Government property in

the possession of contractors. The final rule replaced outmoded regulations that were essentially unchanged for many years.

After publication of the final rule in May 2007, DoD received feedback on the FAR revisions. An Ad Hoc team comprised of members from DoD, GSA, and the Defense Contract Management Agency (DCMA) was formed to review comments from industry, academia and Government sources. As a result of the Ad Hoc team recommendations, FAR case 2008–011 was established to address the recommendations.

The proposed changes include the following:

(1) 2.101 Definitions.

The definitions of ''plant clearance officer'' and ''special tooling'' were clarified.

(2) 4.705–3 Acquisition and supply records.

Paragraph (h) ''Property records'' was added to the list of acquisition and supply records.

(3) 15.404–4 Profit.

Language was added to FAR 15.404–4(a)(3) as follows— ''Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.''

(4) 42.302(a)(30) Contract administration functions.

(A) In paragraph (iii), ''approve use'' was changed to ''evaluate the use.''

(B) Paragraph (v) was deleted in its entirety and replaced with ''modify contracts to reflect addition of Government furnished property and ensure appropriate consideration.''

(5) 45.101 Definitions.

(A) The definitions of ''cannibalize,'' ''equipment,'' ''Government furnished property,'' ''Government property,'' ''material,'' and ''real property'' were clarified.

(B) The definition of ''property records'' was added.

(C) The definition of ''plant equipment'' was deleted in its entirety.

(6) 45.102(d) Policy.

Language was added to paragraph (d) to the effect that property furnished under contracts for maintenance and modification as well as property furnished for repair or overhaul are exceptions from the requirements of FAR 45.102(b).

(7) 45.104 Responsibility and liability for Government property, and 45.105 Contractors' property management system compliance.

All references to ''loss, damage, destruction, or theft'' are changed to ''loss, theft, damage, or destruction.''

(8) 45.201 Solicitation.

(A) Paragraph (a)(4), the term ''unique-item identifier'' was changed to ''item unique identifier.''

(B) Paragraph (d) was revised to delete ''when use of property on more than one contract is anticipated.''

(9) 45.402 Title to contractor-acquired property.

The first sentence of this subsection is deleted and the second sentence is modified to include that ''title vests in the Government for all property ...''

(10) 45.502 Subcontractor and alternate prime contractor locations.

(A) Paragraph (a) was revised to delete existing language and replace with new language to make clear the need for prime contractor approval when support property administration at subcontractor locations is necessary.

(B) Paragraph (b) was edited to state that the prime property administrator shall ''advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.''

(C) Paragraph (c) was added.

(D) Section title has been changed.

(11) 45.602–3(b) Screening.

Paragraph (b)(3) is revised to correct the address for the Public Printer.

(12) 45.604–3 Sale of surplus personal property.

(A) The reference to CFR Part 101–45 is changed to CFR Part 102–38.

(B) Section title has been changed.

(13) 45.606–1 Contractor with an approved scrap procedure.

Paragraph (b) was reformatted to separate categories of property requiring preparation of an inventory disposal schedule into a new paragraph (c). Language was added for ''all aircraft regardless of condition'' and ''flight safety critical aircraft parts.'' In addition, scrap was revised to include ''economically beneficial to recover'' precious metals.

(14) 52.232–16, Progress Payments, and 52.232–32, Performance Based Payments.

(A) The clause at 52.232–16(d)(2)(ii) and the clause at 52.232–32(f)(2)(ii) are revised to delete the language ''under any other clause of this contract.'' This language is no longer necessary.

(B) The clause at 52.232–16(d)(3) and the clause at 52.232–32(f)(3) are revised to delete the language ''or special tooling.'' This language is no longer necessary.

(15) Loss, Damage, Theft, or Destruction.

All references to ''loss, damage, destruction, or theft'' are changed to ''loss, theft, damage, or destruction'' in the coverage in 32.503–16(a) and 32.1010(a) and the clauses at 52.232–16, 52.232–32 and 52.245–1.

(16) Clauses.

§ 52.245–1 Government Property.

(A) Definitions at 52.245–1(a) are changed to be consistent with the definitions in FAR 45.101.

(B) In paragraph (b)(2), ''sale (as surplus property), or other'' disposition was added.

(C) Paragraph (c) was reformatted and information regarding modifications or alterations of Government property was added to clarify that modifications or alterations must be reasonable and necessary due to the scope of work under this contract or its terms and conditions, required for normal maintenance, or otherwise authorized by the contracting officer. In addition, language was added to clarify when cannibalization occurs.

(D) Paragraph (e)(2)(ii) was revised to clarify title under fixed price contracts.

(E) The term ''material'' was changed to ''property'' in paragraphs (e)(2)(iii) and (f)(1)(i).

(F) Paragraphs (f)(1)(iii)(A)(*4*) and (f)(1)(vi)(B)(*4*) ''Unique-item'' identifier was revised to ''Item unique'' identifier.

(H) Paragraph (f)(1)(viii)(B), references to ''property'' were changed to ''material.''

(I) Paragraph (g), Systems analysis, was revised to reflect the coverage in FAR 45.502 that provides for support property administration for subcontractors and prime contractor alternate locations.

(J) Paragraph (i) deleted the language ''the right to an equitable adjustment shall be the Contractor's exclusive remedy.''

(K) Paragraph (j)(1)(i)(B) was reformatted into paragraphs (B) and (C) to separate categories of property requiring preparation of an inventory disposal schedule. Language was added for ''all aircraft regardless of condition'' and ''flight safety critical aircraft parts.'' In addition, scrap was revised to include ''economically beneficial to recover'' precious metals.

(L) Paragraph (j)(3)(iii)(E), the phrase ''in raw or bulk form'' was added.

(M) Paragraph (j)(3)(iv) was revised to add a list of items for which additional descriptive information is required during disposition.

(N) Paragraph (j)(3)(v) was revised to delete the language ''describe the property in sufficient detail to permit an understanding of its intended use.''

(O) Paragraph (j)(3)(vi) was added.

(P) Paragraph (j)(7)(ii) was revised to change ''facility'' to ''area.''

(Q) Paragraph (j)(8)(ii) was revised to add ''unless otherwise directed by the contracting officer or by the plant clearance officer the Contractor shall

remove and destroy any Government affixed markings...''

(R) Alternate I, 52.245–1, paragraph (h)(1) and 52.245–2 (b) were revised to change the reference from ''loss, damage, destruction, or theft'' to ''loss, theft, damage, or destruction.''

52.245–9 Use and Charges.

The clause at 52.245–9 was revised to delete definitions contained in 52.245–1 and to include language that definitions applicable to this contract are provided in the clause at 52.245–1. 52.245–9 may only be used when 52.245–1 is included in the contract.

52.251–1 Government Supply Sources.

The clause at 52.251–1 was revised to update the reference to the clause at 52.245–1.

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

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. The rule does not affect the method of managing Government property. The rule merely clarifies and corrects the previous FAR rule.

An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 4, 15, 42, 45, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2008–011), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 4, 15, 32, 42, 45, and 52

Government procurement.

Dated: July 30, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 4, 15, 32, 42, 45, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 4, 15, 32, 42, 45, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

2. Amend section 2.101, in paragraph (b)(2), by removing from the definition ''Plant clearance officer'' the words ''contractor-operator plants, and Federal installations'' and adding ''contractor-operator plants, Federal installations and Federal and non-Federal industrial operations'', in its place; and removing from the definition ''Special tooling'' the words ''test equipment, and'' and adding ''tooling, and'' in its place.

PART 4—ADMINISTRATIVE MATTERS

3. Amend section 4.705–3 by adding paragraph (h) to read as follows:

4.705–3 Acquisition and supply records.

* * * * *

(h) Property records (see 45.101 and 52.245–1): Retain 4 years.

PART 15—CONTRACTING BY NEGOTIATION

4. Amend section 15.404–4 by adding a sentence to the end of paragraph (a)(3) to read as follows:

15.404–4 Profit.

(a) * * *

(3) * * * Unless the contractor acquired property is a deliverable under the contract, no profit or fee shall be permitted on the cost of the property.

* * * * *

PART 32—CONTRACT FINANCING

32.503–16 [Amended]

5. Amend section 32.503–16 by removing from paragraph (a) ''loss, theft, destruction, or damage to'' and adding ''lost, stolen, damaged, or destroyed'' in its place.

32.1010 [Amended]

6. Amend section 32.1010 by removing from paragraph (a) ''loss, theft, destruction, or damage to'' and adding ''lost, stolen, damaged, or destroyed'' in its place.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

7. Amend section 42.302 by revising paragraphs (a)(30)(iii) and (a)(30)(v) to read as follows:

42.302 Contract administration functions.

(a) * * *

(30) * * *

(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245–9, Use and Charges;

* * * * *

(v) Modify contracts to reflect addition of Government furnished property and ensure appropriate consideration.

* * * * *

PART 45—GOVERNMENT PROPERTY

8. Amend section 45.101 by—

a. Revising the definitions ''Cannibalize'', ''Equipment'', ''Government-furnished property'', and ''Government property'';

b. Removing from the definition ''Material'' the words ''test equipment'' and adding ''test equipment or real property'' in its place;

c. Removing the definition ''Plant equipment'';

d. Adding the definition ''Property records''; and

e. Revising the definition ''Real property.

The revised and added text reads as follows:

45.101 Definitions.

* * * * *

Cannibalize means to remove parts from equipment, special tooling or special test equipment in order to install them on other property.

* * * * *

Equipment means a tangible item that is functionally complete for its intended purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material or real property.

Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes spares and property furnished for repair, maintenance, overhaul, or modification.

Government property means all property owned or leased by the

Government. Government property includes both Government-furnished property and contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property, and software.

* * * * *

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

* * * * *

Real property. See Federal Management Regulation 102–71.20 (41 CFR 102–71.20.)

* * * * *

9. Amend section 45.102 by revising paragraph (d) to read as follows:

45.102 Policy.

* * * * *

(d) *Exception.* Property provided under contracts for repair, maintenance, overhaul, or modification is not subject to the requirements of paragraph (b) of this section.

10. Amend section 45.104 by revising the introductory text of paragraph (a) to read as follows:

45.104 Responsibility and liability for Government property.

(a) Generally, contractors are not held liable for loss, theft, damage, or destruction of Government property under the following types of contracts:

* * * * *

11. Amend section 45.105 by revising paragraph (b)(1); and removing from paragraph (d) ''damage, destruction, or theft'' and adding ''theft, damage, or destruction'' in its place. The revised text reads as follows:

45.105 Contractors' property management system compliance.

* * * * *

(b) * * *

(1) Revocation of the Government's assumption of risk for loss, theft, damage, or destruction; and/or

* * * * *

45.201 [Amended]

12. Amend section 45.201 by removing from paragraph (a)(4) ''Unique-item'' and adding ''Item unique'' in its place; and removing from paragraph (d) ''When use of property on more than one contract is anticipated, any'' and adding ''Any'' in its place.

13. Amend section 45.402 by revising paragraph (a) to read as follows:

45.402 Title to contractor-acquired property.

(a) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

* * * * *

14. Revise section 45.502 to read as follows:

45.502 Subcontractor and alternate prime contractor locations.

(a) To ensure subcontractor compliance with Government property administration requirements, and with prime contractor consent, the property administrator assigned to the prime contract may request support property administration from another contract administration office. If the prime contractor does not provide consent to support property administration at subcontractor locations, the property administrator shall refer the matter to the contracting officer for resolution.

(b) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.

(c) Prime contractor consent is not required for support delegations involving prime contractor alternate locations.

45.602–3 [Amended]

15. Amend section 45.602–3 by removing from paragraph (b)(3) ''North Capitol and H Streets'' and adding ''732 North Capitol Street'' in its place.

16. Revise section 45.604–3 to read as follows:

45.604–3 Sale of surplus personal property.

Policy for the sale of surplus personal property is contained in the Federal Management Regulations, at Part 102–38 (41 CFR Part 102–38). Agencies may specify implementing procedures.

17. Amend section 45.606–1 by revising paragraph (b) and adding paragraph (c) to read as follows:

45.606–1 Contractor with an approved scrap procedure.

* * * * *

(b) For scrap from other than production or testing, the contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures).

(c) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that—

(1) Requires demilitarization;

(2) Is a classified item;

(3) Is generated from classified items;

(4) Contains hazardous materials or hazardous wastes;

(5) Contains precious metals that are economically beneficial to recover; or

(6) Is dangerous to the public health, safety, or welfare.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.232–16 [Amended]

18. Amend section 52.232–16 by—

a. Removing from the clause heading ''(JUL 2009)'' and adding ''(DATE)'' in its place;

b. Removing from paragraph (d)(2)(ii) ''under any other clause of this contract'';

c. Removing from paragraph (d)(3) ''or special tooling''; and

d. Removing from paragraph (e) ''is damaged, lost, stolen, or'' and adding ''is lost, stolen, damaged, or'' in its place.

52.232–32 [Amended]

19. Amend section 52.232–32 by—

a. Removing from the clause heading ''(JAN 2008)'' and adding ''(DATE)'' in its place;

b. Removing from paragraph (f)(2)(ii) ''under any other clause of this contract'';

c. Removing from paragraph (f)(3) ''or special tooling''; and

d. Removing from paragraph (g) ''is damaged, lost, stolen, or'' and adding ''is lost, stolen, damaged, or'' in its place.

20. Amend section 52.245–1 by—

a. Revising the date of the clause;

b. In paragraph (a) by—

1. Revising the definition ''Cannibalize'';

2. Removing from the definition ''Equipment'' the word ''asset'' and adding the word ''item'' in its place; and adding a sentence to the end of the definition;

3. Adding a sentence to the end of the definition ''Government-furnished property'';

4. Adding a sentence to the end of the definition ''Government property'';

5. Adding the words ''or real property'' to the end of the definition ''Material'';

6. Removing the definition ''Plant equipment'';

7. Adding, in alphabetical order, the definition ''Property records''; and

8. Revising the definition ''Real property'';

c. Revising the first sentence of paragraph (b)(2), (c), and (e)(2)(ii);

d. Removing from paragraphs (e)(2)(iii) and (f)(1)(i) the word ''material'' and adding the word ''property'' wherever it occurs (8 times);

e. Removing from paragraph (f)(1)(iii)(A)(*4*) the word ''Unique-item'' and adding the words ''Item unique'' in its place;

f. Revising paragraph (f)(1)(v)(A), introductory text of paragraph (f)(1)(vi), paragraphs (f)(1)(vi)(A), (f)(1)(vi)(B)(*4*), (f)(1)(vi)(B)(*10*), (f)(1)(vii)(A), (f)(1)(viii)(B), (f)(1)(x), (g), introductory text of paragraph (h)(1), the first sentence of paragraph (h)(1)(ii), (h)(1)(iii), the first sentence of paragraph (h)(2), paragraph (h)(3), the second sentence of paragraph (i), and paragraph (j)(1)(i)(B);

h. Add paragraph (j)(1)(i)(C);

i. Revise paragraphs (j)(3)(iii)(E), and (j)(3)(iv);

g. Add paragraphs (j)(3)(v), and (j)(3)(vi);

j. Remove from paragraph (j)(7)(ii) the word ''facility'' and add the word ''area'' in its place;

k. Revise paragraph (j)(8)(ii);

l. In Alternate I, revise the date of the alternate, and the first sentence of paragraph (h)(1).

The added and revised text reads as follows:

52.245–1 Government Property.

* * * * *

GOVERNMENT PROPERTY (DATE)

(a) * * *

* * * * *

Cannibalize means to remove parts from equipment, special tooling or special test equipment in order to install them on other property.

* * * * *

Equipment * * * Equipment does not include material or real property.

Government-furnished property * * * Government-furnished property includes spares and property furnished for repair, maintenance, overhaul, or modification.

Government property * * * Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property, and software.

* * * * *

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

* * * * *

Real property. See Federal Management Regulation 102–71.20 (41 CFR 102–71.20).

* * * * *

(b) * * *

(2) The Contractor's responsibility extends from the initial acquisition and receipt of property, through stewardship, custody, and use until formally relieved of responsibility by authorized means, including delivery, consumption, expending, sale (as surplus property), or other disposition, or via a completed investigation, evaluation, and final determination for lost, stolen, damaged, or destroyed property. * * *

* * * * *

(c) *Use of Government property.* (1) The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer.

(2) Modifications or alterations of Government property are prohibited, unless they are—

(i) Reasonable and necessary due to the scope of work under this contract or its terms and conditions;

(ii) Required for normal maintenance; or

(iii) Otherwise authorized by the Contracting Officer.

(3) The Contractor shall not cannibalize Government property unless otherwise provided for in this contract or approved by the Contracting Officer.

* * * * *

(e) * * *

(2) * * *

(ii) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

* * * * *

(f) * * *

(1) * * *

(v) * * *

(A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract terms and conditions (*e.g.*, extent of liability for loss, theft, damage, or destruction of Government property).

* * * * *

(vi) *Reports.* The Contractor shall have a process to create and provide reports of discrepancies; loss, theft, damage, or destruction; physical inventory results; audits and self-assessments; corrective actions; and other property related reports as directed by the Contracting Officer.

(A) Loss, theft, damage, or destruction. Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish a written narrative of all incidents of loss, theft, damage, or destruction to the property administrator as soon as the facts become known or when requested by the Government.

(B) * * *

(*4*) Item unique Item Identifier (if available).

* * * * *

(*10*) A statement that the Government will receive any reimbursement covering the loss, theft, damage, or destruction in the event the Contractor was or will be reimbursed or compensated.

* * * * *

(vii) * * *

(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract, including reasonable inventory adjustments of material as determined by the Property Administrator; or a Property Administrator granted relief of responsibility for loss, theft, damage, or destruction of Government property;

* * * * *

(viii) * * *

(B) Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle Government material with material not owned by the Government.

* * * * *

(x) *Property closeout.* The Contractor shall promptly perform and report to the Property Administrator contract

property closeout, to include reporting, investigating and securing closure of all loss, theft, damage, or destruction cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.

* * * * *

(g) *Systems analysis.* (1) The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan, systems, procedures, records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all subcontractor premises.

(2) Records of Government property shall be readily available to authorized Government personnel and shall be appropriately safeguarded.

(3) Should it be determined by the Government that the Contractor's (or subcontractor's) property management practices are inadequate or not acceptable for the effective management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall immediately take all necessary corrective actions as directed by the Property Administrator.

* * * * *

(h) * * *

(1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, theft, damage, or destruction to the Government property furnished or acquired under this contract, except when any one of the following applies—

* * * * *

(ii) The loss, theft, damage, or destruction is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel. * * *

(iii) The Contracting Officer has, in writing, revoked the Government's assumption of risk for loss, theft, damage, or destruction, due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present an undue risk to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish by clear and convincing evidence that the loss, theft, damage, or destruction of Government property occurred while the Contractor had adequate property management practices or the loss, theft, damage, or destruction of Government property did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.

(2) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, theft, damage, or destruction. * * *

(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, theft, damage, or destruction of Government property.

* * * * *

(i) *Equitable adjustment.* * * * However, the Government shall not be liable for breach of contract for the following:

* * * * *

(j) * * *

(1) * * *

(i) * * *

(B) For scrap from other than production or testing the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures.)

(C) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that—

(*1*) Requires demilitarization;

(*2*) Is a classified item;

(*3*) Is generated from classified items;

(*4*) Contains hazardous materials or hazardous wastes;

(*5*) Contains precious metals that are economically beneficial to recover; or

(*6*) Is dangerous to the public health, safety, or welfare.

* * * * *

(3) * * *

(iii) * * *

(E) Precious metals in raw or bulk form;

* * * * *

(iv) The Contractor shall provide the information required by 52.245–1(f)(1)(iii) along with the following:

(A) For special tooling and special test equipment, identify each part number with which the item is used.

(B) For work-in-progress, the estimated percentage of completion.

(C) For precious metals, the type of metal and estimated weight.

(D) For hazardous material or property contaminated with hazardous material, the type of hazardous material.

(E) For metals in mill product form, the form, shape, treatment, hardness, temper, specification (commercial or Government) and dimensions (thickness, width and length.)

(F) Any additional information that may facilitate understanding of the property's intended use.

(v) Property with the same description, condition code, and reporting location may be grouped in a single line item.

(vi) Scrap should be reported by ''lot'' along with metal content, estimated weight and estimated value.

* * * * *

(8) * * *

(ii) The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of Contractor inventory as directed by the Plant Clearance Officer. Unless otherwise directed by the Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove and destroy any Government affixed markings identifying the property as U.S. Government-owned property prior to its disposal.

* * * * *

Alternate I (Date). * * *

(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, theft, damage, or destruction of Government property upon its delivery to the Contractor as Government-furnished property. * * *

* * * * *

20. Amend section 52.245–2 by revising the date of the clause, and the first two sentences of paragraph (b) to read as follows:

52.245–2 Government Property Installation Operation Services.

* * * * *

GOVERNMENT PROPERTY INSTALLATION OPERATION SERVICES (DATE)

* * * * *

(b) The Government bears no responsibility for repair or replacement of any loss, theft, damage, or destruction of Government property. If any or all of the Government property is lost, stolen, damaged, or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. * * *

* * * * *

21. Amend section 52.245–9 by revising the date of the clause, and the introductory text of paragraph (a); and removing the definitions ''Acquisition cost'', ''Government property'', ''Plant equipment'', and ''Real property''. The revised text reads as follows:

52.245–9 Use and Charges.

* * * * *

USE AND CHARGES (DATE)

(a) *Definitions.* Definitions applicable to this contract are provided in the clause at 52.245–1, Government

Property. Additional definitions as used in this clause include:

* * * * *

23. Amend section 52.251–1 by revising the date of the clause, and the last sentence of the clause to read as follows:

52.251–1 Government Supply Sources.

* * * * *

GOVERNMENT SUPPLY SOURCES (DATE)

* * * The provisions of the clause entitled ''Government Property,'' at 52.245–1, shall apply to all property acquired under such authorization.

(End of clause)

[FR Doc. E9–18799 Filed 8–5–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R1-ES-2009-0043]
[MO 9221050083]

Endangered and Threatened Wildlife and Plants; Initiation of Status Review for Mountain Whitefish (*Prosopium williamsoni*) in the Big Lost River, Idaho

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; initiation of status review and solicitation of new information.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the initiation of a status review for mountain whitefish (*Prosopium williamsoni*) in the Big Lost River, Idaho. The status review will help us determine whether this population warrants listing as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). At the conclusion of the review, we will issue a 12–month finding on our determination as to whether listing is warranted. If listing is warranted, we will also determine whether or not to propose critical habitat for mountain whitefish in the Big Lost River.

DATES: To allow us adequate time to conduct this review, we request that you send us information on or before September 8, 2009.

ADDRESSES: You may submit comments by one of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Search for Docket FWS-R1-ES-2009-0043 and then follow the instructions for submitting comments.

• U.S. mail or hand-delivery: Public Comments Processing, Attn: Docket FWS-R1-ES-2009-0043; 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 **Information Solicited** section below for more information).

FOR FURTHER INFORMATION CONTACT: Jeffery L. Foss, State Supervisor, U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office, 1387 S. Vinnell Way, Room 368, Boise, ID 83709; 208-378-5243; facsimile at 208-378-5262. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

On June 15, 2006, we received a petition from the Western Watersheds Project requesting we list the population of mountain whitefish in the Big Lost River, Idaho, as a species, subspecies, or distinct population segment (DPS). The petitioner also requested that we designate critical habitat. On October 23, 2007, we published our 90–day finding (72 FR 59983), which found the petition failed to provide substantial information indicating that listing mountain whitefish in the Big Lost River may be warranted. This finding was based on a lack of information demonstrating the Big Lost River mountain whitefish may be a listable entity under the Act. For more information on the biology, habitat, and range of the mountain whitefish in the Big Lost River, please refer to our 90–day finding (72 FR 59983) published in the **Federal Register** on October 23, 2007.

On January 25, 2008, the Western Watersheds Project filed a complaint challenging our negative 90–day finding. On March 31, 2009, United States District Court (*Western Watershed Project* vs. *Dirk Kempthorne, et al.*, (Case No. CV07-409-S-EJL)) found the Service had considered information beyond the material in the petition such that the Service had effectively begun to conduct a status review. The Court directed the Service to proceed directly to a status review of the species and issue a 12–month finding by March 31, 2010.

Section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), requires a 12–month finding to announce whether the petitioned actions is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are endangered or threatened, and expeditious progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12–month findings in the **Federal Register**.

To help inform our status review, we are soliciting new information on the status of, and potential threats to, mountain whitefish, in particular the population in the Big Lost River. We will base our determination as to whether listing is warranted on a review of the best scientific and commercial data available, including all such information received as a result of this notice.

Information Solicited

To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information concerning the status of the mountain whitefish. We will use the information gained during this process to evaluate, as appropriate, whether:

• The population of mountain whitefish in the Big Lost River is a species, subspecies, or a DPS (as described in our Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the Endangered Species Act (DPS Policy; 61 FR 4722; February 7, 1996)), and

• Listing of that entity as threatened or endangered is warranted under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*).

We request information from other concerned governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties on the status of mountain whitefish throughout its range. We are seeking information regarding:

(1) The historical and current status and distribution of the mountain whitefish, its population trend, taxonomy, genetics, biology, ecology, and habitat selection.

(2) Ongoing conservation measures for the species and its habitat.

(3) Whether the population of mountain whitefish in the Big Lost River is a separate species or subspecies.

(4) Whether the population of mountain whitefish in the Big Lost River is discrete, as defined in the DPS policy, including, but not limited to, information indicating that the mountain whitefish population in the Big Lost River is markedly separated from other populations of mountain whitefish due to physical, physiological, ecological, or behavioral factors.

(5) Whether the population of mountain whitefish in the Big Lost River is significant to the remainder of the taxon to which it belongs (i.e., to the remainder of the species of mountain whitefish throughout its range), as defined in the DPS Policy, including, but not limited to:

(a) Information indicating the ecological setting, including such factors as temperature, moisture, weather patterns, etc., in which the Big Lost River population of mountain whitefish persists, is unusual or unique for the taxon;

(b) Information indicating that the loss of the population of mountain whitefish in the Big Lost River would or would not result in a significant gap in the range of the taxon; or

(c) Information indicating that the Big Lost River population of mountain whitefish differs markedly in its genetic characteristics from other populations of mountain whitefish in the United States.

(6) If the population of mountain whitefish in the Big Lost River is not a species or subspecies, whether that population constitutes a significant portion of the range of the species or subspecies to which it belongs.

(7) The effects of potential threat factors that are the basis for making a listing determination under section 4(a) of the Act, which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

If we determine that listing the population of mountain whitefish in the Big Lost River is warranted, it is our intent to propose critical habitat to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, with regard to areas within the geographical range currently occupied by the species, we also request data and information on what may constitute physical or biological features essential to the conservation of the species, where these features are currently found, and whether any of these features may require special management considerations or protection. In addition, we request data and information regarding whether there are areas outside the geographical area occupied by the species that are essential to the conservation of the species. Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if mountain whitefish in the Big Lost River are proposed for listing, and why such habitat meets the requirements of the Act.

Please note that submissions merely stating support or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made ''solely on the basis of the best scientific and commercial data available.'' At the conclusion of the status review, we will determine whether listing is warranted, not warranted, or warranted but precluded by other pending proposals.

You may submit your information by one of the methods listed in the **ADDRESSES** section. If you submit information via *http://www.regulations.gov*, your entire submission—including your personal identifying information—will be posted on the website. If your submission is made via a hardcopy 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 we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Information and materials we receive, as well as supporting documentation used, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Idaho Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this notice are the staff members of the Idaho Fish and Wildlife Office.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 24, 2009

James J. Slack,

Acting Deputy Director, Fish and Wildlife Service.

[FR Doc. E9–18802 Filed 8–5–09; 8:45 am]

BILLING CODE 4310-55-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 0812191631–91125–02]

RIN 0648–AX53

Pacific Halibut Fisheries; Subsistence Fishing

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to revise the criteria for rural residents to participate in the subsistence fishery for Pacific halibut in waters in and off Alaska. Currently, certain rural residents who reside in locations outside the legal boundaries of specified communities are prohibited by regulations from participating in the subsistence halibut fishery. This action is necessary to allow subsistence halibut fishing opportunities for these rural residents. This action is intended to allow inadvertently excluded rural residents to participate in the subsistence halibut fishery and to support the conservation and management provisions of the Northern Pacific Halibut Act of 1982.

DATES: Comments must be received no later than September 8, 2009.

ADDRESSES: Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–AX53'' by any one of the following methods:

• Electronic Submissions: Submit all electronic public comments via the

Federal eRulemaking Portal website at *http://www.regulations.gov*.

- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: 907–586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, Alaska.

All comments received are a part of the public record and generally will be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

Electronic copies of the Regulatory Impact Review (RIR) prepared for this action, and the environmental assessment (EA) prepared for the original subsistence halibut action (68 FR 18145; April 15, 2003) may be obtained from *http://www.regulations.gov* or from the Alaska Region website at *http://www.alaskafisheries.noaa.gov*.

Written comments regarding the burden hour estimates or other aspects of the collection of information requirements contained in this proposed rule may be submitted to NMFS at the above address and by e mail to *David__Rostker@omb.eop.gov*, or fax to 202 395 7285.

FOR FURTHER INFORMATION CONTACT: Becky Carls, 907–586–7228.

SUPPLEMENTARY INFORMATION:

Background

Management of the Pacific halibut (*Hippoglossus stenolepis*) (hereafter halibut) fishery in and off Alaska is based on an international agreement between Canada and the United States. This agreement, entitled the AConvention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea@ (Convention), was signed at Ottawa, Canada, on March 2, 1953, and amended by the AProtocol Amending the Convention,@ signed at Washington, D.C., March 29, 1979. The Convention, administered by the International Pacific Halibut Commission (IPHC), is given effect in the United States by the Northern Pacific Halibut Act of 1982 (Halibut Act).

The IPHC promulgates regulations pursuant to the Convention. The IPHC=s regulations are subject to approval by the Secretary of State with concurrence from the Secretary of Commerce (Secretary). After approval by the Secretary of State and the Secretary, the IPHC regulations are published in the **Federal Register** as annual management measures pursuant to 50 CFR 300.62. NMFS published the IPHC=s current annual management measures on March 19, 2009 (74 FR 11681).

The Halibut Act also authorizes the North Pacific Fishery Management Council (Council) to develop halibut fishery regulations, including limited access regulations, in its geographic area of concern that would apply to nationals or vessels of the United States (Halibut Act, section 773(c)). Such an action by the Council is limited to only those regulations that are in addition to, and not in conflict with, IPHC regulations. Council-developed regulations must be approved and implemented by the Secretary. Any allocation of halibut fishing privileges must be fair and equitable and consistent with other applicable Federal law. The Council used its authority under the Halibut Act to recommend a subsistence halibut program in October 2000 to recognize and manage the subsistence fishery for halibut. Like the original subsistence halibut program and subsequent amendments to it, this action was developed by the Council under the authority of the Halibut Act.

The Halibut Act at sections 773c (a) and (b) provides the Secretary with the general responsibility to carry out the Convention with the authority to, in consultation with the Secretary of the department in which the U.S. Coast Guard is operating (currently the Secretary of Homeland Security), adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act. The Secretary has delegated authority to NMFS to implement the Halibut Act.

Need for Action

The subsistence halibut regulations authorize eligible persons to conduct subsistence halibut fishing in waters in and off Alaska. Currently, a person is eligible to harvest subsistence halibut if he or she is a rural resident of a community with customary and traditional uses of halibut that is listed in the tables at § 300.65(g)(1) (hereafter ''listed community''), or a member of an Alaska Native tribe with customary and traditional uses of halibut that is listed in the tables at § 300.65(g)(2). Persons eligible to fish must possess a subsistence halibut registration certificate (SHARC) to exercise the privilege.

The definition of the term ''rural resident'' is the primary issue in this proposed action. For purposes of the subsistence halibut program, a rural resident currently is defined as a person domiciled in a listed community, who has maintained a domicile in a listed rural community for the 12 consecutive months immediately preceding the time when the assertion of residence is made, and who is not claiming residency in another state, territory, or country. A minimum threshold of 25 residents was used when the list of eligible rural places originally was developed by the Council and approved by the Secretary. The list of rural communities was developed by the Council based on customary and traditional findings for halibut and bottomfish made by the State of Alaska Board of Fisheries (Board). Therefore, the process for including additional communities in the subsistence halibut program has been for an interested party to first send a written request to the Board that then may recommend inclusion of additional communities in the subsistence halibut program.

The current regulations have inadvertent, adverse impacts on some rural residents; individuals who reside outside the boundaries of designated communities do not qualify for a SHARC. The boundaries of many rural Alaska communities are not adjacent to the boundaries of other communities due to Alaska's large size and relatively sparse population. Areas between incorporated communities are unincorporated areas. Individuals who reside in these extremely remote locations between listed communities likely have the same if not greater customary and traditional use of halibut as currently eligible participants, and otherwise may be deemed eligible to participate in the subsistence halibut program except for the location of their residence outside the boundaries of a listed community. Initially, SHARCs were issued to individuals who resided close to listed communities. Beginning in 2007, SHARCs have been denied to individuals who previously received them because these individuals reside outside the legal boundaries of listed communities. SHARCs were either returned voluntarily or were not renewed by NMFS.

Description of the Proposed Action

The Council used a community-based approach to determine rural eligibility in its original subsistence halibut action as cited in the proposed rule published August 26, 2002 (67 FR 54767). In June

2008, the Council revised its policy based on information that numerous individuals and their families have been disadvantaged under the current regulations. The Council recommended a wider geographic scope for rural resident eligibility to include individuals who reside in remote homesteads outside the boundaries of listed communities. The Council determined that those individuals or families in remote locations within the subsistence halibut use areas of Alaska practice the same patterns of use as residents of nearby listed communities that have customary and traditional uses, and, therefore, should be eligible to participate in subsistence fishing for halibut.

The Council's original intent for the subsistence halibut program was to allow persons who had customarily and traditionally used halibut for food in the past to continue in that practice. This action would amend the regulations to conform the subsistence halibut program regulations to the Council=s original intent for the program. If the proposed action is implemented, additional rural residents of Alaska south of Cape Espenberg who reside within a designated ten-statute-mile boundary adjacent to the waters of the Bering Sea and Pacific Ocean or in other designated places, and who do not reside in specified non-rural areas, would be eligible to subsistence fish for halibut. This action would include in the subsistence halibut program certain individuals who live a subsistence lifestyle and who rely on halibut as a customary and traditional source of food for themselves and their families, but who do not reside in a listed community. This action would provide them with the subsistence halibut fishing opportunities contemplated in the original subsistence halibut program.

The proposed change in the criteria for rural eligibility does not include residents living in non-rural areas and does not apply to Alaska Native tribal members. To include non-rural residents would expand subsistence eligibility beyond the Council's original intent. Members of Alaska Native tribes listed at § 300.65(g)(2) are eligible for SHARCs regardless of the location of their residences. Therefore, the discussion of rural versus non-rural eligibility in the preamble of this proposed action does not apply to Alaska Native tribal members. Members of Alaska Native tribes would not be directly affected by this action.

When the Council considered the areas to include as rural areas for purposes of the subsistence halibut program, it consulted with State of Alaska Department of Fish and Game Subsistence Division experts regarding customary and traditional use of the halibut resource. Cape Espenberg was chosen as the northern limit of the rural area because it is the most prominent point of land north of the northern most listed community of Shishmaref, Alaska. The ten-statute-mile limit was selected to define a band of land that included listed communities so that people living between listed communities would become eligible under this action. The land areas adjacent to the current non-subsistence marine waters areas are proposed to be included as non-subsistence areas.

Approximately 600 additional rural residents could be expected to receive SHARCs according to estimates in the RIR prepared for this action (see **ADDRESSES**). Most of these rural residents reside in the Kodiak Island Borough. Some of these rural residents previously had received a SHARC but were later found to be ineligible based on a closer examination of the regulatory language. These rural residents may have fed their families with halibut harvested under sport fishing regulations or by purchasing other protein sources from commercial entities. Up to 9,400 residents may benefit from this action through the customary and traditional practices of sharing food. Currently, the affected rural residents may harvest halibut with a sport fishing license, but the sport daily bag limits are smaller than are allowed under subsistence halibut regulations. This action would reduce the cost of acquiring halibut for subsistence purposes, reduce associated fishing time and effort, and provide comparable opportunity to harvest this subsistence resource for the affected rural residents to that enjoyed by residents of listed communities.

The amount of halibut that is projected to be harvested under this action is small compared to the harvest in the commercial and sport fisheries. The subsistence halibut harvest was estimated to be 1.4 percent, or 1,032,293 lb, of the total halibut removals of 74,389,000 lb in 2007, the most recent year for which subsistence harvest information is available. This action is expected to increase the subsistence halibut harvest by 105,000 lb, or about 10 percent of the current subsistence halibut harvest. However, without this action, some of this expected increase in the subsistence halibut harvest would be harvested as part of the sport fishery for halibut.

Under the proposed regulations, rural residents would be considered eligible to participate in the subsistence halibut program if they met the criteria for rural residency under one of two options. First, a person would continue to be considered a rural resident if he or she were domiciled in a community specified at § 300.65(g)(1). Second, under the new definition for a rural area, a person would be considered a rural resident if he or she were domiciled in one of the following rural areas of Alaska that would be listed at § 300.65(g)(3):

- Southeast Alaska east of 141° W. long., except for the land areas of the Ketchikan Gateway Borough as these areas are described below, the land areas of the City and Borough of Juneau, and the Ketchikan and Juneau non-subsistence marine waters areas (see Figures 2 and 3);
- The Alaska Peninsula, Aleutian Islands, Kodiak Island Archipelago, and the area south of the northern boundary of the Bristol Bay Borough and south of 58° 39.2′ N. lat. (see Figures 5, 6, and 7);
- Nelson, Nunivak, and Saint Lawrence Islands (see Figure 6); and
- All other areas of Alaska within ten statute miles of mean high water on the Bering Sea and Pacific Ocean coasts, south of Cape Espenberg, including along the Kuskokwim River to Bethel, and that are not specified as non-rural areas and that are not specified as the Anchorage-Matsu-Kenai or Valdez non-subsistence marine waters areas (see Figures 4, 5, 6, and 7).

The area along the Kuskokwim River to Bethel was not specified in the Council's action, but was specifically included on the maps delineating rural areas in the RIR (see **ADDRESSES**) used by the Council when it took action. This rural area along the Kuskokwim River is beyond ten statute miles from the marine coastline of the Bering Sea and would leave a gap between the rural community of Bethel and Kuskokwim Bay. The State of Alaska has determined that the rural residents of this area historically participated in the customary and traditional harvest of subsistence halibut. Therefore NMFS is proposing this modification to the Council's preferred alternative. Additionally, the Council adopted language specifying the area ''south of the Bristol Bay Borough'' but this is vague. The maps used by the Council to describe the boundaries in this area clearly show that the entire Bristol Bay Borough is to be included, so the proposed regulations clarify that the area south of the northern boundary of the Bristol Bay Borough is included as a rural area.

An applicant for a rural SHARC would be required to maintain a domicile in a rural area of Alaska for the 12 consecutive months immediately preceding the time when the assertion of residence is made, and not claim residency in another state, territory, or country. The definitions for ''rural'' and ''rural resident'' listed at § 300.61 would be revised to include the residents of these newly described rural areas.

Other alternatives for expanding the areas defined as rural were considered but rejected. The addition of small communities to the list of eligible places would have continued to exclude individuals who reside outside the boundaries of listed communities and likely would have resulted in continued petitions to add to the list of places with customary and traditional use of halibut. Another alternative that was considered, and on which the Council's preferred alternative was based, was less specific in its descriptions of included areas.

The proposed action would require specification of non-rural areas. A resident of a non-rural area does not qualify for a SHARC. Currently, rural residents must reside within communities specified in regulations at § 300.65(g)(1) to be considered eligible for SHARCs. As a result, specifying the boundaries of non-rural areas has been unnecessary. However, expansion of the rural resident definition as proposed would require definitive specification of non-rural areas as exceptions to the proposed rural areas. In general, the non-rural areas would be those land areas adjacent to the current non-subsistence marine waters areas and would include the non-subsistence marine waters areas. The Council recommended that the boundaries for the non-rural areas match the boundaries for ''non-subsistence use areas'' established by the State of Alaska Joint Board of Fisheries and Game. This recommendation was made because these boundaries were determined by the State of Alaska based on the role of subsistence uses in the economy and not on population size. Also, the marine boundaries of these areas were used to set the boundaries of the current non-subsistence marine waters areas. The descriptions of the boundaries that are used by the State of Alaska (5AAC 99.015) were analyzed to determine the geographic coordinates that precisely define those boundaries. For the Juneau non-rural area alone, this resulted initially in a table of 3,000 geographic coordinates. By ignoring some minor turns of the boundary, this could be simplified to hundreds of geographic coordinates for one non-rural area. NMFS determined that a long, multi-page table for each non-rural area would not be practical for public use or for NMFS staff who must determine whether an applicant for a SHARC is domiciled in a specified rural area.

Therefore, NMFS proposes in this action to use the legal boundaries for cities and boroughs adjacent to the non-subsistence marine waters areas, excluding the southern tip of the Kenai Peninsula (see Figure 5), to describe the non-rural land areas. The current non-subsistence marine waters areas would be retained because they do not always match the marine boundaries of the non-rural cities and boroughs and they purposely were chosen to match the ''non-subsistence use area'' boundaries used by the State of Alaska. The land areas of the following cities and boroughs would be non-rural areas for the purposes of the subsistence halibut fishery: the Ketchikan Gateway Borough as those boundaries existed on May 18, 2008; the City and Borough of Juneau; the Greater Anchorage Area Borough; the Matanuska-Susitna Borough; the Kenai Peninsula Borough, excluding the southern tip of the Kenai Peninsula that includes the Seldovia Census Designated Place; and the City of Valdez. For comparison, the maps that show the areas the Council designated as non-subsistence areas are included in the RIR for this action (see **ADDRESSES**).

The land area in the Ketchikan Gateway Borough that would be designated as non-rural would fall within the boundaries of the borough prior to its annexation of 4,510 square miles (11,681 square kilometers) on May 19, 2008. These older boundaries would be described at § 300.65(g)(4)(i) and closely match the boundaries adopted in the Council action on June 4, 2008. Also, these boundaries closely match the Ketchikan Nonsubsistence Area established by the State of Alaska. The current boundaries of the Ketchikan Gateway Borough encompass a much larger area than that recommended by the Council as the Ketchikan non-rural area and, therefore, were rejected by NMFS as the boundaries to describe the Ketchikan non-rural area. The status of the municipality of Saxman would be unaffected by this action; Saxman would remain a listed community under this proposed rule.

The land area in the Kenai Peninsula Borough that would be designated as rural would include the Seldovia Census Designated Place, the area south and west of that place, and the area south and west of a line that runs from 59° 27.5′ N lat., 151° 31.7′ W. long. to 59° 12.5′ N lat., 151° 18.5′ W. long., as shown in Figure 5. This area of the Kenai Peninsula Borough was specified as a rural area in the Council's recommendation and closely matches the boundary established by the State of Alaska for the ''Anchorage-Matsu-Kenai Nonsubsistence Area.''

The land area enclosed by these city and borough boundaries are close to the Council's recommendation; however, more land area would be classified as rural under this proposal than was recommended by the Council. The proposed non-rural boundaries would not include any land area that was classified as rural under the Council's action. In fact, the proposed boundaries would classify as rural some land areas outside city or borough boundaries that would have been classified as non-rural under the Council's recommendation. The proposed non-rural area boundaries would be consistent with the current regulations that limit eligible rural residents to those who reside within the boundaries of specified rural communities. Finally, the proposed descriptions of non-rural areas would greatly simplify the regulations for public and agency use rather than tables of hundreds and potentially thousands of geographic coordinates for complex non-rural areas. NMFS anticipates that applicants might know, or could readily determine, whether their domiciles are located inside or outside of non-rural city or borough boundaries based on the tax status of the properties. The non-subsistence marine waters areas' boundaries would remain unchanged, except for correcting an error to the southern boundary for Valdez that is discussed below.

The current figures that display the ''non-subsistence marine waters areas'' described at § 300.65(h)(3) in which subsistence fishing for halibut is prohibited would be revised to include the adjacent non-rural land areas. These revised figures would show the rural and non-rural areas of Southern Southeast Alaska, including Ketchikan; Northern Southeast Alaska, including Juneau; Prince William Sound, including Valdez; and Anchorage-Matsu-Kenai. Two new figures would be added to show the rural and non-rural areas of the Alaska Peninsula and Aleutian Islands and of Western and Central Alaska. Because revised and new figures are included with this action, the references to figure numbers would be revised under § 300.65 at paragraphs (j)(3)(i)(B), (k)(3)(i)(A), and (k)(3)(i)(B).

The southern boundary for the Valdez non-subsistence marine waters area would be corrected in the regulations at § 300.65(h)(3)(iv). The coordinates for the boundaries used in the original

subsistence halibut regulations (68 FR 18145; April 15, 2003) were believed to match the boundary of the City of Valdez. However, an error in converting the legal description of the boundaries of the City of Valdez into geographic coordinates was discovered in preparing the analysis for this action. Therefore, this regulatory amendment would revise the southern boundary from waters north of 61° 02.24′ N. lat., to waters north of 61° 01.38′ N. lat. This would move the boundary farther south by 5,300 ft (1,620 m). The maps provided to the Council and to the public for the June 2008 meeting reflected this revision.

The SHARC application would be revised to incorporate the changes that would be necessitated by this action. Currently, one combined application is used by rural residents and by Alaska Native tribal members. To simplify the application process for the public, separate applications would be used by rural residents and by Alaska Native tribal members. Additionally, the regulations at § 300.65(i)(2) would be revised to simplify the application requirements that are listed in the regulations. The SHARC application requirements for a rural resident would include indicating the basis upon which the applicant is eligible to harvest subsistence halibut as a rural resident. Additional requirements would include listing a post office box number, describing the physical location of the domicile if there is no street address, and adding Aor area@ to the requirement to list the community that qualifies the fisherman as eligible to fish for subsistence halibut. The SHARC application for an Alaska Native tribal member would clearly state what is needed for address or location information and include listing the community or area of residence, and would no longer require the dates of residence in a community because that information is not necessary for an Alaska Native tribal member.

The specific location of any SHARC holder's domicile would be provided on the SHARC application due to regulations related to cash reimbursement for subsistence halibut fishing expenses. Cash reimbursement for subsistence halibut is restricted to actual trip expenses for ice, bait, food, and fuel directly related to the harvest of subsistence halibut because it is illegal for subsistence halibut to enter the commercial market. Regulations at § 300.66(j)(1) and § 300.66(j)(2) limit the reimbursement of a fisherman's actual expenses to residents of the same community for people who are not members of an Alaska Native tribe. Therefore, regulations at § 300.66(j)(1) and § 300.66(j)(2) would be revised to include: (A) references to the proposed new qualification for a rural resident that would be described at § 300.65(g)(3), and (B) a limit for qualified persons who reside outside listed rural communities, that the fisherman's actual expenses could be reimbursed only by those rural residents who reside within ten statute miles of the rural location listed on the fisherman§ s SHARC application. The ten-statute-mile limit was selected by NMFS to match the boundary that would be described at § 300.65(g)(3)(iv) and to maintain the intent of the Council to limit the scope of reimbursement to residents of a localized area. NMFS is seeking public comment regarding the size of this ten-statute-mile limit.

Additionally, the text at § 300.66(j)(2) would be revised to specify that Alaska Native tribal members may be reimbursed for only actual expenses for ice, bait, food and fuel. The words ''actual expenses'' were inadvertently omitted from the regulatory text. This revision would parallel the construction that is used at § 300.66(j)(1) regarding reimbursement of rural residents.

The SHARC application for a rural resident would include the requirement to provide the name, complete mailing address, and phone number of an adult age 18 years or older who can verify that the residence listed by the applicant is the applicant's domicile and that it was the applicant§ s domicile for 12 months prior to the date of the application. The verifying person may not be the applicant's wife, husband, parent, or child and may not be living at the rural residence listed by the applicant. This requirement for a verifier would enhance the ability of NMFS to discern whether a SHARC applicant is truly qualified as a rural resident eligible to fish for subsistence halibut.

Other Regulatory Changes

Several other minor changes to the regulations are proposed. First, a definition for SHARC, which is the documentation, issued by NMFS, of the registration required to participate in subsistence fishing, would be added to the regulations at § 300.61 because that term is used in the current and proposed regulations but is not defined. Second, the regulations at § 300.65(g) would be revised to include a reference to the new qualification for a rural resident described at § 300.65(g)(3). Third, a misspelling of Sheldon Point (Nunam Iqua) would be corrected in the regulations at § 300.65(g)(2) in the table for the IPHC halibut regulatory area 4E. Fourth, the regulations at § 300.65(h)(3) would no longer specify ''non-rural areas'' but ''non-subsistence marine waters areas'' instead, therefore, regulations at § 300.65(h)(4) and § 300.66(g) would be revised to reflect that change. Finally, the meaning of the ''area of tribal membership'' that is defined at § 300.65(h)(4)(iii) would be revised to specify that this means the IPHC regulatory area under which an organized tribal entity is listed at § 300.65(g)(2), or the area of the Bering Sea that is closed to commercial halibut fishing and adjacent to the rural area in which the Alaska Native tribal headquarters is located.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the IPHC, the Pacific Fishery Management Council, the Council, and the Secretary. Section 5 of the Halibut Act (16 U.S.C. 773c) allows the Regional Council having authority for a particular geographical area to develop regulations governing the allocation and catch of halibut in U.S. Convention waters as long as those regulations do not conflict with IPHC regulations. The proposed action is consistent with the Council's authority and the Secretary's authority to allocate halibut catches among fishery participants in the waters in and off Alaska.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866. This proposed rule also complies with the Secretary's authority under the Halibut Act to implement management measures for the halibut fishery.

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

Basis and Purpose of Rule

The United States and Canada participate in the International Pacific Halibut Commission (IPHC) and promulgate regulations governing the Pacific halibut (hereafter halibut) fishery under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The North Pacific Fishery Management Council (Council) may develop regulations governing the allocation and catch of halibut in its area of concern that would apply to nationals or vessels of the United States and that are in agreement with IPHC regulations. The Secretary of Commerce must approve regulations recommended

by the Council before implementation by the National Marine Fisheries Service (NMFS). The Council prepared an environmental assessment/regulatory impact review (EA/RIR) for subsistence halibut fisheries in January 2003, and NMFS published the final rule to implement subsistence halibut regulations in April 2003 (68 FR 18145). These regulations include criteria, based on community of residence, for rural residents to qualify as participants in the subsistence halibut fishery.

The criteria for rural residency that were approved in 2003 would be revised under the proposed rule in order for more Alaskans with customary and traditional use of halibut to participate in the subsistence halibut fishery in waters in and off Alaska. Beginning in 2007, based on a closer examination of the regulatory language, subsistence halibut registration certificates that permit fishermen to subsistence fish for halibut have been denied to individuals who previously received them. These rural residents were determined to be ineligible because they reside outside the legal boundaries of communities specified in the regulations. Individuals who reside in these extremely remote locations likely have the same if not greater customary and traditional use of halibut as currently eligible participants, and otherwise may be deemed eligible to participate in the subsistence halibut program except for the location of their residence outside the boundaries of a specified community.

This action is necessary to allow subsistence halibut fishing opportunities for these affected rural residents. Currently, the affected rural residents may harvest halibut with a sport fishing license, but the sport daily bag limits may be smaller than would be allowed under the subsistence halibut fishery. The intended effect of this action is to reduce the cost of acquiring subsistence halibut, reduce associated fishing time and effort, and provide comparable opportunity to harvest this subsistence resource for the affected rural residents.

Factual Basis for Certification

Description and Estimate of the Number of Small Entities to Which the Rule Applies

No small entities would be directly regulated by the proposed rule. Small entities are defined as small businesses, small organizations, and small governmental jurisdictions in Section 601(3)-(5) of the Regulatory Flexibility Act (RFA) of 1980. This action would apply uniquely to individual natural persons who are not considered small entities within the meaning of the RFA.

All of the persons that would be directly regulated by the action are natural persons. The proposed subsistence halibut regulation at 50 CFR 300.65(g)(3) would specify that ''A person is eligible to harvest subsistence halibut if he or she is a resident in one of the rural areas of Alaska described [in this paragraph].'' The regulations further specify at § 300.61 that halibut caught for subsistence purposes is defined as halibut caught by a rural resident or a member of an Alaska Native tribe for direct personal or family consumption as food, sharing for personal or family consumption as food, or customary trade. Additionally, the definition for rural resident only specifies that an individual, clearly indicating a natural person, may qualify to be a rural resident.

Description and Estimate of Economic Impacts on Small Entities by Entity Size and Industry

No small entities are directly regulated by the proposed rule. Therefore, there are no economic impacts on directly regulated small entities.

Criteria Used to Evaluate Whether the Rule Would Impose Impacts on ''A Substantial Number'' of Small Entities

The Small Business Administration criteria for what constitutes a small entity, described in Section 601(6) of the RFA, and the definition of a business concern that appears at 13 CFR 121.105 were used to determine that there are no impacts on any small entities. Only individual natural persons would be directly regulated by this proposed rule and such persons are not considered small entities under Small Business Administration guidelines.

Criteria Used to Evaluate Whether the Rule Would Impose ''Significant Economic Impacts''

Because no small entities are directly regulated by the proposed rule, no criteria were applied.

Description of, and an Explanation of the Basis for, Assumptions Used

The finding that no small entities would be directly regulated by this action is based on the definition of small entities in the RFA and implementing regulations, and a determination that only individual natural persons, and not small entities, would be directly regulated by the proposed action.

As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed rule contains a collection of information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648 0460. Public reporting burden for the SHARC applications for a rural resident or an Alaska Native tribal member are each estimated to average ten minutes per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e mail to *David__Rostker@omb.eop.gov*, or fax to 202 395 7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Executive Order 13175 of November 6, 2000 (25 U.S.C. 450 note), the Executive Memorandum of April 29, 1994 (25 U.S.C. 450 note), and the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995) outline the responsibilities of the National Marine Fisheries Service in matters affecting tribal interests. Section 161 of Public Law 108–199 (188 Stat 452), as amended by section 518 of Public Law 108–447 (118 Stat 3267), extends the consultation requirements of Executive Order 13175 to Alaska Native corporations. Consultations occurred with the Alaska Native Subsistence Halibut Working Group in December 2008, pursuant to the requirements of Executive Order 13175.

List of Subjects in 50 CFR Part 300

Alaska, Alaska Natives, Fisheries, Pacific halibut fisheries, Recordkeeping and reporting requirements.

Dated: July 31, 2009.

Samuel D. Rauch III,

Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300, subpart E is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart E—Pacific Halibut Fisheries

1. The authority citation for 50 CFR part 300, subpart E continues to read as follows:

Authority: 16 U.S.C. 773–773k.

2. In § 300.61 revise the definitions for ''Rural'' and ''Rural resident'' and add a new definition for ''Subsistence halibut registration certificate (SHARC)'' in alphabetical order to read as follows:

§ 300.61 Definitions.

* * * * *

Rural means, for purposes of the subsistence fishery for Pacific halibut in waters in and off Alaska, a community of Alaska listed at § 300.65(g)(1) or an area of Alaska described at § 300.65(g)(3) in which the non-commercial, customary, and traditional use of fish and game for personal or family consumption is a principal characteristic of the economy or area and in which there is a long-term, customary, and traditional use of halibut.

Rural resident means, for purposes of the subsistence fishery for Pacific halibut in waters in and off Alaska:(1) An individual domiciled in a rural community listed in the table at § 300.65(g)(1) and who has maintained a domicile in rural communities listed in the table at § 300.65(g)(1), or in rural areas described at § 300.65(g)(3), for the 12 consecutive months immediately preceding the time when the assertion of residence is made, and who is not claiming residency in another state, territory, or country; or

(2) An individual domiciled in a rural area described at § 300.65(g)(3) and who has maintained a domicile in rural areas described at § 300.65(g)(3), or in rural communities listed in the table at § 300.65(g)(1), for the 12 consecutive months immediately preceding the time when the assertion of residence is made, and who is not claiming residency in another state, territory, or country.

* * * * *

Subsistence halibut registration certificate (SHARC) means documentation, issued by NMFS, of the registration required at § 300.65(i).

* * * * *

3. In § 300.65:

A. Revise paragraphs (g) introductory text, (h)(3) introductory text, (h)(3)(iii) introductory text, (h)(3)(iv), (h)(4) introductory text, (h)(4)(iii), (i)(2), (j)(3)(i)(B), (k)(3)(i)(A) introductory text, and (k)(3)(i)(B).

B. In paragraph (g)(2), in the table entitled ''Halibut Regulatory Area 4E'', revise the entry for ''Sheldon Point (Nuna Iqua)''.

C. Add new paragraphs (g)(3) and (g)(4).

The additions and revisions read as follows:

§ 300.65 Catch sharing plan and domestic management measures in waters in and off Alaska.

* * * * *

(g) *Subsistence fishing in and off Alaska.* No person shall engage in subsistence fishing for halibut unless that person meets the requirements in paragraphs (g)(1), (g)(2), or (g)(3) of this section.

* * * * *

(2) * * *

HALIBUT REGULATORY AREA 4E

Place with Tribal Headquarters	Organized Tribal Entity
* * * * *	
Sheldon Point (Nunam Iqua)	Native Village of Sheldon's Point
* * * * *	

(3) A person is eligible to harvest subsistence halibut if he or she is a rural resident in one of the rural areas of Alaska described as follows:

(i) Southeast Alaska east of 141 W. long., except for the land areas of the Ketchikan Gateway Borough as described at (g)(4)(i) of this section, the land areas of the City and Borough of Juneau, and the Ketchikan and Juneau non-subsistence marine waters areas as defined in paragraphs (h)(3)(i) and (h)(3)(ii) of this section (see figures 2 and 3 to this subpart E).

(ii) The Alaska Peninsula, Aleutian Islands, Kodiak Island Archipelago, and the area south of the northern boundary of the Bristol Bay Borough and south of 58° 39.2′ N. lat. (see figures 5, 6, and 7 to this subpart E).

(iii) Nelson, Nunivak, and Saint Lawrence Islands (see figure 6 to this subpart E).

(iv) All other areas of Alaska within ten statute miles of mean high water on the Bering Sea and Pacific Ocean coasts, south of Cape Espenberg, including along the Kuskokwim River to Bethel, and that are not specified as non-rural land or water areas as defined in paragraph (g)(4) of this section (see figures 4, 5, 6, and 7 to this subpart E).

(4) Non-rural areas consist of the non-subsistence marine waters areas defined in paragraph (h)(3) of this section and the land areas of the following cities and boroughs for purposes of the subsistence fishery for Pacific halibut in waters in and off Alaska:

(i) The Ketchikan Gateway Borough on May 18, 2008. This area encompasses all those islands bounded on the east, north, and west by Behm Canal, Behm Narrow, and Clarence Strait to its junction with Nichols Passage, and on the south by Nichols and Revillagigedo Channel to its junction with Behm Canal. The designated boundaries extend to the center line of Behm Canal, Behm Narrows, Clarence Strait, Nichols Passage, and Revillagigedo Channel, and include all the area of Revillagigedo, Gravina, Pennock, Betton, Grant and other Clover Passage and Naha Bay Islands, Hassler, Gedney, Black, Smeaton, Manzanita, Rudyerd, and Bold Islands, and all other offshore and adjacent islands and inlets thereto (see figure 2 to this subpart E).

(ii) The City and Borough of Juneau (see figure 3 to this subpart E).

(iii) The Greater Anchorage Area Borough (see figures 4 and 5 to this subpart E).

(iv) The Matanuska-Susitna Borough (see figure 5 to this subpart E).

(v) The Kenai Peninsula Borough excluding the area of the Seldovia Census Designated Place, the area south and west of that place, and the area south and west of a line that runs from 59 27.5′ N. lat., 151° 31.7′ W. long. to 59° 12.5′ N. lat., 151° 18.5′ W. long (see figure 5 to this subpart E).

(vi) The City of Valdez (see figures 4 and 5 to this subpart E).

(h) * * *

(3) Subsistence fishing may be conducted in any waters in and off Alaska except in the four non-subsistence marine waters areas defined as follows:

* * * * *

(iii) The Anchorage-Matsu-Kenai non-subsistence marine waters area in Commission Regulatory Area 3A (see figures 4, 5, 6, and 7 to this subpart E) is defined as:

* * * * *

(iv) Valdez non subsistence marine waters area in Commission regulatory area 3A (see figures 4 and 5 to this subpart E) is defined as the waters of Port Valdez and Valdez Arm located north of 61° 01.38′ N. lat., and east of 146° 43.80′ W. long.

(4) Waters in and off Alaska that are not specifically identified as non-subsistence marine waters areas in paragraph (h)(3) of this section are rural for purposes of subsistence fishing for halibut. Subsistence fishing may be conducted in any rural area by any

person with a valid subsistence halibut registration certificate in his or her name issued by NMFS under paragraph (i) of this section, except that:

* * * * *

(iii) For purposes of this paragraph (h)(4), Aarea of tribal membership@ means rural areas of the Commission regulatory area under which the Organized Tribal Entity is listed in the tables set out in paragraph (g)(2) of this section, or the Bering Sea closed area adjacent to the rural area in which the Alaska Native tribal headquarters is located.

(i) * * *

(2) Registration. To register as a subsistence halibut fisherman, a person may request a cooperating Alaska Native tribal government or other entity designated by NMFS to submit an application on his or her behalf to the Alaska Region, NMFS. Alternatively, a person may apply by submitting a completed application to the Alaska Region, NMFS. Application forms are available on the NMFS Alaska Region website at *http://alaskafisheries.noaa.gov*, or by contacting NMFS at 800–304–4846, Option 2. Applications must be mailed to: Restricted Access Management Program, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668. NMFS will process a SHARC Application for an Alaska Native Tribal Member or a SHARC Application for a Rural Resident provided that a paper application is completed, with all applicable fields accurately filled-in, and all required additional documentation is attached. The applicant must sign and date the application certifying that all information is true, correct, and complete.

* * * * *

(j) * * *

(3) * * *

(i) * * *

(B) Within the Ketchikan, Juneau, Anchorage-Matsu-Kenai, and Valdez non-subsistence marine waters areas as defined in paragraph (h)(3) of this section (see figures 2, 3, 4, 5, 6, and 7 to this subpart E).

* * * * *

(k) * * *

(3) * * *

(i) * * *

(A) In the Anchorage-Matsu-Kenai non-subsistence marine waters area defined in paragraph (h)(3) of this section (see figures 4, 5, 6, and 7 to this subpart E), only the following tribes may use a Ceremonial or Educational permit:

* * * * *

(B) In the Valdez non-subsistence marine waters area defined in paragraph (h)(3) of this section (see figures 4 and 5 to this subpart E), only the Native Village of Tatitlek may use a Ceremonial or Educational permit.

* * * * *

4. In § 300.66, revise paragraphs (g), (j)(1), and (j)(2) to read as follows:

§ 300.66 Prohibitions.

* * * * *

(g) Fish for subsistence halibut in and off Alaska in a non-subsistence marine waters area specified at 300.65(h)(3).

* * * * *

(j) * * *

(1) Persons who qualify as rural residents under § 300.65(g)(1) or (g)(3) and hold a SHARC in the person's name under § 300.65(i) may be reimbursed for actual expenses for ice, bait, food, and fuel directly related to subsistence fishing for halibut, by residents of the same rural community or by rural residents residing within ten statute miles of the rural location listed on the person's SHARC application; or

(2) Persons who qualify as Alaska Native tribal members under § 300.65(g)(2) and hold a SHARC in the person's name under § 300.65(i) may be reimbursed for actual expenses for ice, bait, food, and fuel directly related to subsistence fishing for halibut, by any Alaska Native tribe, or its members, or residents of the same rural community or by rural residents residing within ten statute miles of the rural location listed on the person's SHARC application.

* * * * *

5. Revise figures 2, 3, 4, and 5 to subpart E of part 300 and add figures 6 and 7 to subpart E of part 300 to read as follows:

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Figure 2 to Subpart E of Part 300--Southern Southeast Alaska Rural and Non-Rural Areas

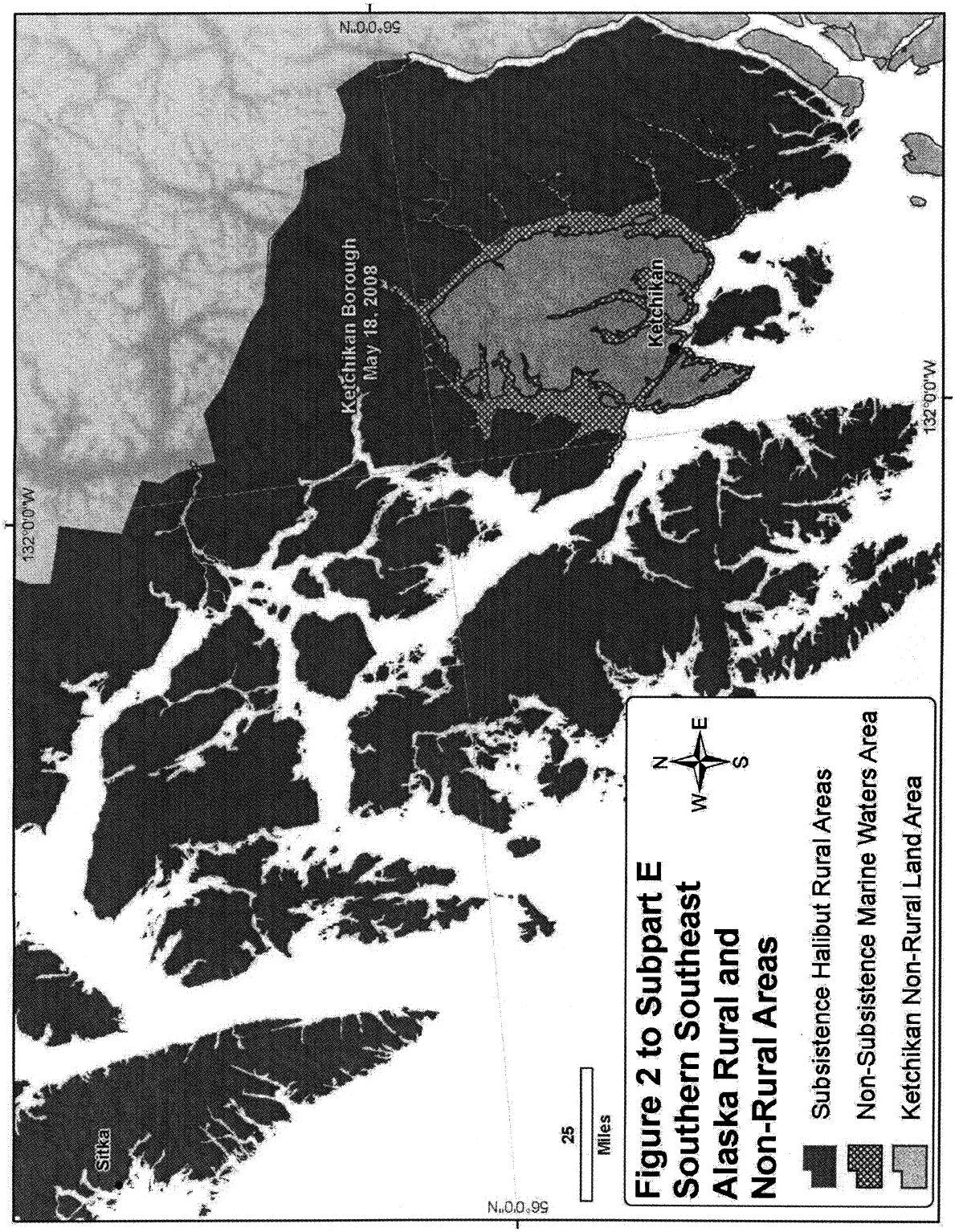


Figure 3 to Subpart E of Part 300--Northern Southeast Alaska Rural and Non-Rural Areas

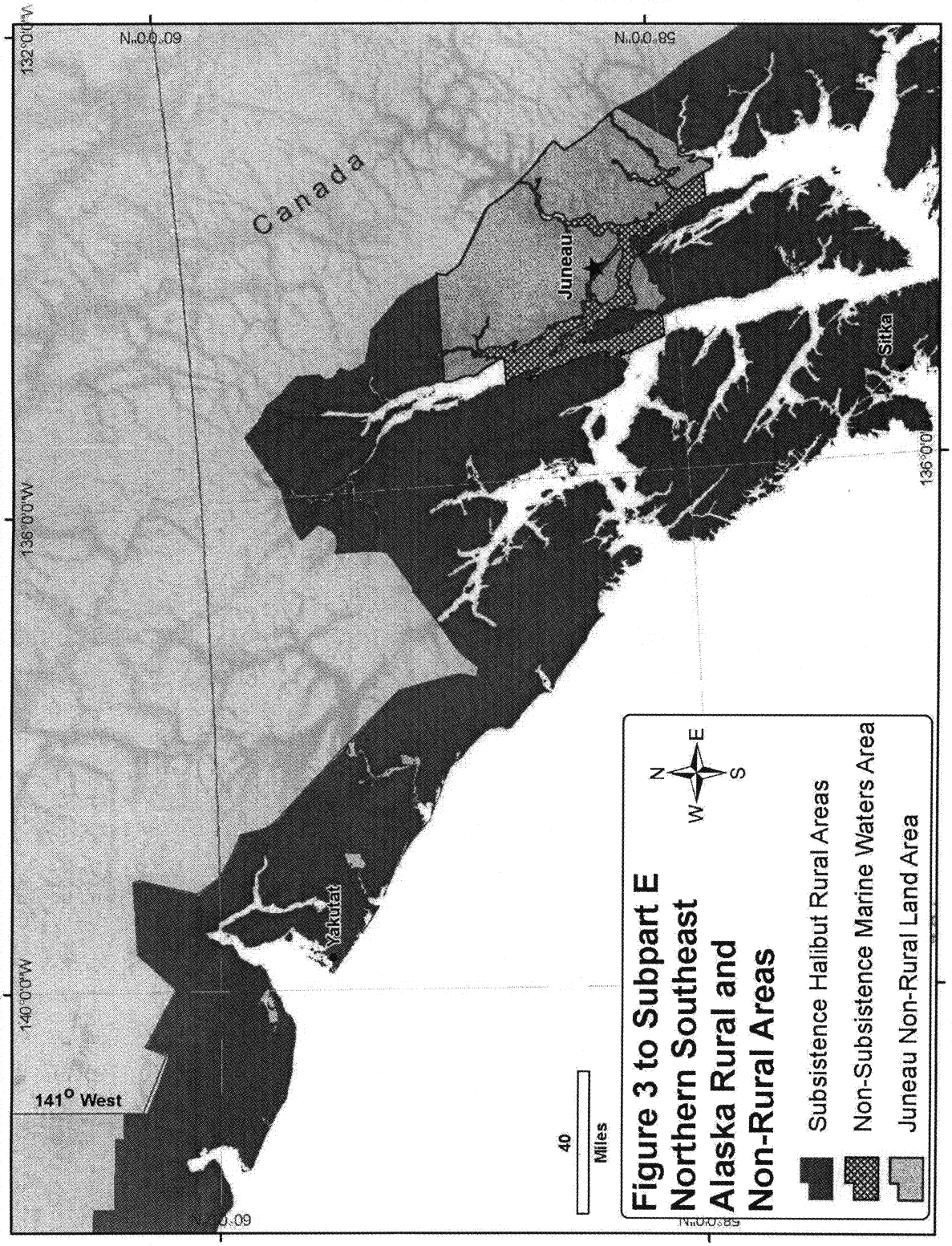


Figure 4 to Subpart E of Part 300--Prince William Sound Rural and Non-Rural Areas

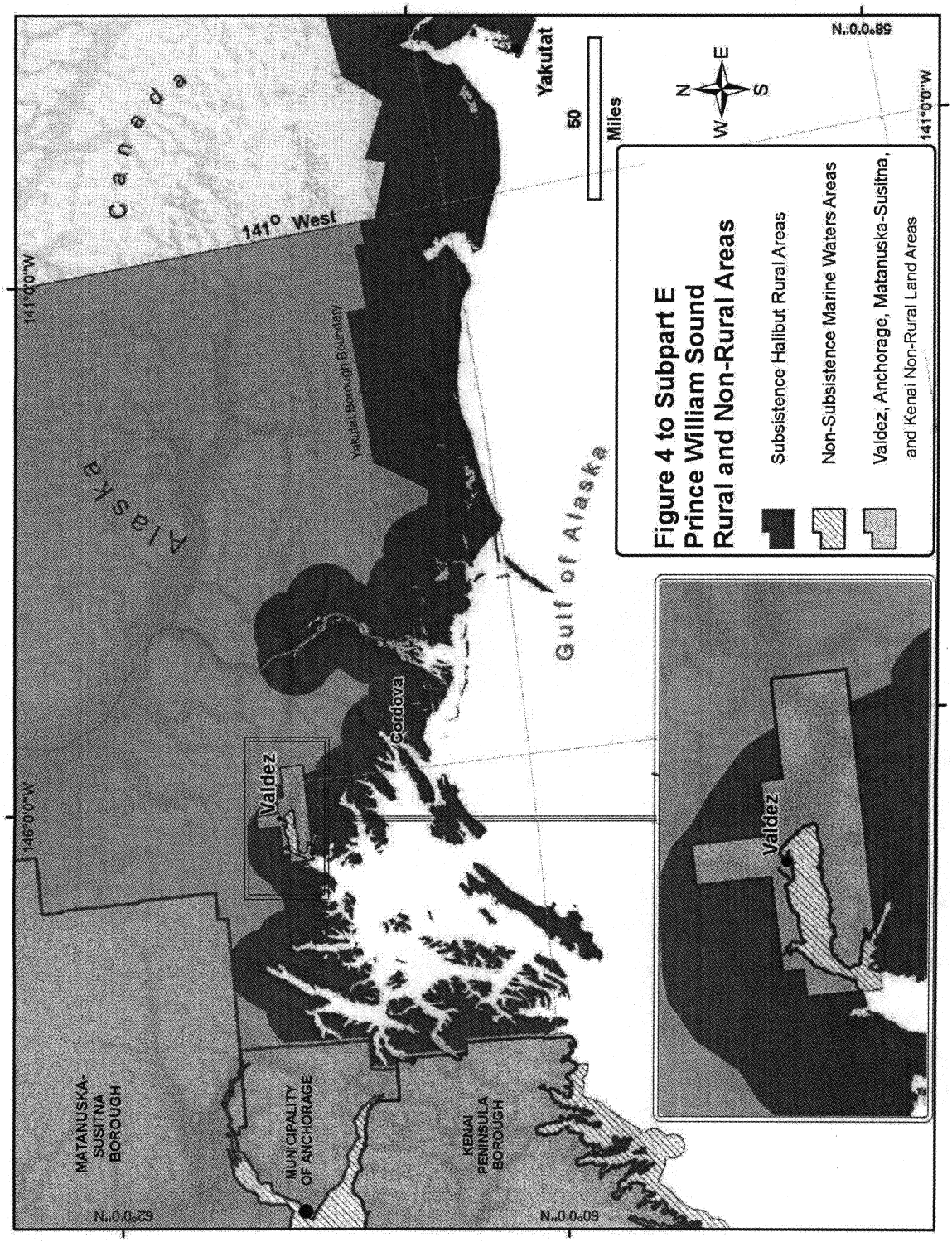


Figure 5 to Subpart E of Part 300—Anchorage, Matanuska-Susitna, and Kenai Rural and Non-Rural Areas

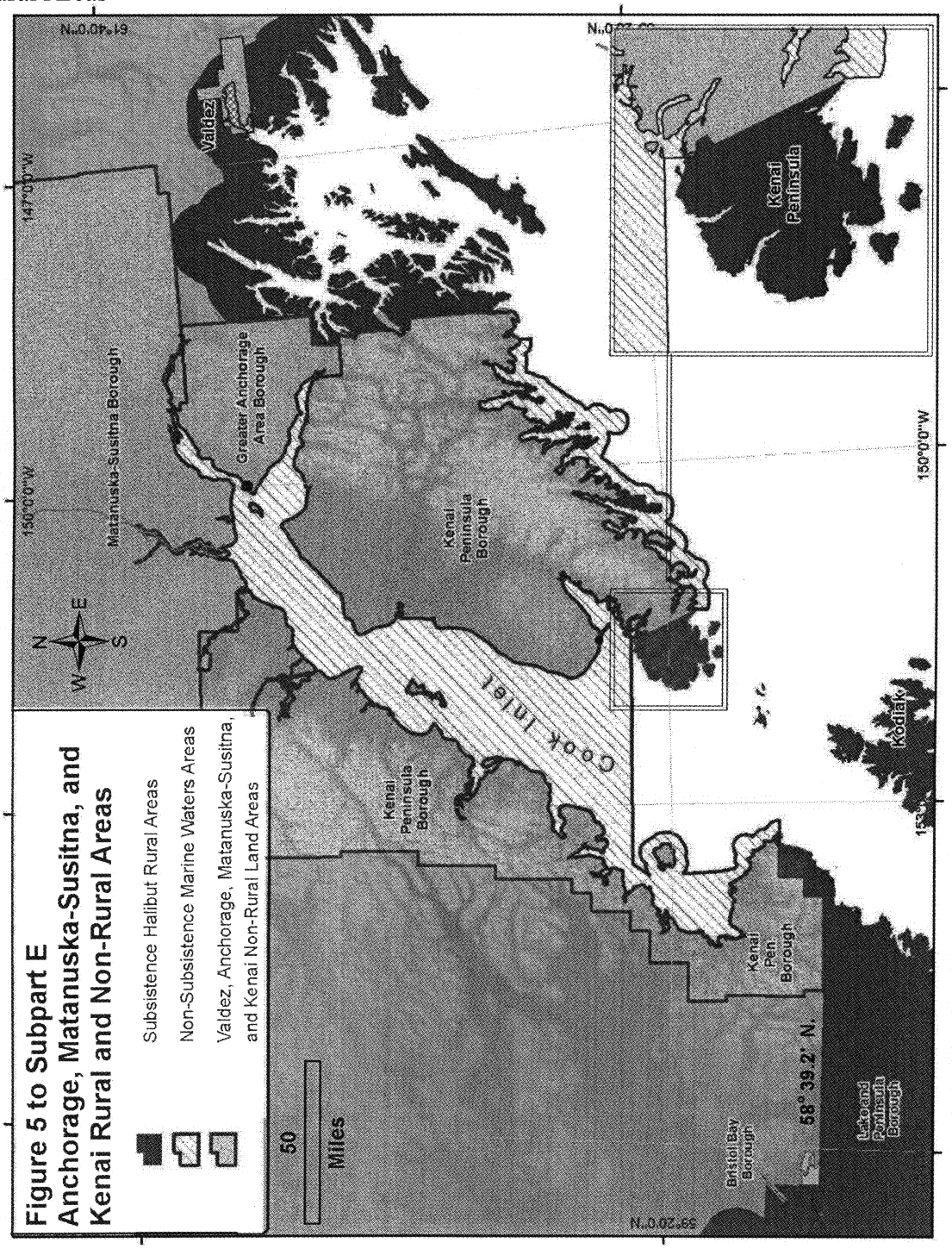


Figure 6 to Subpart E of Part 300--Alaska Peninsula and Aleutian Islands Rural and Non-Rural Areas

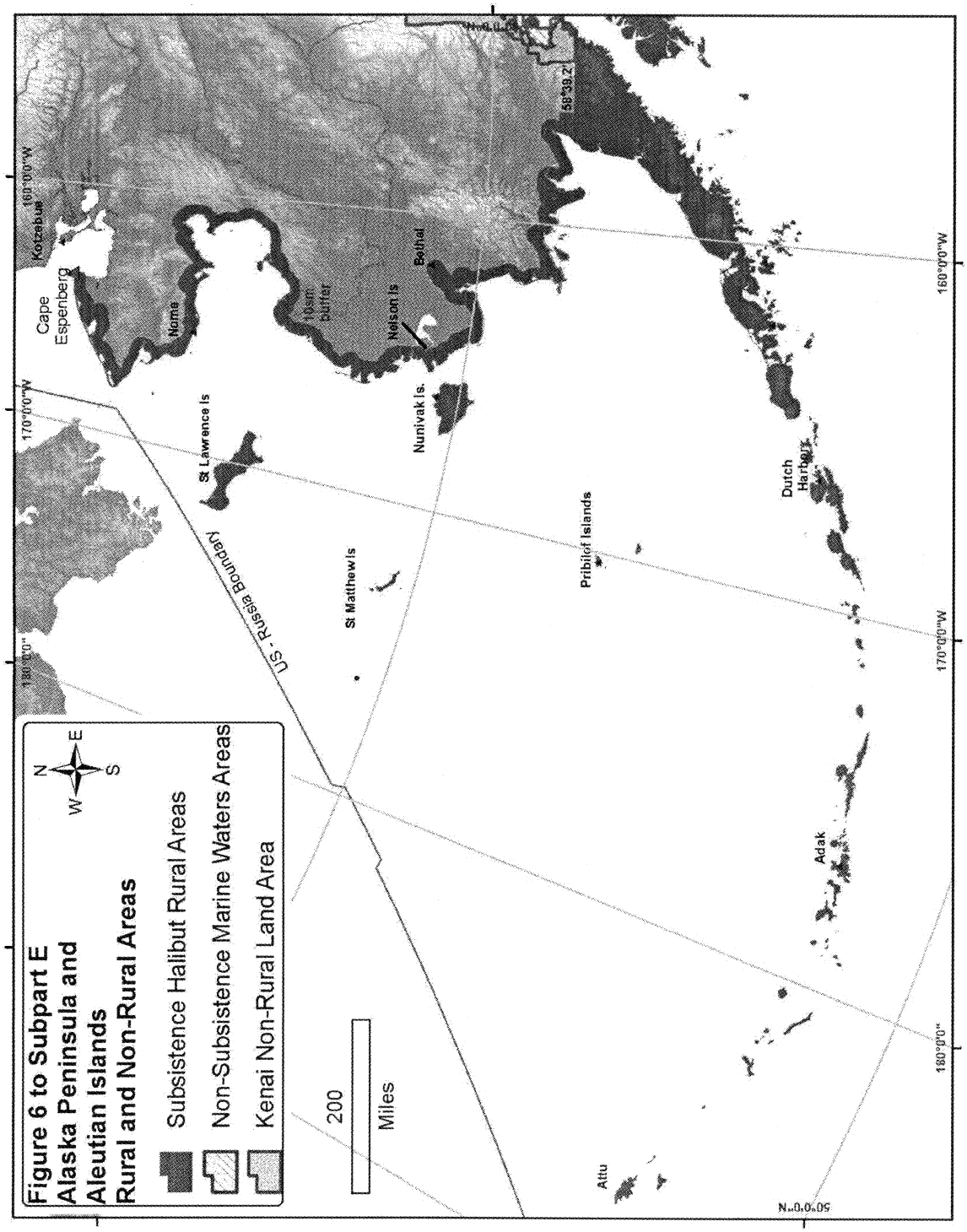
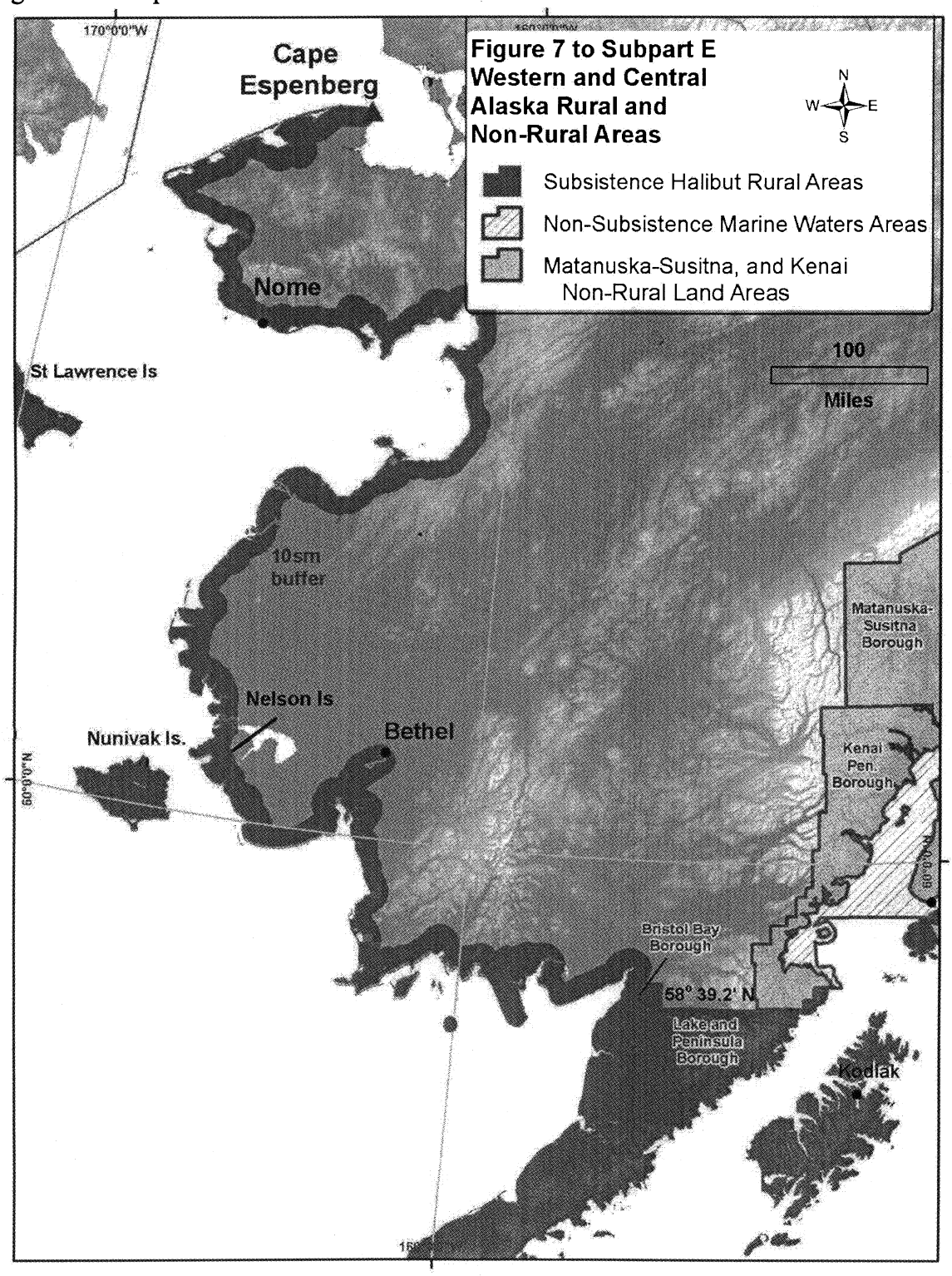


Figure 7 to Subpart E of Part 30--Western and Central Alaska Rural and Non-Rural Areas



[FR Doc. E9–18841 Filed 8–5–09; 8:45 am]

BILLING CODE 3510–22–C

Notices

Federal Register
Vol. 74, No. 150
Thursday, August 6, 2009

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

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Seek Reinstatement of an Information Collection

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 3) and the office of Management and Budget (OMB) regulations at 5 CFR part 1320, this notice announces the Agricultural Research Service's (ARS) intent to seek reinstatement of the ARS Animal Health National Program Assessment Survey, which seeks input on the impact of the Animal Health National Research Program through the completion of an electronic evaluation form. This voluntary information collection will give the beneficiaries of ARS research the opportunity to provide input on the impact of the research conducted by ARS in the last national program cycle. This input will be used for planning the research agenda for the next 5-year program cycle.

DATES: Comments must be submitted on or before September 23, 2009.

ADDRESSES: Address all comments concerning this notice to Dr. Cyril G. Gay, National Program Leader, Agricultural Research Service, National Program Staff, Animal Production and Protection, 5601 Sunnyside Avenue, GWCC, Building 4, Beltsville, Maryland 20705–5148. Comments may be sent by phone to (301) 504–4786 or fax to (301) 504–4873. Submit electronic comments to *Cyril.Gay@ars.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Cyril G. Gay at (301) 504–4786.

SUPPLEMENTARY INFORMATION:

Title: ARS Animal Health National Program Assessment Evaluation Form.

OMB Number: 0518–0042.

Expiration Date: January 4, 2008.

Type of Request: Approval to seek reinstatement of the ARS Animal Health National Program Assessment Survey, which seeks input from the beneficiaries of research conducted by ARS for program planning and ensures alignment of the Animal Health National Program with the needs of our customers, partners, and stakeholders.

Abstract: This voluntary electronic evaluation form will give the beneficiaries of ARS research the opportunity to provide input on the impact of the national program on animal agriculture. For the purpose of this National Program Assessment, impact is defined as research that has influenced or will significantly influence the animal sciences and animal health, has created or will create economic opportunities for producers and farmers, or has enabled or will enable action and regulatory agencies to formulate policies and regulations to support American agriculture. The report and evaluation form can be found online at: *http://www.afmtestlab.ars.usda.gov/surveys/ahnp/survey.htm*

The input provided through the completion of the evaluation form will be shared with customers, partners, and stakeholders at the Animal Health National Program Assessment Workshop, which will be held in March of 2010, location to be determined.

ARS National Program Assessments are conducted every five years, through the organization of one or more workshops. Workshops allow ARS to periodically update the vision and rationale of each National Program and assess the relevancy, effectiveness, and responsiveness of ARS research. In addition, the workshops facilitate the review and simultaneously provide an opportunity for customers, stakeholders, and partners to assess the progress made through the National Program and provide input for future modifications to the National Program or the National Program's research agenda. In the case of the ARS Animal Health National Program, the beneficiaries of the research are numerous, including the majority of the livestock and poultry industries, trade associations, federal and state government agencies, and research partners in universities and the private sector. The electronic evaluation form will allow ARS to outreach to its many customers, partners, and stakeholders that are unable to attend the workshop and also ensure an efficient means of obtaining the greatest amount of input on the impact and direction of the ARS Animal Health National Research Program.

Estimate of Burden: Completing the electronic evaluation form is estimated to average 15 minutes per response.

Estimated Number of Respondents: 400.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 100 hours.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the input provided by a wide array of customers, and; (d) ways to minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technology. Comments should be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: July 21, 2009.

Caird E. Rexroad, Jr.,

Associate Administrator, ARS.

[FR Doc. E9–18848 Filed 8–5–09; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Revision and Extension of a Currently Approved Information Collection

AGENCY: National Agricultural Statistics Service.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention the National Agricultural Statistics Service

(NASS) to request revision and extension of a currently approved information collection, the Agricultural Prices Surveys. Revision to burden hours may be needed due to changes in the size of the target population, sampling design, and/or questionnaire length.

DATES: Comments on this notice must be received by October 5, 2009 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0003, by any of the following methods:

- *E-mail: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Agricultural Prices.

OMB Control Number: 0535–0003.

Expiration Date of Approval: December 31, 2009.

Type of Request: To revise and extend a currently approved information collection for a period of three years.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to prepare and issue State and national estimates of crop and livestock production, prices, and disposition; as well as economic statistics, environmental statistics related to agriculture and also to conduct the Census of Agriculture.

The Agricultural Prices surveys provide data on the prices received by farmers and prices paid by them for production goods and services. NASS estimates based on these surveys are used by agencies of the U.S. Department of Agriculture to prepare the economic accounts of the United States. These price estimates are also used to compute Parity Prices in accordance with requirements of the Agricultural Adjustment Act of 1938 as amended (Title III, Subtitle A, Section 301a). In addition, price data are used by the Federal Crop Insurance Corporation to help determine payment rates, program option levels, and disaster programs.

Authority: These data will be collected under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985 as amended, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–113) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995). NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E–Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register**, Vol. 72, No. 115, June 15, 2007, p. 33376.

Estimate of Burden: Public reporting burden for this information collection is based on 18 individual surveys with expected responses of 5–20 minutes and frequency of 1–12 times per year. Estimated number of responses per respondent is 2.03.

Respondents: Farmers and farm-related businesses.

Estimated Number of Respondents: 43,000.

Estimated Total Annual Burden on Respondents: 13,000 hours.

Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS Clearance Officer, at (202) 690–2388.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) 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; (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 those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, July 15, 2009.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. E9–18849 Filed 8–5–09; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to OSPREY BIOTECHNICS, INC. of SARASOTA, FLORIDA an exclusive license to U.S. Patent Application Serial No. 11/901,547, ''COMPOSITION OF ENTOMOPATHOGENIC FUNGUS AND METHOD OF PRODUCTION AND APPLICATION FOR INSECT CONTROL'', filed on September 13, 2007.

DATES: Comments must be received by September 8, 2009.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as OSPREY BIOTECHNICS, INC. of SARASOTA, FLORIDA has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. E9–18850 Filed 8–5–09; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Certain Pasta from Italy: Notice of Preliminary Results of Twelfth Antidumping Duty Administrative Review

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

SUMMARY: In response to requests by interested parties, the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on certain pasta (''pasta'') from Italy for the period of review (''POR'') July 1, 2007, through June 30, 2008. This review covers four producers/exporters of subject merchandise. We preliminarily determine that during the POR, respondents sold subject merchandise at less than normal value (''NV''). If these preliminary results are adopted in the final results of this administrative review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries of subject merchandise during the POR. Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett or Victoria Cho, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–4161 or (202) 482–5075, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published in the **Federal Register** the antidumping duty order on pasta from Italy. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 FR 38547 (July 24, 1996).

On July 11, 2008, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on certain pasta from Italy. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 73 FR 39948 (July 11, 2008). We received requests for review from petitioners [1] and from individual Italian exporters/producers of pasta, in accordance with 19 CFR 351.213(b)(1) and (2). On August 26, 2008, the Department published the notice of initiation of this antidumping duty administrative review covering the period July 1, 2007, through June 30, 2008, listing the following companies as respondents: Arrigi, S.p.A. (''Arrigi''), Domenico Paone fu Erasmo S.p.A., F. Divella SpA (''Divella''), Industria Alimentare Colavita, S.p.A., P.A.M. S.p.A. (''PAM''), Pasta Lensi, Pasta Zara SpA (''Zara''), Pastificio Di Martino Gaetano & F.lli S.r.L. (''Di Martino''), Pastificio Felicetti S.r.L. (''Felicetti''), Pastificio Fratelli Pagani S.p.A., Pastificio Labor S.r.L., Pastificio Lucio Garofalo (''Garofalo''), Pastificio Riscossa F.Illi Mastromauro S.r.L., Rummo S.p.A. Molino e Pastificio, and Rustichella d'Abruzzo S.p.A. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 73 FR 50308 (August 26, 2008) (''*Initiation Notice''*).

On August 26, 2008, due to the significant number of requests received and the Department's resource constraints at the time of initiation of the instant review, the Department informed known interested parties its intent to limit the number of companies examined in the current review, and requested comments. *See* memo to Melissa Skinner, through James Terpstra, from Christopher Hargett, ''2007–2008 Antidumping Duty Administrative Review of Certain Pasta from Italy: Customs and Border Protection Data for Selection of Respondents for Individual Review,'' dated August 26, 2008.

On September 25, 2008, the Department selected the two exporters/producers accounting for the largest volume of exports—PAM and Garofalo, as mandatory respondents.[2]

As a result of timely withdrawals of request for review, we rescinded this review, in part, with respect to Zara, Felicetti, Divella, Di Martino, and Arrighi.[3]

Between September 2008 and May 2009, the Department issued its initial questionnaire and supplemental questionnaires to each respondent, as applicable. We received responses to the Department's initial and supplemental questionnaires on December 3, 2008, December 10, 2008, March 5, 2009, April 10, 2009, May 4, 2009, May 11, 2009, and May 29, 2009, from PAM. Garofalo provided responses to the Department's initial and supplemental questionnaires on November 10, 2008, November 24, 2008, December 10, 2009, April 15, 2009, May 14, 2009, and July 7, 2009.

On March 16, 2009, the Department fully extended the due date for the preliminary results of review from April 2, 2009, to July 31, 2009. *See Certain Pasta from Italy: Extension of Time Limits for the Preliminary Results of Twelfth Antidumping Duty Administrative Review*, 74 FR 11084 (March 16, 2009).

On May 8, 2009, the petitioners alleged that a particular market situation exists with respect to the Italian market for certain pasta that warrants the Department rejecting home market prices as the basis for NV and instead, relying on constructed value (''CV''). On May 20, 2009, the Department requested additional information from the petitioners regarding their allegation. On June 12, 2009, the petitioners provided the information requested. On June 22, 2009, the respondents submitted rebuttal comments.

Scope of the Order

Imports covered by this order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, by Bioagricoop Scrl, by QC&I International Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, by Associazione Italiana per l'Agricoltura Biologica, or by Instituto per la Certificazione Etica e Ambientale (''ICEA'') are also excluded from this order. *See* Memorandum from Audrey Twyman to Susan Kuhbach, dated February 28, 2006, ''Recognition of Instituto per la Certificazione Etica e Ambientale .''

The merchandise subject to this order is currently classifiable under subheadings 1901.90.95 and 1902.19.20

[1] New World Pasta Company, Dakota Growers Pasta Company, and American Italian Pasta Company.

[2] *See* Memorandum to James Terpstra, from the Team regarding Selection of Respondents for Individual Review, September 25, 2008.

[3] *See Certain Pasta From Italy: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 23392 (May 19, 2009).

of the *Harmonized Tariff Schedule of the United States* (''*HTSUS*''). Although the *HTSUS* subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Model Match Clarification

In the eleventh review of pasta from Italy the Department stated that it would solicit comments from interested parties with respect to the appropriate standards and criteria to be applied in differentiating among wheat codes, and make any necessary changes and/or clarifications to the model match criteria for pasta to apply to all future respondents. *See Certain Pasta from Italy: Notice of Final Results of the Eleventh Administrative Review and Partial Rescission of Review*, 73 FR 75400 (December 11, 2008).

On January 9, 2009, we contacted interested parties and solicited comments on the following four factors: (1) Industry standards, (2) measuring material cost differences, (3) defining commercial significance, and (4) physical characteristics. Parties submitted comments on February 23, 2009, and rebuttal comments on March 10, 2009.[4]

Because of a lack of consistency in the Department's treatment of separate wheat codes in model match decisions in previous determinations, we solicited comments in order to articulate a clearer statement of our policy. Our goal was to develop objective criteria that would apply in each review of this antidumping duty order. Petitioners and the two respondents in this review submitted factual information and comments. Based on our analysis of these comments, and our review of prior determinations, we propose to clarify and modify our treatment of the wheat code physical characteristic. *See* memorandum from James Terpstra, Program Manager, to John M. Andersen, Acting Deputy Assistant Secretary, entitled ''Preliminary Model Match Clarification on Pasta Wheat Code Classifications,'' dated July 31, 2009. We propose replacing the existing single Wheat Code field with the following three fields: Wheat species, form, and protein content.

We note that the threshold set forth in Protein Content corresponds to the minimum protein content of 12.5 percent established by the Italian Commodity Exchanges. We are requesting that interested parties provide comments on the proposed model match changes included there in. We will evaluate comments on the proposed methodology. Any new model match criteria developed will be applicable in the 2008–2009 and subsequent administrative reviews of pasta from Italy.

Product Comparisons

In accordance with section 771(16) of the Tariff Act of 1930, as amended (''the Act''), we first attempted to match contemporaneous sales of products sold in the United States and comparison markets that were identical with respect to the following characteristics: (1) Pasta shape; (2) type of wheat; (3) additives; and (4) enrichment, by quarter. When there were no sales of identical merchandise in the comparison market to compare with U.S. sales, we compared U.S. sales with the most similar product based on the characteristics listed above, in descending order of priority. When there were no appropriate comparison market sales of comparable merchandise, we compared the merchandise sold in the United States to CV, in accordance with section 773(a)(4) of the Act.

For purposes of the preliminary results, where appropriate, we have calculated the adjustment for differences in merchandise based on the difference in the variable cost of manufacturing (''VCOM'') between each U.S. model and the most similar home market model selected for comparison.

Comparisons to Normal Value

To determine whether sales of certain pasta from Italy were made in the United States at less than NV, we compared the export price (''EP'') or constructed export price (''CEP'') to the NV by quarter, as described in the ''Export Price/Constructed Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transactions. Because we are using a quarterly costing approach, we have not made price-to-price comparisons outside of a quarter to lessen the potential distortion to sales prices which result from significantly changing costs. *See* Memorandum Through James Terpstra from Christopher Hargett titled ''Sales Analysis Memorandum—PAM S.p.A., Liguori Pastificio dal 1820 S.p.A. (''Liguori''), and Chirico Molini e Pastificio S.p.A. (''Chirico'') (collectively, ''PAM'')'' (''PAM Sales Analysis Memo''), and Memorandum from Christopher Hargett to James Terpstra titled ''Sales Analysis Memorandum—Pastificio Lucio Garofalo (''Garofalo'')'' (''Garofalo Sales Analysis Memorandum''), both dated July 31, 2009, and available in the Central Records Unit (''CRU'') in Room 1117 of the Main Commerce Building.

Export Price/Constructed Export Price

For the price to the United States, we used, as appropriate, EP or CEP, in accordance with sections 772(a) and (b) of the Act. We calculated EP when the merchandise was sold by the producer or exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and when CEP was not otherwise warranted based on the facts on the record. We calculated CEP for those sales where a person in the United States, affiliated with the foreign exporter or acting for the account of the exporter, made the sale to the first unaffiliated purchaser in the United States of the subject merchandise. We based EP and CEP on the packed cost-insurance-freight (''CIF''), ex-factory, free-on-board (''FOB''), or delivered prices to the first unaffiliated customer in, or for exportation to, the United States. When appropriate, we reduced these prices to reflect discounts and rebates.

In accordance with section 772(c)(2) of the Act, we made deductions, where appropriate, for movement expenses including inland freight from plant or warehouse to port of exportation, foreign brokerage, handling and loading charges, export duties, international freight, marine insurance, U.S. inland freight expenses, warehousing, and U.S. duties. In addition, when appropriate, we increased EP or CEP as applicable, by an amount equal to the countervailing duty (''CVD'') rate attributed to export subsidies in the most recently completed CVD administrative review, in accordance with section 772(c)(1)(C) of the Act.

For CEP, in accordance with section 772(d)(1) of the Act, when appropriate, we deducted from the starting price those selling expenses that were incurred in selling the subject merchandise in the United States, including direct selling expenses (advertising, cost of credit, warranties, banking, slotting fees, and commissions paid to unaffiliated sales agents). In addition, we deducted indirect selling expenses that related to economic activity in the United States. These expenses include certain indirect selling expenses incurred by its affiliated U.S. distributors. We also deducted from CEP an amount for profit in accordance with

[4] In addition, we sent a letter on June 4, 2009, soliciting additional information from PAM and Garafolo. PAM and Garafolo submitted responses on July 7, 2009.

sections 772(d)(3) and (f) of the Act. *See* PAM's Sales Analysis Memo; *see also* Garofalo's Sales Analysis Memo.

Normal Value

A. Selection of Comparison Markets

Section 773(a)(1) of the Act directs that NV be based on the price of the foreign like product sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate) and that there is no particular market situation that prevents a proper comparison with the export price or constructed export price. The statute contemplates that quantities (or value) normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States. To determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared each respondent's volume of home market to serve as a viable basis for calculating NV, we compared each respondent's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise. Pursuant to section 773(a)(1)(B) of the Act, because PAM and Garofalo each had an aggregate volume of home market sales of the foreign like product that was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable for both PAM and Garofalo.

On May 8, 2009, the petitioners alleged that a particular market situation existed in the Italian pasta market that prevents a proper comparison with the export price or constructed export price. Neither the antidumping statute nor the Statement of Administrative Action (''SAA'') that accompanied the Uruguay Round Agreements Act specifically defines the term ''particular market situation.'' The SAA, however, states that a particular market situation might exist where, for instance, a single sale in the home market constitutes five percent of sales to the United States, there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set, or the demand patterns in the home market are different from those in the United States. *See* SAA at 822. In their May 8, 2009 filing, the petitioners submitted a February 2009 press release of the Italian Competition Authority (''ICA'') which contains a summary of its findings regarding an agreement among Italian pasta producers to increase prices for non-egg dry pasta. The petitioners claimed that these findings demonstrate that the respondents' reported home market prices are *per se* unrepresentative and prevent a proper comparison with the respondents' U.S. sale prices. The petitioners requested, therefore, that the Department reject home market prices and rely on CV as the basis for NV. On June 12, 2009, the petitioners provided the Department a complete English translation of the ICA report and stated that a review of the complete report shows that the ICA was focused solely on anticompetitive conduct in the Italian market and did not cover export sales. The petitioners also noted that the ICA report is an Italian government finding. In this connection, the petitioners noted that the Italian government regularly participates in CVD reviews on pasta and the Department considers the evidence and information provided by the Italian government in its CVD findings. Finally, the petitioners noted that, in this review, they are only requesting that the Department resort to the statutorily-approved, alternative calculation for NV using CV because of the non-market nature of the home market prices.

On June 22, 2009, the respondents submitted rebuttal comments in which they noted that the ICA's decision is currently being appealed, that no fines have been paid to date, and thus, no final determination has been made by the ICA. Additionally, the respondents argued that the ICA did not find that home market prices were not market-based. Rather, the respondents asserted that the ICA specifically found that each producer set its prices in accordance with its own market position and cost structure. The respondents further argued that the Department properly is not interested in the various reasons dumping may occur, such as conditions of competition in the comparison market including the existence of a monopoly or oligopoly, or high import duty rates. Further, anticompetitive behavior in the home market is not covered by AD law. The respondents also asserted that the Department should not consider the ICA report because, unlike in a CVD review, the Italian government is not a party to this case, and the underlying data is not subject to review or verification.

In past cases, the Department has recognized a strong preference to use home market prices in its dumping calculations and, therefore, has established a high threshold for rejecting home market prices based upon a particular market situation.[5] Based on the information and arguments submitted by the petitioners and the respondents, the Department has considered whether a particular market situation exists in the Italian pasta market that would warrant rejection of home market prices as the basis for NV. As discussed below, the Department preliminarily finds that there is not a particular market situation in the Italian pasta market that would prevent a proper comparison with the export price or constructed export price.

At the outset we note that, unlike in prior cases where the Department has examined whether home market prices were not competitively set and, therefore, could not be used as the basis for NV, in this case, petitioners' allegation claims that Italian producers of pasta colluded to increase home market prices. Specifically, the petitioners assert that according to the ICA press release and report, the ICA found that between October 2006 and at least March 2008, members of the Italian pasta industry had a concerted strategy to change prices in the Italian market. Further, the petitioners claim that just because the ''non-competitive'' behavior results in an increase in home market prices (and potentially dumping margins) does not diminish the fact that the behavior is ''non-competitive'' and therefore, rejection of home market prices is appropriate.

The Department has a longstanding practice of evaluating each particular market situation independently based on the facts of the record. In prior cases where the Department has evaluated whether home market prices were competitively set, the Department has found that government participation in

[5] *See Fresh Kiwifruit from New Zealand: Final Results of Antidumping Administrative Review*, 61 FR 46438 (September 3, 1996); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 62 FR 18404 (April 15, 1997) (''*Cold-Rolled from Korea*''); *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from South Africa*, 62 FR 61804 (November 14, 1997); *Notice of Final Determination of Sales at Less than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411 (June 9, 1998); *Final Results of Antidumping Duty Administrative Review: Electrolytic Manganese Dioxide from Greece,* 65 FR 68978 (November 15, 2000); *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada,* 68 FR 52741 (September 5, 2003) (''*Wheat from Canada*''); *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 68336 (December 8, 2003), unchanged in final, *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 19388 (April 13, 2004) (''*Hot-Rolled from Thailand*'').

the market place, and the government control, by itself, was not sufficient enough to determine that home market prices could not be considered to be competitively set. For example, in *Cold-Rolled from Korea* the Department noted that the petitioners provided evidence indicative of a not insubstantial level of government interest and involvement in the day-to-day operations of the Korean steel industry, including domestic price levels. The Department determined that absent substantial evidence that government control is so extensive that prices are not competitively set, the Department cannot find the Korean home market not viable.

Further, in *Wheat from Canada prelim*,[6] the Department noted that the fact that the Canadian Wheat Board, a government entity, operated as a monopoly buyer and seller of wheat in the Canadian domestic market raised legitimate concerns that a particular market situation might exist with respect to the Canadian home market. The Department, nonetheless, based on the record evidence, determined that the Canadian government did not control prices to such an extent that home market prices were non-competitive and inappropriate for use in the Department's dumping analyses.

Additionally, in *Hot-Rolled from Thailand*, the Department examined whether a government-imposed price ceiling, possibly affecting producers' ability to set prices competitively, constituted a particular market situation sufficient to warrant rejection of home market prices as the basis for NV. Based on the evidence on the record in that case, the Department found that the government-imposed price ceilings did not warrant a finding that a particular market situation existed that would prevent a proper comparison between home market prices and export price or constructed export price.[7]

In this case, there is no evidence of government control or intervention to suppress home market prices, although the evidence indicates that the majority of Italian pasta producers may have colluded to raise home market prices of pasta. However, there is no evidence that Italian pasta producers agreed upon a particular ceiling or floor price. Rather, each company set its own prices with its customers independently. Additionally, as we discuss more fully below, there was a change in the cost of manufacturing (''COM'') that was primarily attributed to the price volatility of semolina. Thus, the respondents' price increases could have resulted from objective market conditions (*i.e.*, significant increases in the price of inputs) rather than particular anti-competition conduct. Accordingly, we do not find sufficient evidence to conclude that a particular market situation exists that warrants a determination that home market prices cannot form the basis for a proper comparison. Therefore, the Department has not requested that either respondent report sales to its largest third country market.[8]

B. Cost Reporting Period

The Department's normal practice is to calculate an annual weighted-average cost for the entire POR. *See*, *e.g.*, *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (Dec. 13, 2000) (*Pasta from Italy*), and accompanying Issues and Decision Memorandum at Comment 18 and *Notice of Final Results of Antidumping Duty Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (Jan. 24, 2006) (*Wire Rod from Canada*), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted-average cost for the entire period). This methodology is predictable and generally applicable in all proceedings. However, the Department recognizes that possible distortions may result when our annual average cost method is used during a period of significant cost changes. In these circumstances, in determining whether to deviate from our normal methodology, the Department has evaluated the case-specific record evidence using two primary factors: (1) The change in the COM recognized by the respondent during the POR must be deemed significant; and (2) the record evidence must show that sales during the shorter averaging periods could be reasonably linked with the COP or CV during the same shorter averaging periods. *See*, *e.g.*, *Stainless Steel Plate in Coils From Belgium: Final Results of Administrative Review*, 73 FR 75398, 75399 (December 11, 2008) (*SSPC from Belgium*) and *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Administrative Review*, 74 FR 6365 (February 9, 2009) (*2006–2007 Final Results*).

1. Significance of Cost Changes

In the instant case, record evidence shows that both respondents, PAM and Garofalo, experienced significant changes (*i.e.*, changes that exceeded 25 percent) between the high and low quarterly COM during the POR, and that the change in COM is primarily attributable to the price volatility of semolina, the primary input consumed in the production of the merchandise under consideration. In examining the company-specific inventory records and commodity exchanges within Italy, we found that semolina prices changed dramatically throughout the POR and directly affected the total cost of manufacturing for pasta. Specifically, the record data shows that the percentage difference between the high and low quarterly costs for pasta products exceeded 25 percent during the POR. As a result, we have determined for the preliminary results that the changes in COM for both PAM and Garofalo are significant enough to warrant a departure from our standard annual costing approach for direct materials, as these significant cost changes create distortions in the Department's sales-below-cost test as well as the overall margin calculation.

2. Linkage Between Cost and Sales Information

The Department evaluated whether there is evidence of linkage between the cost changes and the sales prices during the POR. The Department's definition of linkage does not require direct traceability between specific sales and their specific production cost, but rather relies on whether there are elements which would demonstrate a reasonable correlation between the underlying costs and the final sales prices levied by the company. *See Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242, 31244 (June 30, 2009) (*SSP from Korea*). These correlative elements may be measured and defined in a number of ways depending on the associated industry and the overall production and sales processes.

To examine the correlation, we conducted a price and cost trend analysis using the quarterly net sale prices for the five most frequently sold

[6] *See Notice of Preliminary Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 24707 (May 8, 2003) (''*Wheat from Canada prelim*''), unchanged in final *Wheat from Canada*.

[7] *See Hot-Rolled from Thailand*.

[8] We note that contrary to the petitioners' assertion that the Department should resort to CV for calculating NV, were the Department to find that a particular market situation exists in the home market, preventing proper comparison with the export price or constructed export price, section 773(a)(1)(B)(ii) of the Act instructs the Department to use the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in a country other than the exporting country or the United States. The petitioners have not alleged that a basis exists for rejecting third country prices and, in fact, have specifically stated that the findings of the ICA do not apply to exports from Italy.

control numbers (''CONNUMs'') in the U.S. market and the corresponding quarterly costs of this merchandise. Our comparison reveals that sales and costs for each of the sample CONNUMs generally trended in the same direction and demonstrated a high degree of correlation between the sales and cost data. The inventory records for both respondents demonstrate that the raw material and finished goods inventory are relatively low, indicating a minimal time lag between production and sale dates.

In light of the two factors discussed above, we have preliminarily determined that a quarterly costing approach, with respect to both PAM and Garofalo, would lead to more accurate comparisons in our antidumping duty calculations. Thus, we used quarterly indexed annual average direct material costs and annual weighted-average conversion costs in the cost of production (''COP'') and CV calculations.

C. Cost of Production Analysis

The Department disregarded sales below the COP in the last completed review in which each respondent, PAM and Garofalo, participated. *See Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part*, 70 FR 6832 (February 9, 2005) (*Pasta Seven*); *see also Amended Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination Not to Revoke in Part*, 69 FR 22761 (April 27, 2004) (*Pasta Six*). We therefore have reasonable grounds to believe or suspect, pursuant to section 773(b)(2)(A)(ii) of the Act, that sales of the foreign like product under consideration for the determination of NV in this review may have been made at prices below COP. Thus, pursuant to section 773(b)(1) of the Act, we examined whether sales from PAM and Garofalo in the home market were made at prices below the COP.

We compared sales of the foreign like product in the home market with model-specific COP figures. In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the costs of materials and fabrication employed in producing the foreign like product, plus selling, general and administrative (''SG&A'') expenses, financial expenses and all costs and expenses incidental to placing the foreign like product in packed condition and ready for shipment. In our sales-below-cost analysis, we relied on home market sales and COP information provided by PAM and Garofalo in its questionnaire responses, except where noted below.

PAM

We are relying on PAM's reported quarterly indexed direct material costs and annual conversion costs.

We collapsed products PAM classified as wheat code ''1'' (*i.e.*, pasta made from superior semolina) with products classified as wheat code ''2'' (*i.e.*, pasta made from normal semolina), as we did in *Pasta Seven* at Comment 21. Therefore we recalculated the weighted-average costs for this merchandise.

We revised the general and administrative expense rate numerator to include costs related to the bankruptcy of Chirico, a producing entity within the PAM Group. *See* PAM Sales Analysis Memo and Memorandum from Angela Strom to Neal Halper ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—PAM S.p.A., Liguori Pastificio dal 1820 S.p.A. (''Liguori''), and Chirico Molini e Pastificio S.p.A. (''Chirico'') (collectively, ''PAM''),'' dated July 31, 2009 (''PAM Cost Calculation Memo'').

Garofalo

We are relying on quarterly direct material costs and annual conversion costs.

1. Calculation of COP

Before making any comparisons to NV, we conducted a COP analysis of PAM and Garofalo pursuant to section 773(b) of the Act, to determine whether PAM's and Garofalo's comparison market sales were made at prices below the COP, by quarter. We calculated the COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for SG&A expenses and packing, in accordance with section 773(b)(3) of the Act.

2. Test of Comparison Market Prices

As required under section 773(b)(2) of the Act, we compared the quarterly weighted-average COP to the per-unit price of the comparison market sales of the foreign like product to determine whether these sales had been made at prices below the COP within an extended period of time in substantial quantities, and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. We determined the net comparison market prices for the below-cost test by subtracting from the gross unit price any applicable movement charges, discounts, rebates, direct and indirect selling expenses (also subtracted from the COP), and packing expenses. *See* PAM's Sales Analysis Memo; *see also* Garofalo's Sales Analysis Memo.

3. Results of COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of sales of a given product during the POR were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP we determined such sales to have been made in ''substantial quantities.'' *See* section 773(b)(2)(C) of the Act. The sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, because they were made over the course of the POR. In such cases, because we compared prices to weighted-average costs, we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, for PAM and Garofalo, we disregarded below-cost sales of a given product of 20 percent or more and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. *See* PAM's Sales Analysis Memo; *see also* Garofalo's Sales Analysis Memo.

D. Calculation of Normal Value Based on Comparison Market Prices

We calculated NV based on ex-works, FOB or delivered prices to comparison market customers. We made deductions from the starting price, when appropriate, for handling, loading, inland freight, warehousing, inland insurance, discounts, and rebates. In accordance with sections 773(a)(6)(A) and (B) of the Act, we added U.S. packing costs and deducted comparison market packing, respectively. In addition, we made circumstance-of-sale adjustments for direct expenses, including imputed credit expenses, advertising, warranty expenses, commissions, bank charges, and billing adjustments, in accordance with section 773(a)(6)(C)(iii) of the Act. We also made adjustments for PAM and Garofalo, in accordance with 19 CFR 351.410(e), for indirect selling expenses incurred in the home market or the United States where commissions were granted on sales in one market but not in the other, the ''commission offset.''

Specifically, where commissions are incurred in one market, but not in the other, we will limit the amount of such allowance to the amount of either the selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacture (''VCOM'') for the foreign like product and subject merchandise, using weighted-average costs.

Sales of pasta purchased by the respondents from unaffiliated producers and resold in the comparison market were disregarded. *See* PAM's Sales Analysis Memo; *see also* Garofalo's Sales Analysis Memo.

E. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, we determined NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP and CEP sales, to the extent practicable. When there were no sales at the same LOT, we compared U.S. sales to comparison market sales at a different LOT. When NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit.

Consistent with 19 CFR 351.412, to determine whether comparison market sales were at a different LOT, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's-length) customers. If the comparison market sales were at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we will make an LOT adjustment under section 773(a)(7)(A) of the Act.

Finally, if the NV LOT is more remote from the factory than the CEP LOT and there is no basis for determining whether the differences in LOT between NV and CEP affected price comparability, we will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731, 61732–33 (November 19, 1997).

Both respondents claim two LOTs in the home market. PAM reported that it sold through three channels of distribution to nine customer categories. Garofalo reported that it sold through three channels of distribution to four customer categories.

We disagree with both PAM and Garofalo that there are two LOTs in the home market. Section 351.412 (c)(2) of the Department's regulations provides that the Department will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.

Our analysis of the selling activities for PAM shows that there is overlap in these activities for channels of distribution and customer categories. In other words, PAM performs similar selling activities for all customer categories and channels of distribution. Although there are differences in intensity of these activities for some of the claimed customer categories, this, in and of itself, does not show a substantial difference in selling activities that would form the basis for finding a different LOT. *See*, *e.g.*, *Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review*, 72 FR 52070 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 4. Due to the proprietary nature of this issue, please refer to PAM's Sales Analysis Memo for further discussion.

Our analysis of the selling activities for Garofalo shows that Garofalo also performs similar selling activities for different customer categories, although some of the activities were at different levels of intensity. Moreover, some selling activities within the claimed LOT1 are at higher level of intensity while other selling activities are at lower level of intensity than the same selling activities in the claimed LOT2. In addition, there is overlap among the channels of distribution for the different customer categories in these two claimed LOTs. The differences in Garofalo's selling activities chart do not rise to a level of substantial differences that would support a finding that there are two LOTs in the home market. Due to the proprietary nature of this issue, please refer to Garofalo's Sales Analysis Memo for further discussion.

In the U.S. market, both PAM and Garofalo reported that their sales were made through one channel of distribution to one customer category, and therefore, at one LOT. The Department has determined that PAM's and Garofalo's home market sales were made at LOT1 and at the same stage of marketing as the U.S. sales LOT. Therefore, the Department will not make an LOT adjustment for PAM and Garofalo's sales to the United States.

Currency Conversion

For purposes of these preliminary results, we made currency conversions in accordance with section 773A(a) of the Act, based on the official exchange rates published by the Federal Reserve Bank. *See* PAM's Sales Analysis Memo; *see also* Garofalo's Sales Analysis Memo.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following weighted-average percentage margins exist for the period July 1, 2007, through June 30, 2008, for the mandatory respondents:

Manufacturer/exporter	Margin (percent)
PAM	15.77
Garofalo	15.91

For those companies not selected as mandatory respondents, Domenico Paone fu Erasmo S.p.A., Industria Alimentare Colavita, S.p.A.,, Pasta Lensi, Pastificio Fratelli Pagani S.p.A., Pastificio Labor S.r.L., Pastificio Riscossa F.Illi Mastromauro S.r.L., Rummo S.p.A. Molino e Pastificio, and Rustichella d'Abruzzo S.p.A., we preliminarily determine that the following simple average percentage margin (based on the two reviewed companies) exists for the period July 1, 2007, through June 30, 2008, is 15.84 percent.

The Department will disclose the calculations performed for these preliminary results within five days of the date of publication of this notice to the parties of this proceeding, in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). The Department intends to verify the information upon which we will rely in making our final determination. As a result, we intend to establish the briefing schedule upon the completion of verification.

Pursuant to 19 CFR 351.213(h), the Department intends to issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such

comments, or at a hearing, if requested, within 120 days of publication of these preliminary results.

Assessment Rate

Pursuant to 19 CFR 351.212(b), the Department calculated an assessment rate for each importer of the subject merchandise. Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.*, at or above 0.5 percent), the Department will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. For assessment purposes, we calculated importer-specific assessment rates for the subject merchandise by aggregating the dumping margins for all U.S. sales to each importer and dividing the amount by the total entered value of the sales to that importer. Where appropriate, to calculate the entered value, we subtracted international movement expenses (*e.g.*, international freight) from the gross sales value. For the responsive companies which were not selected for individual review, we have calculated an assessment rate based on the simple average of the cash deposit rates calculated for the companies selected for individual review.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these preliminary results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

To calculate the cash deposit rate for PAM and Garofalo, we divided its total dumping margin by the total net value of its sales during the review period. For the responsive companies which were not selected for individual review, we have calculated a cash deposit rate based on the simple average of the cash deposit rates calculated for the companies selected for individual review.

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of pasta from Italy entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for companies subject to this review will be the rate established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis*, no cash deposit will be required; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent final results for a review in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (''LTFV'') investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 15.45 percent, the all-others rate established in the LTFV investigation. *See Implementation of the Findings of the WTO Panel in U.S.—Zeroing (EC): Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 25261 (May 4, 2007). These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

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

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: July 31, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–18884 Filed 8–5–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–952, A–583–844)]

Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China and Taiwan: Initiation of Antidumping Duty Investigations

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

EFFECTIVE DATE: August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood at (202) 482–3874 or Miriam Eqab at (202) 482–3693 (Taiwan), AD/CVD Operations, Office 2; Maisha Cryor at (202) 482–5831 or Zhulieta Willbrand at (202) 482–3147 (the People's Republic of China (the ''PRC'')), AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petitions

On July 9, 2009, the Department of Commerce (the ''Department'') received petitions concerning imports of narrow woven ribbons with woven selvedge (''narrow woven ribbon'') from the PRC and Taiwan filed in proper form by Berwick Offray LLC and its wholly–owned subsidiary Lion Ribbon Company, Inc. (collectively, the ''Petitioner''). *See* Petitions for the Imposition of Antidumping and Countervailing Duties on Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China and Taiwan dated July 9, 2009 (the ''Petitions''). On July 14, 2009, the Department contacted the Petitioner by telephone seeking additional information and clarification regarding the Petition. *See* Memo to the File from Matthew Glass, ''Scope Call with the Petitioner,'' dated July 14, 2009. On July 15, 2009, and July 22, 2009, the Department issued a request for additional information and clarification of certain areas of the Petitions. Also, on July 23, 2009, the Department contacted the Petitioner by telephone seeking additional information and clarification

regarding the Petitions. *See* Memo to the File from Meredith A.W. Rutherford, ''General Issues Discussion with the Petitioner,'' dated July 23, 2009. Based on the Department's requests, the Petitioner filed additional information on July 21, 2009 (hereinafter, Supplement to the AD/CVD Petitions, dated July 21, 2009) and July 27, 2009 (hereinafter, Second Supplement to the AD/CVD Petitions, dated July 27, 2009). On July 28, 2009, the Department again contacted the Petitioner by telephone seeking additional information and clarification regarding certain general issues of the Petitions. See Memo to the File from Meredith A.W. Rutherford, ''Phone Call with the Petitioner,'' dated July 28, 2009, and Memo to the File from Elizabeth Eastwood, ''Scope Calls with the Petitioner,'' dated July 29, 2009. Based on the Department's requests, the Petitioner timely filed additional information pertaining to the Petition on July 29, 2009 (hereinafter, Third Supplement to the AD/CVD Petitions, dated July 29, 2009). The period of investigation (''POI'') for the PRC is January 1, 2009, through June 30, 2009. The POI for Taiwan is July 1, 2008, through June 30, 2009. *See* 19 CFR 351.204(b)(1).

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the ''Act''), the Petitioner alleges that imports of narrow woven ribbon from the PRC and Taiwan are being, or are likely to be, sold in the United States at less than fair value, within the meaning of section 731 of the Act, and that such imports are materially injuring, or threatening material injury to, an industry in the United States.

The Department finds that the Petitioner filed the Petitions on behalf of the domestic industry because the Petitioner is an interested party as defined in section 771(9)(C) of the Act and has demonstrated sufficient industry support with respect to the antidumping duty investigations that the Petitioner is requesting that the Department initiate (*see* ''Determination of Industry Support for the Petitions'' section below).

Scope of Investigations

The products covered by these investigations are narrow woven ribbons with woven selvedge from the PRC and Taiwan. For a full description of the scope of the investigations, please see the ''Scope of Investigations,'' in Appendix I of this notice.

Comments on Scope of Investigations

During our review of the Petitions, we discussed the scope with the Petitioner to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by August 18, 2009, twenty calendar days from the signature date of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Comments on Product Characteristics for Antidumping Duty Questionnaires

We are requesting comments from interested parties regarding the appropriate physical characteristics of narrow woven ribbon to be reported in response to the Department's antidumping questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to more accurately report the relevant factors and costs of production, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate listing of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as 1) general product characteristics and 2) the product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, while there may be some physical product characteristics utilized by manufacturers to describe narrow woven ribbon, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in product matching. Generally, the Department attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments at the above–referenced address by August 18, 2009. Additionally, rebuttal comments must be received by August 25, 2009.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (*see* section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc. v. United States*, 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel*

Corp., Ltd. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.*, the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the Petitioner does not offer a definition of domestic like product distinct from the scope of the investigations. Based on our analysis of the information submitted on the record, we have determined that narrow woven ribbon constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, see Antidumping Duty Investigation Initiation Checklist: Narrow woven ribbon from the PRC (''PRC Initiation Checklist'') at Attachment II, Industry Support, and Antidumping Duty Investigation Initiation Checklist: Narrow woven ribbon from Taiwan (''Taiwan Initiation Checklist'') at Attachment II, Industry Support, dated concurrently with this notice and on file in the Central Records Unit (''CRU''), Room 1117 of the main Department of Commerce building.

In determining whether the Petitioner has standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions with reference to the domestic like product as defined in the ''Scope of Investigations'' section above. To establish industry support, the Petitioner provided its production of the domestic like product for the year 2008, and compared this to the estimated total production of the domestic like product for the entire domestic industry. *See* Volume I of the Petition, at 7, and Exhibits 2, 4, and 5, Supplement to the AD/CVD Petitions, dated July 21, 2009, at A–9–11, Second Supplement to the AD/CVD Petitions, dated July 27, 2009, at A–1–2 and Exhibit 117, and Third Supplement to the AD/CVD Petitions, dated July 29, 2009, at Attachment II. To estimate 2008 production of the domestic like product, the Petitioner used its own data and industry specific knowledge. The Petitioner calculated total domestic production based on its own production plus estimates from the nine other producers of the domestic like product in the United States. *See id.*; *see also* PRC Initiation Checklist at Attachment II, and Taiwan Initiation Checklist at Attachment II.

Our review of the data provided in the Petitions, supplemental submissions, and other information readily available to the Department indicates that the Petitioner has established industry support. First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.*, polling). *See* section 732(c)(4)(D) of the Act; *see also* PRC Initiation Checklist at Attachment II, and Taiwan Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product. *See* PRC Initiation Checklist at Attachment II, and Taiwan Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions. Accordingly, the Department determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act. *See id.*

The Department finds that the Petitioner filed the Petitions on behalf of the domestic industry because it is an interested party as defined in section 771(9)(C) of the Act and it has demonstrated sufficient industry support with respect to the antidumping duty investigations that it is requesting the Department initiate. *See id.*

Allegations and Evidence of Material Injury and Causation

The Petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (''NV''). In addition, the Petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

The Petitioner contends that the industry's injured condition is illustrated by reduced market share, underselling and price depressing and suppressing effects, increased import penetration, lost sales and revenue, reduced production, reduced capacity, reduced capacity utilization, reduced shipments, reduced employment, and an overall decline in financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* PRC Initiation Checklist at Attachment III, Injury, and Taiwan Initiation Checklist at Attachment III, Injury.

Allegations of Sales at Less Than Fair Value

The following is a description of the allegations of sales at less than fair value upon which the Department based its decision to initiate these investigations of imports of narrow woven ribbon from the PRC and Taiwan. The sources of data for the deductions and adjustments relating to the U.S. price, the factors of production (for the PRC) and constructed value (''CV'') (for Taiwan) are also discussed in the country–specific initiation checklists. *See* PRC Initiation Checklist and Taiwan Initiation Checklist. Should the need arise to use any of this information as facts available under section 776 of the Act in our preliminary or final determinations, we will reexamine the information and revise the margin calculations, if appropriate.

Export Price

The PRC

For the PRC, the Petitioner calculated export price (''EP'') based on a price quote made during the POI for narrow woven ribbon products by a Chinese producer, sale term free on board (''FOB''). *See* PRC Initiation Checklist; *see also* Volume I of the Petitions at 24. To be conservative, the Petitioner did not make specific adjustments to the EP for domestic inland freight from the plant to the Chinese port. *Id.* However, the Petitioner did make an adjustment for foreign brokerage and handling. *Id.* Specifically, the Petitioner calculated PRC brokerage and handling by using the brokerage and handling surrogate value from *Certain Steel Grating from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 74 FR 30273 (June 25, 2009) (''*Steel Grating From China*''), and adjusted it for inflation for the POI. *See Steel Grating From China*, 74 FR at

30276; *see also* Supplement to the AD/CVD Petitions, dated July 21, 2009, at 4 and Exhibit 93; and PRC Initiation Checklist. In addition, the Petitioner converted brokerage and handling expenses into U.S. dollars based on the POI–average rupee/U.S. dollar exchange rate, as reported on the Department's website. *See* Volume II of the Petitions, at Exhibit 42, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 98.

Taiwan

For Taiwan, the Petitioner calculated EP based on price quotes made during the POI for narrow woven ribbon products from a Taiwan producer/exporter, sale term FOB. *See* Taiwan Initiation Checklist; *see also* Volume I of the Petitions at 28–29 and Volume II of the Petitions at Exhibits 58, 59, and 60. To be conservative, the Petitioner did not make specific adjustments to the EP for domestic inland freight from the plant to the Taiwanese port. *See id.* However, the Petitioner did make an adjustment for foreign brokerage and handling. *See id.* Specifically, the Petitioner calculated Taiwanese brokerage and handling using Taiwan–specific brokerage and handling expenses. *See* Volume II of the Petitions, at Exhibit 59; *see also* Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 108 and Taiwan Initiation Checklist.

Normal Value

The PRC

The Petitioner states that the PRC is a non–market economy (''NME'') country and no determination to the contrary has been made by the Department. *See* Volume I of the Petitions, at 19. The Petitioner states that the Department has treated the PRC as an NME country in every administrative proceeding in which the PRC has been involved, and has continued to do so in recent months. *See id.*; *see also Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009); *see also Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 14514 (March 31, 2009).

In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and, therefore, remains in effect for purposes of the initiation of this investigation. Accordingly, the NV of the product for the PRC investigation is appropriately based on factors of production valued in a surrogate market–economy country in accordance with section 773(c) of the Act. In the course of the PRC investigation, all parties, including the public, will have the opportunity to provide relevant information related to the issue of the PRC's NME status and the granting of separate rates to individual exporters.

Citing section 773(c)(4) of the Act, the Petitioner contends that India is the appropriate surrogate country for the PRC because: 1) it is at a level of economic development comparable to that of the PRC; and 2) it is a significant producer of narrow woven ribbon. *See* Volume I of the Petitions at 19–21, and Volume II of the Petitions, at Exhibit 32. Based on the information provided by the Petitioner, we believe that it is appropriate to use India as a surrogate country for initiation purposes. After initiation of the investigation, interested parties will have the opportunity to submit comments regarding surrogate–country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value factors of production within 40 days after the date of publication of the preliminary determination.

The Petitioner calculated the NV and dumping margins for the U.S. price, discussed above, using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. The Petitioner calculated NV based on its own consumption rates for producing narrow woven ribbon in 2009. *See* Volume I of the Petitions at 18, and Volume II of the Petitions, at Exhibit 29, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 95. In calculating NV, the Petitioner based the quantity of each of the inputs used to manufacture and pack narrow woven ribbon in the PRC based on an analysis of Chinese narrow woven ribbon samples obtained by the Petitioner, as well as on its own production experience during the POI. *See id.* The Petitioner states that the actual usage rates of the foreign manufacturers of narrow woven ribbon are not reasonably available to it; however, the Petitioner notes that the production of narrow woven ribbon relies on the same basic technology worldwide. *See* Volume I of the Petitions at 18. The Petitioner asserts that the Chinese producers of narrow woven ribbon use largely the same production equipment, material inputs, and production processes as the Petitioner itself. *See* Volume I of the Petitions at 18, and Exhibit 27, and Volume II of the Petitions, at Exhibit 29.

Raw materials (*e.g.*, yarn) are significant inputs used in the production of narrow woven ribbon. The Petitioner determined the consumption of all raw materials and packing materials based on examination and analysis of samples of white single face satin narrow woven ribbon and black single face satin narrow woven ribbon from the PRC as well as its own production experience. *See* Volume I of the Petitions at 18, and Volume II of the Petitions at Exhibit 29, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 95. The Petitioner valued the factors of production based on reasonably available, public surrogate–country data, including Indian import statistics from the World Trade Atlas (''WTA''). *See* Volume I of the Petitions, at 21, and Volume II of the Petitions, at Exhibit 34. The Petitioner excluded from these import statistics imports from countries previously determined by the Department to be NME countries and from Indonesia, the Republic of Korea, and Thailand as the Department has previously excluded prices from these countries because they maintain broadly available, non–industry-specific export subsidies. *See* Volume I of the Petition at 22. In addition, the Petitioner made currency conversions, where necessary, based on the POI–average rupee/U.S. dollar exchange rate, as reported on the Department's website. *See* Volume I of the Petitions, at 23, and Volume II of the Petitions, at Exhibit 42. Further, the Petitioner inflated certain factors of production, where necessary, on a POI basis. *See* Volume I of the Petitions, at 23, and Volume II of the Petitions, at Exhibit 41. The Petitioner determined labor costs using the labor consumption, in hours, derived from its own experience. *See* Volume II of the Petitions, at Exhibit 29, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 95. The Petitioner valued labor costs using the Department's NME Wage Rate for the PRC at *http://ia.ita.doc.gov/wages/05wages/05wages–051608.html*. *See* Volume I of the Petitions, at 22, and Volume II of the Petitions, at Exhibit 35. For purposes of initiation, the Department determines that the surrogate values used by the Petitioner are reasonably available and, thus, acceptable for purposes of initiation.

The Petitioner determined electricity costs using the electricity consumption, in kilowatt hours, derived from its own experience. See Volume I of the

Petitions, at 22, and Volume II of the Petitions, at Exhibits 29 and 43, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 95. The Petitioner valued electricity using the Indian electricity rate reported by the Central Electric Authority of the Government of India. *See* Volume I of the Petitions, at 22, and Volume II of the Petitions, at Exhibit 36.

The Petitioner determined natural gas costs using the natural gas consumption derived from its own experience. *See* Volume I of the Petitions, at 22, and Volume II of the Petitions, at Exhibit 29. The Petitioner valued natural gas using the Indian rate reported by the Gas Authority of India, Ltd. *See* Volume I of the Petitions, at 22, and Volume II of the Petitions, at Exhibit 38. The Petitioner adjusted the Indian natural gas rates to make them contemporaneous with the POI using Indian wholesale price indices as published by the International Monitory Fund. *See* Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 97.

The Petitioner determined water costs using the water consumption derived from its own experience. *See* Volume I of the Petitions, at 22, and Volume II of the Petitions, at Exhibit 29. The Petitioner valued water based on information from the Maharastra Industrial Development Corporation, which is contemporaneous with the POI. *See* Volume I of the Petitions, at 22, and Volume II of the Petitions at 22, and Exhibit 37.

The Petitioner based factory overhead, selling, general and administrative (''SG&A''), and profit on data from Ratan Glitter Industries Ltd. (''Ratan''), a ribbon producer, for the fiscal year April 2007 through March 2008. *See* Volume I of the Petitions, at 23, and Volume II of the Petitions, at Exhibit 39. The Petitioner states that Ratan is an Indian producer of in–scope ribbon. *See* Volume I of the Petitions at 23. Therefore, for purposes of the initiation, the Department finds the Petitioner's use of Ratan's financial ratios appropriate.

Taiwan

With respect to NV for the Taiwan investigation, the Petitioner states that neither home–market prices nor third–country POI prices of narrow woven ribbon produced in Taiwan were reasonably available. According to the Petitioner, it was unsuccessful in obtaining Taiwanese POI pricing information despite its best efforts. *See* Volume I of the Petitions at 16–17, and Exhibit 2. Further, the Petitioner claims it was unable to base NV on publicly available information covering Taiwanese third–country export prices because exports of narrow woven ribbon from Taiwan are classified in Taiwan's export schedule under Harmonized Tariff Schedule (''HTS'') number 5806.32.1000. According to the Petitioner, this HTS category includes both in–scope and out–of-scope ribbons including typewriter ribbons, ribbons exceeding 12 centimeters in width, and ribbons without woven selvedge. Therefore, the Petitioner based NV on CV.

Pursuant to section 773(e) of the Act, CV consists of the cost of manufacturing (''COM''), SG&A expenses, packing expenses, and profit. In calculating COM and packing, the Petitioner based the quantity of each of the inputs used to manufacture and pack narrow woven ribbon in Taiwan based on an analysis of Taiwanese narrow woven ribbon samples obtained by the Petitioner, as well as on its own production experience during the POI. *See* Volume I of the Petitions, at 18, Volume II of the Petitions, at Exhibit 29, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 95. The Petitioner states that the actual usage rates of the foreign manufacturers of narrow woven ribbon are not reasonably available to it; however, the Petitioner notes that the production of narrow woven ribbon relies on the same basic technology worldwide. The Petitioner asserts that the Taiwanese producers of narrow woven ribbon use largely the same production equipment, material inputs, and production processes as the Petitioner itself. *See* Volume I of the Petitions at 18 and Exhibit 27.

The Petitioner multiplied the usage quantities of the inputs used to manufacture and pack narrow woven ribbon by the Taiwanese values based on publicly available data. *See* Volume I of the Petitions, at 25–28 and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibits 105, 106, and 107.

Raw materials (*e.g.*, yarn) are significant inputs used in the production of narrow woven ribbon. The Petitioner determined the consumption of all raw materials and packing materials based on examination and analysis of samples of white single face satin narrow woven ribbon and black single face satin narrow woven ribbon from Taiwan, as well as its own production experience. *See* Volume I of the Petitions at 18, Volume II of the Petitions, at Exhibit 29, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 95. The Petitioner valued all raw materials and packing materials using Taiwanese import statistics as reflected in the WTA data for the POI. The Petitioner excluded from these import statistics imports from countries previously determined by the Department to be NME countries and from India, Indonesia, the Republic of Korea, and Thailand as the Department has previously excluded prices from these countries because they maintain broadly available, non–industry-specific export subsidies. *See* Volume I of the Petitions at 26 and Volume II of the Petitions, at Exhibit 48. Because Taiwanese import statistics report import values in Taiwanese dollars, the Petitioner converted the import values into U.S. dollars using the Department's POI exchange rates. *See* Volume I of the Petitions at 28 and Volume II of the Petitions, at Exhibit 56.

The Petitioner determined labor costs using the labor consumption in hours derived from its own experience. As the Petitioner did not have access to the cost of labor inputs in the production of narrow woven ribbon in Taiwan, it relied on data available from the International Labour Organization's database at *http://laborsta.ilo.org* to determine the average wage rate in Taiwan. *See* Volume I of the Petitions at 34 and Volume II of the Petitions, at Exhibit 49. The Petitioner adjusted Taiwanese labor rates to make them contemporaneous with the POI using Taiwanese wholesale price indices as published by the Directorate General of Budget, Accounting and Statistics, Republic of China. The Petitioner converted the Taiwanese labor rates into U.S. dollars using the Department's POI exchange rates. *See* Volume I of the Petitions at 26, Volume II of the Petitions, at Exhibit 49, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 106.

The Petitioner determined the costs of electricity, water, and natural gas using consumption amounts derived from its own experience. The Petitioner valued electricity and natural gas using the Taiwanese electricity and natural gas rates for the industry reported by the Energy Information Administration at *http://www.eia.doe.gov/emeu/international/*. Because Taiwanese electricity and natural gas rates are reported in U.S. dollars, the Petitioner did not make currency conversions. The Petitioner adjusted the Taiwanese electricity and natural gas rates to make them contemporaneous with the POI using Taiwanese wholesale price indices as published by the Directorate General of Budget, Accounting and Statistics, Republic of China. *See* Volume I of the Petitions at 26; Volume II of the Petitions, at Exhibits 50, 52, and 55, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit

106. The Petitioner valued water using the Taiwanese rates published by Taiwan Water Corporation, which are contemporaneous with the POI. The Petitioner converted the Taiwanese water rates into U.S. dollars using the Department's POI exchange rates. *See* Volume I of the Petitions at 26; Volume II of the Petitions at Exhibit 51, and Supplement to the AD/CVD Petitions, dated July 21, 2009, at C 2.

To calculate factory overhead, SG&A, interest expenses, and a profit rate, the Petitioner relied on financial statements of a Taiwanese producer of textile products, Far Eastern Textile Ltd. *See* Supplement to the AD/CVD Petitions, dated July 21, 2009, at C 3, and Exhibits 103 and 104. *See also* Taiwan Initiation Checklist.

Fair–Value Comparisons

Based on the data provided by the Petitioner, there is reason to believe that imports of narrow woven ribbon from the PRC and Taiwan are being, or are likely to be, sold in the United States at less than fair value. Based on a comparison of EPs and NV calculated in accordance with section 773(c) of the Act, the estimated dumping margins for narrow woven ribbon from the PRC range from 208.80 percent to 231.40 percent. *See* PRC Initiation Checklist. Based on a comparison of EPs and CV calculated in accordance with section 773(a)(4) of the Act, the estimated dumping margins for narrow woven ribbon from Taiwan range from 116.60 percent to 137.20 percent. *See* Taiwan Initiation Checklist.

Initiation of Antidumping Investigations

Based upon the examination of the Petitions on narrow woven ribbon from the PRC and Taiwan, the Department finds that the Petitions meet the requirements of section 732 of the Act. Therefore, we are initiating antidumping duty investigations to determine whether imports of narrow woven ribbon from the PRC and Taiwan are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of this initiation.

Targeted–Dumping Allegations

On December 10, 2008, the Department issued an interim final rule for the purpose of withdrawing 19 CFR 351.414(f) and (g), the regulatory provisions governing the targeted-dumping analysis in antidumping duty investigations, and the corresponding regulation governing the deadline for targeted–dumping allegations, 19 CFR 351.301(d)(5). *See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008). The Department stated that ''{w}ithdrawal will allow the Department to exercise the discretion intended by the statute and, thereby, develop a practice that will allow interested parties to pursue all statutory avenues of relief in this area.'' *See id.* at 74931.

In order to accomplish this objective, if any interested party wishes to make a targeted- dumping allegation in any of these investigations pursuant to section 777A(d)(1)(B) of the Act, such allegations are due no later than 45 days before the scheduled date of the country–specific preliminary determination.

Respondent Selection

The PRC

For this investigation, the Department will request quantity and value information from all known exporters and producers identified with complete contact information in the Petitions. The quantity and value data received from NME exporters/producers will be used as the basis to select the mandatory respondents.

The Department requires that the respondents submit a response to both the quantity and value questionnaire and the separate–rate application by the respective deadlines in order to receive consideration for separate–rate status. *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 73 FR 10221, 10225 (February 26, 2008); *Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China*, 70 FR 21996, 21999 (April 28, 2005). The Department will post the quantity and value questionnaire along with the filing instructions on the Import Administration website at *http://ia.ita.doc.gov/ia–highlights-and–news.html* and a response to the quantity and value questionnaire is due no later than August 19, 2009. Also, the Department will send the quantity and value questionnaire to those PRC companies identified in the Supplement to the AD/CVD Petitions, dated July 21, 2009, at Exhibit 116, and Second Supplemental to the AD/CVD Petitions, dated July 27, 2009, at B1–B4.

Taiwan

For this investigation, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports under the Harmonized Tariff Schedule of the United States (''HTSUS'') numbers 5806.32.1020, 5806.32.1030, 5806.32.1050, and 5806.32.1060, the four HTSUS categories most specific to the subject merchandise, during the POI. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO within five days of publication of this **Federal Register** notice and make our decision regarding respondent selection within 20 days of publication of this notice. The Department invites comments regarding the CBP data and respondent selection within ten days of publication of this **Federal Register** notice.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Instructions for filing such applications may be found on the Department's website at *http://ia.ita.doc.gov/apo*.

Separate Rates

In order to obtain separate–rate status in NME investigations, exporters and producers must submit a separate–rate status application. *See* Policy Bulletin 05.1: Separate–Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non–Market Economy Countries (April 5, 2005) (Separate Rates and Combination Rates Bulletin), available on the Department's website at *http://ia.ita.doc.gov/policy/bull05–1.pdf*. Based on our experience in processing the separate–rate applications in previous antidumping duty investigations, we have modified the application for this investigation to make it more administrable and easier for applicants to complete. *See*, *e.g.*, *Initiation of Antidumping Duty Investigation: Certain New Pneumatic Off–the-Road Tires From the People's Republic of China*, 72 FR 43591, 43594–95 (August 6, 2007). The specific requirements for submitting the separate–rate application in this investigation are outlined in detail in the application itself, which will be available on the Department's website at <http://ia.ita.doc.gov/ia–highlights-and–news.html> on the date of publication of this initiation notice in the **Federal Register**. The separate–rate application will be due 60 days after publication of this initiation notice. For exporters and producers who submit a separate–rate status application and subsequently are

selected as mandatory respondents, these exporters and producers will no longer be eligible for consideration for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents. As noted in the ''Respondent Selection'' section above, the Department requires that respondents submit a response to both the quantity and value questionnaire and the separate–rate application by the respective deadlines in order to receive consideration for separate–rate status. The quantity and value questionnaire will be available on the Department's website at <http://ia.ita.doc.gov/ia–highlights-and–news.html> on the date of the publication of this initiation notice in the **Federal Register**.

Use of Combination Rates in an NME Investigation

The Department will calculate combination rates for certain respondents that are eligible for a separate rate in this investigation. The Separate Rates and Combination Rates Bulletin states:

> {w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non–investigated firms receiving the weighted–average of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash–deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.

See Separate Rates and Combination Rates Bulletin at 6 (emphasis added).

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public versions of the Petitions have been provided to the representatives of the Governments of the PRC and Taiwan. Because of the large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version to the Government of the PRC, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiations, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

The ITC will preliminarily determine, no later than August 24, 2009, whether there is a reasonable indication that imports of narrow woven ribbon from the PRC and Taiwan are materially injuring, or threatening material injury to a U.S. industry. A negative ITC determination with respect to any country will result in the investigation being terminated for that country; otherwise, these investigations will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: July 29, 2009.

Ronald K. Lorentzen,

Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigations

The merchandise subject to the investigations is narrow woven ribbons with woven selvedge, in any length, but with a width (measured at the narrowest span of the ribbon) less than or equal to 12 centimeters, composed of, in whole or in part, man–made fibers (whether artificial or synthetic, including but not limited to nylon, polyester, rayon, polypropylene, and polyethylene teraphthalate), metal threads and/or metalized yarns, or any combination thereof. Narrow woven ribbons subject to the investigations may:

- also include natural or other non–man-made fibers;
- be of any color, style, pattern, or weave construction, including but not limited to single–faced satin, double–faced satin, grosgrain, sheer, taffeta, twill, jacquard, or a combination of two or more colors, styles, patterns, and/or weave constructions;
- have been subjected to, or composed of materials that have been subjected to, various treatments, including but not limited to dyeing, printing, foil stamping, embossing, flocking, coating, and/or sizing;
- have embellishments, including but not limited to appliqué, fringes, embroidery, buttons, glitter, sequins, laminates, and/or adhesive backing;
- have wire and/or monofilament in, on, or along the longitudinal edges of the ribbon;
- have ends of any shape or dimension, including but not limited to straight ends that are perpendicular to the longitudinal edges of the ribbon, tapered ends, flared ends or shaped ends, and the ends of such woven ribbons may or may not be hemmed;
- have longitudinal edges that are straight or of any shape, and the longitudinal edges of such woven ribbon may or may not be parallel to each other;
- consist of such ribbons affixed to like ribbon and/or cut–edge woven ribbon, a configuration also known as an ''ornamental trimming;''
- be wound on spools; attached to a card; hanked (*i.e.*, coiled or bundled); packaged in boxes, trays or bags; or configured as skeins, balls, bateaus or folds; and/or
- be included within a kit or set such as when packaged with other products, including but not limited to gift bags, gift boxes and/or other types of ribbon.

Narrow woven ribbons subject to the investigations include all narrow woven fabrics, tapes, and labels that fall within this written description of the scope of the investigations.

Excluded from the scope of the investigations are the following:

(1) formed bows composed of narrow woven ribbons with woven selvedge;

(2) ''pull–bows'' (*i.e.*, an assemblage of ribbons connected to one another, folded flat and equipped with a means to form such ribbons into the shape of a bow by pulling on a length of material affixed to such assemblage) composed of narrow woven ribbons;

(3) narrow woven ribbons comprised at least 20 percent by weight of elastomeric yarn (*i.e.*, filament yarn, including monofilament, of synthetic textile material, other than textured yarn, which does not break on being extended to three times its original length and which returns, after being extended to twice its original length, within a period of five minutes, to a length not greater than one and a half times its original length as defined in the Harmonized Tariff Schedule of the United States (HTSUS), Section XI, Note 13) or rubber thread;

(4) narrow woven ribbons of a kind used for the manufacture of typewriter or printer ribbons;

(5) narrow woven labels and apparel tapes, cut–to-length or cut–to-shape, having a length (when measured across the longest edge–to-edge span) not exceeding 8 centimeters;

(6) narrow woven ribbons with woven selvedge attached to and forming the handle of a gift bag;

(7) cut–edge narrow woven ribbons formed by cutting broad woven fabric into strips of ribbon, with or without treatments to prevent the longitudinal edges of the ribbon from fraying (such as by merrowing, lamination, sono–bonding, fusing, gumming or waxing), and with or without wire running lengthwise along the longitudinal edges of the ribbon;

(8) narrow woven ribbons comprised at least 85 percent by weight of threads having a denier of 225 or higher;

(9) narrow woven ribbons constructed from pile fabrics (*i.e.*, fabrics with a surface effect formed by tufts or loops of yarn that stand up from the body of the fabric) ;

(10) narrow woven ribbon affixed (including by tying) as a decorative detail to non–subject merchandise, such as a gift bag, gift box, gift tin, greeting card or plush toy, or affixed (including by tying) as a decorative detail to packaging containing non–subject merchandise;

(11) narrow woven ribbon affixed to non–subject merchandise as a working component of such non–subject merchandise, such as where narrow woven ribbon comprises an apparel trimming, book marker, bag cinch, or part of an identity card holder; and

(12) narrow woven ribbon(s) comprising a belt attached to and imported with an item of wearing apparel, whether or not such belt is removable from such item of wearing apparel.

The merchandise subject to the investigations is classifiable under the HTSUS statistical categories 5806.32.1020; 5806.32.1030; 5806.32.1050 and 5806.32.1060. Subject merchandise also may enter under subheadings 5806.31.00; 5806.32.20; 5806.39.20; 5806.39.30; 5808.90.00; 5810.91.00; 5810.99.90; 5903.90.10; 5903.90.25; 5907.00.60; and 5907.00.80 and under statistical categories 5806.32.1080; 5810.92.9080; 5903.90.3090; and 6307.90.9889. The HTSUS statistical categories and subheadings are provided for convenience and customs purposes; however, the written description of the merchandise under investigation is dispositive.

[FR Doc. E9–18732 Filed 8–5–09; 8:45 am]

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DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 31–2009]

Foreign-Trade Zone 54—Clinton County, NY; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by Clinton County, New York, grantee of FTZ 54, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 01/12/09; correction 74 FR 3987, 01/22/09). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR Part 400). It was formally filed on July 31, 2009.

The grantee's proposed service area under the ASF would be Clinton County, New York. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is adjacent to the Champlain Customs and Border Protection port of entry.

FTZ 54 was approved on February 14, 1980 (Board Order 153, 45 FR 12469, 02/26/80), and expanded on: September 23, 1982 (Board Order 196, 47 FR 43012, 09/30/82); May 29, 1996 (Board Order 829, 61 FR 28840, 06/06/96); May 29, 2001 (Board Order 1169, 66 FR 31612, 06/12/01); and November 16, 2001 (Board Order 1199, 66 FR 59235, 11/27/01). The applicant is requesting to include its current sites in the reorganized zone as ''magnet'' sites. The applicant proposes that Site 4 be exempt from ''sunset'' time limits that otherwise apply to sites under the ASF. No usage-driven sites are being proposed at this time. Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 54's authorized subzones.

In accordance with the Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 5, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to October 20, 2009).

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz*. For further information, contact Kathleen Boyce at *Kathleen_Boyce@ita.doc.gov* or 202–482–1346.

Dated: July 31, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–18874 Filed 8–5–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–953]

Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Initiation of Countervailing Duty Investigation

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

DATES: *Effective Date:* August 6, 2009.

FOR FURTHER INFORMATION CONTACT: Robert Copyak, Shelly Atkinson, or Justin Neuman, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–2209, (202) 482–0116, and (202) 482–0486, respectively.

SUPPLEMENTARY INFORMATION:

The Petition

On July 9, 2009, the Department of Commerce (''the Department'') received countervailing duty (''CVD'') and antidumping duty (''AD'') petitions concerning imports of narrow woven ribbons with woven selvedge (''narrow woven ribbons'') from the People's Republic of China (''PRC''). The petitions were filed in proper form by

Berwick Offray LLC and its wholly-owned subsidiary Lion Ribbon Company, Inc. (collectively, ''the Petitioner''), a domestic producer of narrow woven ribbons. *See* ''Petition for Countervailing Duty and Antidumping Duty Investigations of China and an Antidumping Duty Investigation of Taiwan on Imports of Narrow Woven Ribbons with Woven Selvedge'' (''the Petition''). On July 13, 2009, the Department issued a request for additional information and clarification of certain of the Petitioner's subsidy allegations. *See* Letter from Brandon Farlander, Program Manager, AD/CVD Operations, Office 1, to the Petitioner, ''Petition for the Imposition of Countervailing Duties on Imports of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Questions Regarding the Countervailing Duty Allegations,'' dated July 13, 2009. In response to the Department's request, the Petitioner timely filed additional information on July 17, 2009. *See* Supplement to the CVD Petition, dated July 17, 2009. On July 14, 2009, the Department contacted the Petitioner by telephone seeking additional information and clarification regarding the Petition. *See* Memorandum to the File from Matthew Glass, ''Scope Call with the Petitioner,'' dated July 14, 2009. On July 15, 2009, a request seeking clarification regarding the general issues of the Petition was sent to the Petitioner. *See* Letter from Shawn Thompson, Program Manager, AD/CVD Operations, Office 2, to the Petitioner, ''Regarding Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Narrow Woven Ribbons with Woven Selvedge (''NWR'') from the People's Republic of China and Antidumping Duties on Imports of NWR from Taiwan: Supplemental Questions,'' dated July 15, 2009. A second request seeking additional information and clarification regarding the Petition was sent to the Petitioner on July 17, 2009. *See* Letter from Brandon Farlander, Program Manager, AD/CVD Operations, Office 1, to the Petitioner, ''Petition for the Imposition of Countervailing Duties on Imports of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Questions Regarding the Countervailing Duty Allegations,'' dated June 17, 2009. In response to the Department's request, the Petitioner timely filed additional information pertaining to the Petition on July 21, 2009. *See* Supplement to the AD/CVD Petitions, dated July 21, 2009. On July 22, 2009, another request seeking clarification regarding the general issues of the Petition was sent to the Petitioner. *See* Letter from Shawn Thompson, Program Manager, AD/CVD Operations, Office 2, to the Petitioner, ''Regarding Supplement to the Petitions for the Imposition of Antidumping and Countervailing Duties on Imports of Narrow Woven Ribbons with Woven Selvedge (NWR) from the People's Republic of China and Antidumping Duties on Imports of NWR from Taiwan: Additional Questions,'' dated July 22, 2009. On July 23, 2009, and July 24, 2009, the Department contacted the Petitioner by telephone seeking additional information and clarification regarding the Petition. *See* Memorandum to the File from Meredith A.W. Rutherford, ''General Issues Discussion with the Petitioner,'' dated July 23, 2009; *see also* Memorandum to the File from David Layton, Trade Analyst, AD/CVD Operations, Office 1, ''Petition for the Imposition of Countervailing Duties on Imports of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Question Regarding the Countervailing Duty Allegations,'' dated July 24, 2009. Based on the Department's request, the Petitioner timely filed additional information pertaining to the Petition on July 27, 2009. *See* Second Supplement to the AD/CVD Petitions, dated July 27, 2009. On July 28, 2009, the Department again contacted the Petitioner by telephone seeking additional information and clarification regarding certain general issues of the Petition. *See* Memorandum to the File from Meredith A.W. Rutherford, ''Phone Call with the Petitioner,'' dated July 28, 2009, and Memorandum to the File from Elizabeth Eastwood, ''Scope Calls with the Petitioner,'' dated July 29, 2009. Based on the Department's request, the Petitioner timely filed additional information pertaining to the Petition on July 29, 2009. *See* Third Supplement to the AD/CVD Petitions, dated July 29, 2009.

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (''the Act''), the Petitioner alleges that producers/exporters of narrow woven ribbons in the PRC received countervailable subsidies within the meaning of sections 701 and 771(5) of the Act and that imports materially injure, or threaten material injury to, an industry in the United States.

The Department finds that the Petitioner filed this Petition on behalf of the domestic industry because it is an interested party as defined in section 771(9)(C) of the Act, and the Petitioner has demonstrated sufficient industry support with respect to the CVD investigation that it is requesting the Department to initiate (*see* ''Determination of Industry Support for the Petition'' below).

Period of Investigation

The anticipated period of investigation (''POI'') is calendar year 2008. *See* 19 CFR 351.204(b)(2).

Scope of Investigation

The products covered by this investigation are narrow woven ribbons with woven selvedge from the PRC. For a full description of the scope of the investigation, please see the ''Scope of Investigation'' in Appendix I to this notice.

Comments on Scope of Investigation

During our review of the Petition, we discussed the scope with the Petitioner to ensure that it is an accurate reflection of the products for which the domestic industry is seeking relief. Moreover, as discussed in the preamble to the regulations (*See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27323 (May 19, 1997)), we are setting aside a period for interested parties to raise issues regarding product coverage. The Department encourages all interested parties to submit such comments by August 18, 2009, twenty calendar days from the signature of this notice. Comments should be addressed to Import Administration's APO/Dockets Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. The period of scope consultations is intended to provide the Department with ample opportunity to consider all comments and to consult with parties prior to the issuance of the preliminary determinations.

Consultations

Pursuant to section 702(b)(4)(A)(ii) of the Act, the Department held consultations with the Government of the PRC (hereinafter, the GOC) with respect to the Petition on July 24, 2009. *See* Memorandum to the File, ''Countervailing Duty Petition on Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China—Consultations with the Government of China,'' on file in the CRU, Room 1117 of the main Department of Commerce building.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets

this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the industry.

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The International Trade Commission (''ITC''), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product (section 771(10) of the Act), they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law. *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (Ct. Int'l Trade 2001), citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989), *cert. denied* 492 U.S. 919 (1989).

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the Petitioner does not offer a definition of domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that narrow woven ribbons constitute a single domestic like product and we have analyzed industry support in terms of that domestic like product. For a discussion of the domestic like product analysis in this case, *see* Countervailing Duty Investigation Initiation Checklist: Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China (''CVD Initiation Checklist'') at Attachment II (Industry Support), dated concurrently with this notice and on file in the CRU, Room 1117 of the main Department of Commerce building.

In determining whether the Petitioner has standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of Investigation'' in Appendix I. To establish industry support, the Petitioner provided its production of the domestic like product for the year 2008, and compared this to the total estimated production of the domestic like product for the entire domestic industry. *See* Volume I of the Petition, at 7, and Exhibits 2, 4, and 5, Supplement to the AD/CVD Petitions, dated July 21, 2009, at A–9–11, Second Supplement to the AD/CVD Petitions, dated July 27, 2009, at A–1–2 and Exhibit 117, and Third Supplement to the AD/CVD Petitions, dated July 29, 2009, at Attachment II. To estimate 2008 production of the domestic like product, the Petitioner used its own data and industry specific knowledge. The Petitioner calculated total domestic production based on its own production plus estimates from the nine other producers of the domestic like product in the United States. *See id., see also* CVD Initiation Checklist at Attachment II, Industry Support.

Our review of the data provided in the Petition, supplemental submissions, and other information readily available to the Department indicates that the Petitioner has established industry support. First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling). *See* section 702(c)(4)(D) of the Act; *see also* CVD Initiation Checklist at Attachment II. Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product. *See* CVD Initiation Checklist at Attachment II. Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition. Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act. *See id.*

Injury Test

Because the PRC is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from the PRC materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The Petitioner alleges that imports of narrow woven ribbons from the PRC are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the domestic industry producing narrow woven ribbons. In addition, the Petitioner alleges that subsidized imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.

The Petitioner contends that the industry's injured condition is illustrated by reduced market share, underselling and price depressing and suppressing effects, increased import penetration, lost sales and revenue, reduced production, reduced capacity, reduced capacity utilization, reduced shipments, reduced employment, and an overall decline in financial performance. We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation. *See* CVD Initiation Checklist at Attachment III (Analysis of Allegations and Evidence of Material Injury and Causation for the Petition).

Initiation of Countervailing Duty Investigation

Section 702(b) of the Act requires the Department to initiate a CVD proceeding whenever an interested party files a CVD petition on behalf of an industry that: (1) Alleges the elements necessary for an imposition of a duty under section 701(a) of the Act; and (2) is accompanied by information reasonably available to the petitioner supporting the allegations.

The Department has examined the Petition on narrow woven ribbons from the PRC and finds that it complies with the requirements of section 702(b) of the Act. Therefore, in accordance with section 702(b) of the Act, we are initiating a CVD investigation to determine whether producers/exporters of narrow woven ribbons in the PRC receive countervailable subsidies. For a discussion of evidence supporting our initiation determination, *see* CVD Initiation Checklist.

We are including in our investigation the following programs alleged in the Petition to provide countervailable subsidies to producers/exporters of the subject merchandise:

A. Loan Programs
1. Policy Loans to Narrow Woven Ribbon Producers From State-Owned Commercial Banks

B. Grant Programs
2. The State Key Technology Renovation Project Fund
3. Famous Brands Program
4. Export Assistance Grants
5. Export Interest Subsidy Funds for Enterprises Located in Zhejiang Province
6. Technology Grants for Enterprises Located in Zhejiang Province

C. Income and Other Direct Tax Programs
7. Preferential Tax Policies for Enterprises with Foreign Investment (''Two Free Three Half'') Program
8. Tax Subsidies to FIEs in Specially Designated Areas
9. Preferential Tax Policies for Export-Oriented FIEs
10. Corporate Income Tax Refund Program for Reinvestment of FIE Profits in Export-Oriented Enterprises
11. Local Income Tax Exemption and Reduction Programs for ''Productive'' FIEs
12. Tax Program for High or New Technology FIEs
13. Preferential Tax Policies for Township Enterprises
14. Preferential Tax Policies for Research and Development for FIEs
15. Tax Benefits for FIEs in Encouraged Industries that Purchase Domestic Equipment

D. Indirect Tax and Tariff Exemption Programs
16. Import Tariff and VAT Exemptions for FIEs Using Imported Technology and Equipment
17. Import Tariff and VAT Exemptions for Certain Domestic Enterprises Using Imported Technology and Equipment
18. VAT Rebate for FIE Purchases of Domestically Produced Equipment

For further information explaining why the Department is investigating these programs, *see* CVD Initiation Checklist.

We are not including in our investigation the following programs alleged to benefit producers/exporters of the subject merchandise in the PRC:

1. Loan Guarantees to Narrow Woven Ribbon Producers from State-Owned Commercial Banks
2. Export Loans
3. Loan Forgiveness
4. Loan Interest Forgiveness
5. Grants for High-Technology Equipment
6. Technology Development Grants for Enterprises Located in Wenzhou Municipality
7. Grants to Loss-Making SOEs
8. Provision of Land Use Rights to SOEs for LTAR
9. Provision of Land Use Rights for LTAR in Certain Geographical Regions
10. Provision of Yarn for LTAR

For further information explaining why the Department is not initiating an investigation of these programs, *see* CVD Initiation Checklist.

Respondent Selection

For this investigation, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports under HTSUS numbers 5806.32.1020, 5806.32.1030, 5806.32.1050, and 5806.32.1060, the four HTSUS categories most specific to the subject merchandise, during the POI. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties with access to information protected by APO within five days of the announcement of the initiation of this investigation. Interested parties may submit comments regarding the CBP data and respondent selection within seven calendar days of publication of this notice. We intend to make our decision regarding respondent selection within 20 days of publication of this notice. Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Instructions for filing such applications may be found on the Department's Web site at *http://ia.ita.doc.gov/apo*.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the representatives of the GOC. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by the delivery of the public version to the GOC, consistent with 19 CFR 351.203(c)(2).

ITC Notification

We have notified the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 25 days after the date on which it receives notice of the initiation, whether there is a reasonable indication that imports of subsidized narrow woven ribbons from the PRC materially injure, or threaten material injury to, a U.S. industry. *See* section 703(a)(2) of the Act. A negative ITC determination will result in the investigation being terminated; *see* section 703(a)(1) of the Act. Otherwise, the investigation will proceed according to statutory and regulatory time limits.

This notice is issued and published pursuant to section 777(i) of the Act.

Dated: July 29, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I

Scope of the Investigation

The merchandise subject to the investigation is narrow woven ribbons with woven selvedge, in any length, but with a width (measured at the narrowest span of the ribbon) less than or equal to 12 centimeters, composed of, in whole or in part, man-made fibers (whether artificial or synthetic, including but not limited to nylon, polyester, rayon, polypropylene, and polyethylene teraphthalate), metal threads and/or metalized yarns, or any combination thereof. Narrow woven ribbons subject to the investigation may:

- Also include natural or other non-man-made fibers;
- Be of any color, style, pattern, or weave construction, including but not limited to single-faced satin, double-faced satin, grosgrain, sheer, taffeta, twill, jacquard, or a combination of two or more colors, styles, patterns, and/or weave constructions;
- Have been subjected to, or composed of materials that have been subjected to, various treatments, including but not limited to dyeing, printing, foil stamping, embossing, flocking, coating, and/or sizing;
- Have embellishments, including but not limited to appliqué, fringes, embroidery, buttons, glitter, sequins, laminates, and/or adhesive backing;
- Have wire and/or monofilament in, on, or along the longitudinal edges of the ribbon;
- Have ends of any shape or dimension, including but not limited to straight ends that are perpendicular to the longitudinal edges of

the ribbon, tapered ends, flared ends or shaped ends, and the ends of such woven ribbons may or may not be hemmed;

• Have longitudinal edges that are straight or of any shape, and the longitudinal edges of such woven ribbon may or may not be parallel to each other;

• Consist of such ribbons affixed to like ribbon and/or cut-edge woven ribbon, a configuration also known as an ''ornamental trimming;''

• Be wound on spools; attached to a card; hanked (*i.e.*, coiled or bundled); packaged in boxes, trays or bags; or configured as skeins, balls, bateaus or folds; and/or

• Be included within a kit or set such as when packaged with other products, including but not limited to gift bags, gift boxes and/or other types of ribbon.

Narrow woven ribbons subject to the investigation include all narrow woven fabrics, tapes, and labels that fall within this written description of the scope of this investigation.

Excluded from the scope of the investigation are the following:

(1) Formed bows composed of narrow woven ribbons with woven selvedge;

(2) ''Pull-bows'' (*i.e.*, an assemblage of ribbons connected to one another, folded flat and equipped with a means to form such ribbons into the shape of a bow by pulling on a length of material affixed to such assemblage) composed of narrow woven ribbons;

(3) Narrow woven ribbons comprised at least 20 percent by weight of elastomeric yarn (*i.e.*, filament yarn, including monofilament, of synthetic textile material, other than textured yarn, which does not break on being extended to three times its original length and which returns, after being extended to twice its original length, within a period of five minutes, to a length not greater than one and a half times its original length as defined in the Harmonized Tariff Schedule of the United States (HTSUS), Section XI, Note 13) or rubber thread;

(4) Narrow woven ribbons of a kind used for the manufacture of typewriter or printer ribbons;

(5) Narrow woven labels and apparel tapes, cut-to-length or cut-to-shape, having a length (when measured across the longest edge-to-edge span) not exceeding 8 centimeters;

(6) Narrow woven ribbons with woven selvedge attached to and forming the handle of a gift bag;

(7) Cut-edge narrow woven ribbons formed by cutting broad woven fabric into strips of ribbon, with or without treatments to prevent the longitudinal edges of the ribbon from fraying (such as by merrowing, lamination, sono-bonding, fusing, gumming or waxing), and with or without wire running lengthwise along the longitudinal edges of the ribbon;

(8) Narrow woven ribbons comprised at least 85 percent by weight of threads having a denier of 225 or higher;

(9) Narrow woven ribbons constructed from pile fabrics (*i.e.*, fabrics with a surface effect formed by tufts or loops of yarn that stand up from the body of the fabric);

(10) Narrow woven ribbon affixed (including by tying) as a decorative detail to non-subject merchandise, such as a gift bag, gift box, gift tin, greeting card or plush toy, or affixed (including by tying) as a decorative detail to packaging containing non-subject merchandise;

(11) Narrow woven ribbon affixed to non-subject merchandise as a working component of such non-subject merchandise, such as where narrow woven ribbon comprises an apparel trimming, book marker, bag cinch, or part of an identity card holder; and

(12) Narrow woven ribbon(s) comprising a belt attached to and imported with an item of wearing apparel, whether or not such belt is removable from such item of wearing apparel.

The merchandise subject to this investigation is classifiable under the HTSUS statistical categories 5806.32.1020; 5806.32.1030; 5806.32.1050 and 5806.32.1060. Subject merchandise also may enter under subheadings 5806.31.00; 5806.32.20; 5806.39.20; 5806.39.30; 5808.90.00; 5810.91.00; 5810.99.90; 5903.90.10; 5903.90.25; 5907.00.60; and 5907.00.80 and under statistical categories 5806.32.1080; 5810.92.9080; 5903.90.3090; and 6307.90.9889. The HTSUS statistical categories and subheadings are provided for convenience and customs purposes; however, the written description of the merchandise under investigation is dispositive.

[FR Doc. E9–18892 Filed 8–5–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XQ79

New England 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 New England Fishery Management Council's (NEFMC) Scientific and Statistical Committee (SSC) will host an Ecosystem Based Fisheries Management (EBFM) Workshop for Council members and staff, Plan Development Team members, interested parties and members of the public. The intent of this meeting is to develop a ''blueprint'' that would inform the Council's efforts to develop an EBFM approach or plan for NEFMC-managed species.

DATES: This meeting will be held on August 26 and August 27, 2009. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Marriott Hotel, 25 America's Cup Avenue, Newport, RI 02840; telephone: (401) 849–1000; fax: (401) 849–3422.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The meeting will begin at 9 a.m. on Wednesday, August 26, 2009 and recess at 5 p.m., or when business is complete; reconvene at 9 a.m. on Thursday, August 27, 2009 and recess at 3 p.m., or when business is complete.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at 978–465–0492, at least 5 days prior to the meeting date.

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

Dated: July 31, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–18745 Filed 8–5–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XQ78

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene the SEDAR Red Snapper Update Workshop (SEDAR).

DATES: The meeting will convene at 1 p.m. on Monday, August 24, 2009 and conclude no later than 1 p.m. on Friday, August 28, 2009.

ADDRESSES: The meeting will be held at the NMFS, 75 Virginia Beach Drive, Miami, FL 33149.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamic Statistician, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION: The Gulf of Mexico Fishery Management Council (Council) will convene the SEDAR Red Snapper Update Workshop (SEDAR) to conduct an update assessment of the SEDAR 7 red snapper benchmark stock assessment. An update assessment is a single workshop that utilizes the assessment models and input parameters from the previous full SEDAR benchmark assessment, with minor modifications if any, and updated data streams to update the results of the previous full assessment. The previous SEDAR 7 red snapper benchmark assessment was completed in 2004 with supplemental analyses in 2005. That assessment concluded that, as of 2003 (the final year of available catch data), the red snapper stock was overfished and was undergoing overfishing. In addition to updating the data streams previously used, the update assessment workshop will include a discussion on age distribution, growth and density dependent mortality of juvenile red snapper, and composition and changes of red snapper in shrimp trawl bycatch. The workshop will also include a review of the data inputs with respect to life history, indices of abundance, commercial and recreational fisheries statistics, and fishery independent data.

A copy of the agenda and related materials can be obtained by calling the Council office at (813) 348–1630.

Although other non-emergency issues not on the agendas may come before the SEDAR 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 this meeting. Actions of the SEDAR will be restricted to those issues specifically identified in the agendas 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 action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) 5 working days prior to the meeting.

Dated: July 31, 2009.

Tracey L. Thompson,

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

[FR Doc. E9–18744 Filed 8–5–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Technical Advisory Committee will meet on August 13, 2009, 10 a.m., Herbert C. Hoover Building, Room 3884, 14th Street between Constitution & Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials and related technology.

Agenda

Open Session

1. Opening Remarks and Introduction.
2. Presentation on recently mandated changes to the interagency Commodity Jurisdiction review process.
3. Report on recent changes to the Commerce Control List based on Australia Group Regime list changes.
4. Report of Composite Working group and ECCN review subgroup.
5. New business.
6. Public comments from teleconference and physical attendees.
7. Closed session to follow.

Closed Session

8. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than August 6, 2009.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the materials should be forwarded prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 1, 2008, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended, that the portion of the meeting dealing with matters the premature disclosure of which would likely frustrate the implementation of a proposed agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: July 31, 2009.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. E9–18846 Filed 8–5–09; 8:45 am]

BILLING CODE 3510–JT–P

COMMODITY FUTURES TRADING COMMISSION

RIN 3038–AC

Determination of Appropriateness of the Supervision by the Bundesanstalt für Finanzdienstleistungaufsicht (BaFin), in Conjunction With Deutsche Bundesbank (Bundesbank), Both of the Federal Republic of Germany, With Respect to the Clearing Activities of Eurex Clearing AG (Eurex)

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice and Order.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is issuing an order, pursuant to Section 409(b)(3) of FDICIA, stating that the supervision provided by BaFin, in conjunction with the Bundesbank, with respect to the clearing activities of Eurex satisfies appropriate standards (the Order). The Order will permit Eurex to operate a multilateral clearing organization (MCO) in the United States for any over-the-counter (OTC) derivative instrument.

DATES: *Effective Date:* July 31, 2009.

FOR FURTHER INFORMATION CONTACT: Robert B. Wasserman, Associate Director, (202) 418–5092, *rwasserman@cftc.gov*, or Nancy Schnabel, Attorney-Advisor, (202) 418–5334, *nschnabel@cftc.gov*, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION: Section 409(a) of FDICIA provides that, in order to operate an MCO [1] in the United States

[1] Section 408(1) of FDICIA (12 U.S.C. 4421(1)) defines MCO to mean ''a system utilized by more than [two] participants in which the bilateral credit exposures of participants arising from the

Continued

for an OTC derivative instrument,[2] a clearing organization must meet one of several alternative requirements.[3] Section 409(b)(3) of FDICIA sets forth one such alternative.[4] It states that a clearing organization will qualify to operate such an MCO, if such clearing organization is supervised by a foreign financial regulator that the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, or the CFTC, as applicable, has determined satisfies appropriate standards.[5]

Eurex, a central counterparty licensed by BaFin, has requested that the CFTC determine that the supervision provided by BaFin, in conjunction with the Bundesbank,[6] with respect to Eurex's clearing activities, satisfies appropriate standards in accordance with Section 409(b)(3) of FDICIA.[7] Such a determination would permit Eurex to operate an MCO in the United States for any OTC derivative instrument.[8]

In reviewing the request from Eurex, the CFTC primarily considered three factors. First, the CFTC considered whether the German statutory and regulatory regime applicable to Eurex clearing activities substantially corresponds with the Commodity Exchange Act (the CEA) including the core principles applicable to a derivatives clearing organization (DCO), and the regulations promulgated thereunder (the Regulations).[9] In Germany, a central counterparty such as Eurex, is regulated as a ''credit institution'' conducting ''banking business.'' [10] Accordingly, the CFTC reviewed translated versions of the following documents, among others: (i) The *Gesetz über das Kreditwesen* (*i.e.*, the German Banking Act); (ii) the guidance that BaFin or Bundesbank provided on compliance therewith, including (A) ''Minimum Requirements for Risk Management'' (Circular 5/2007), (B) Auditor's Report Regulation,[11] (C) Principle I (Concerning the Capital of Institutions), and (D) Principle II (Concerning Own Funds and the Liquidity of Institutions); and (iii) the *Bundesgesetzblatt* (*i.e.*, the German Insolvency Statute); and (iv) *Gesetz gegen Wettbewerbsbeschränkunge* (*i.e.*, the German Act Against Restraints of Competition). The CFTC also reviewed an analysis provided by Eurex regarding the correspondence between the German statutory and regulatory regime and the core principles applicable to a DCO.

Second, the CFTC considered whether the supervision provided by BaFin, in conjunction with Bundesbank, with respect to Eurex's clearing activities, substantially corresponds with the supervision provided by the CFTC with respect to the activities of a DCO. Accordingly, the CFTC reviewed the manner in which BaFin, with the assistance of the Bundesbank, conducts supervision of a credit institution (including a central counterparty such as Eurex), both on an annual basis and through special reviews.[12] The CFTC also reviewed the manner in which BaFin, as well as the Bundesbank, rely on external auditors of a credit institution in conducting certain aspects of such supervision, including the control which BaFin, as well as Bundesbank, exerts over such external auditors.

Third, the CFTC considered whether the supervision provided by BaFin, with the assistance of the Bundesbank, substantially comports with the *Principles and Objectives of Securities Regulation* (the IOSCO Principles), as developed by the International Organization of Securities Commissions (IOSCO).

In reviewing the request from Eurex, the CFTC also considered additional facts, such as (i) the risk management procedures implemented by Eurex with respect to the clearing of credit default swaps, and (ii) existing arrangements with BaFin to exchange information regarding Eurex.[13]

As a matter of courtesy, the CFTC invited the other federal financial regulators listed in Section 409(b)(3) of FDICIA to comment on the Application. The CFTC also invited the public to comment on the Application, by posting the Application on its Web site on May 13, 2009. The CFTC received no comments.

Based on its review, the CFTC has determined, pursuant to Section 409(b)(3) of FDICIA, that the supervision provided by BaFin, in conjunction with the Bundesbank, with respect to the clearing activities of Eurex satisfies appropriate standards. Accordingly, the CFTC has issued this Order. Any material changes or omissions in the facts and circumstances upon which this Order is based might require the CFTC to reconsider this matter.

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transactions cleared are effectively eliminated and replaced by a system of guarantees, insurance, or mutualized risk of loss.''

[2] Section 408(2) of FDICIA (12 U.S.C. 4421(2)) defines ''OTC derivative instrument.''

[3] 12 U.S.C. 4422(a).

[4] 12 U.S.C. 4422(b)(3).

[5] Section 409(b)(3) of FDICIA (12 U.S.C. 4422(b)(3)). The CFTC has issued three previous orders, pursuant to Section 409(b)(3) of FDICIA, determining that the supervision of a particular MCO by a foreign financial regulator met appropriate standards. The foreign financial regulators involved were (i) the Norwegian Banking, Insurance and Securities Commission, (ii) the Alberta (Canada) Securities Commission, and (iii) the United Kingdom Financial Services Authority. *See* 67 FR 2419 (January 17, 2002), 71 FR 10958 (March 3, 2006), and 73 FR 44706 (July 31, 2008), respectively.

[6] The Bundesbank is the central bank of the Federal Republic of Germany. *See http://www.bundesbank.de/aufgaben/aufgaben.en.php.*

[7] *See* Letter, dated March 27, 2009, from Paul Architzel of Alston & Bird LLP, submitted on behalf of Eurex, to David A. Stawick, Secretary of the CFTC, with enclosure and appendices thereto (collectively, the Application).

BaFin is authorized under the German Banking Act to (i) supervise the operation of a ''credit institution'' conducting ''banking business'' (including a central counterparty) domiciled in Germany, and to (ii) enforce compliance with applicable laws, rules and regulations. Because clearing comprises ''banking business'' under the German Banking Act, BaFin has the authority to regulate any entity engaged in the clearing of OTC derivative instruments. BaFin undertakes such supervision with the assistance of Bundesbank. *See* Sections 6 and 7 of the German Banking Act.

[8] Currently, Eurex intends to clear as an MCO (i) OTC derivative instruments that share common terms and conditions with commodity contracts that are listed on the Eurex Deutschland Exchange, and (ii) credit default swaps.

[9] *See* Section 5b(c)(2) of the CEA (7 U.S.C. 7a–1(c)(2)(A)–(N)) and Appendix A to Part 39 of the Regulations (17 CFR pt. 39, app. A).

Section 409(b)(3) of FDICIA (12 U.S.C. 4422(b)(3)) does not reference the supervision of the foreign financial regulator over trading, and the CFTC has accordingly not reviewed BaFin or Bundesbank supervision of trading in considering the Eurex request.

[10] *See* Attachment to the Application entitled, ''Permit according to Section 32 of the Banking Act, issued by BaFin to Eurex as of December 18, 2006 (GZ: WA 22–K 5000–10119203/2006).''

[11] The full title of the Auditor's Report Regulation is ''Regulation, as of December 17, 1998, governing the auditing of the annual accounts and interim reports of credit institutions and financial services institutions and auditing in accordance with section 12(1) sentence 3 of the Act on Investment Companies as well as the reports to be drawn up on these.''

[12] The division of responsibilities between BaFin and the Bundesbank may be found in the Supervision Directive. *See* Attachment to the Application entitled, ''Directive for Implementation and Quality Assurance of the Current Supervision of the Credit and Financial Service Institutions by the Deutsche Bundesbank.''

[13] *See* Memorandum of Understanding, dated October 17, 1997, between the Commission and the German *Bundesaufsichtsamt für den Wertpapierhandel* (*i.e.*, the predecessor of BaFin) Concerning Consultation and Cooperation in the Administration and Enforcement of Futures Laws (the Memorandum of Understanding), and the Side Letter Relating to the Memorandum of Understanding, dated July 28, 2009 between the Commission and BaFin.

BaFin is also a signatory of the multilateral Declaration on Cooperation and Supervision of International Futures Exchanges and Clearing Organizations, and the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.

Issued in Washington, DC, on July 31, 2009.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E9–18854 Filed 8–5–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

Office of the Secretary

List of Institutions of Higher Education Ineligible for Federal Funds

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: This document is published to identify institutions of higher education that are ineligible for contracts and grants by reason of a determination by the Secretary of Defense that the institution prohibits or in effect prevents military recruiter access to the campus, students on campus or student directory information. It also implements the requirements set forth in section 983 of title 10, United States Code, and 32 CFR part 216. The institutions of higher education so identified are:

Vermont Law School, South Royalton, Vermont.

William Mitchell College of Law, St. Paul, Minnesota.

ADDRESSES: Director for Accession Policy, Office of the Under Secretary of Defense for Personnel and Readiness, 4000 Defense Pentagon, Washington, DC 20301–4000.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel Rose Jourdan, (703) 695–5529.

Dated: July 29, 2009.

Patricia L. Toppings,

OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. E9–18827 Filed 8–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Advisory Council on Dependents' Education

AGENCY: Department of Defense Education Activity (DoDEA), DoD.

ACTION: Notice of open meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting of the Advisory Council on Dependents' Education will take place:

DATES: Wednesday, October 14, 2009, 8 a.m. to 5 p.m. Eastern Daylight Standard Time.

ADDRESSES: DoDEA Headquarters, 4040 N. Fairfax Drive, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Mr. Leesa Rompre, at (703) 588–3128, or at *Leesa.Rompre@hq.dodea.edu.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: Recommend to the Director, DoDEA, general policies for the operation of the Department of Defense Dependents Schools (DoDDS); to provide the Director with information about effective educational programs and practices that should be considered by DoDDS; and to perform other tasks as may be required by the Secretary of Defense.

Agenda: The meeting agenda will be the current operational qualities of schools, the continuous improvement processes, and other educational matters.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165 and the availability of space, this meeting is open to the public. Seating is on a first-come basis. Appropriate government issued identification will be required to enter the meeting facility, which is a U.S. Military managed facility.

Committee's Point of Contact: Ms. Leesa Rompre, tel. (703) 588–3128, 4040 North Fairfax Drive, Arlington, VA 22203, e-mail: *Leesa.Rompre@hq.dodea.edu.*

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Advisory Council on Dependents' Education about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of the planned meeting of the Advisory Council on Dependents' Education.

All written statements shall be submitted to the Designated Federal Officer for the Advisory Council on Dependents' Education and this individual will ensure that the written statements are provided to the membership for their consideration. For the next meeting of the Advisory Council on Dependents' Education, Mr. Charles Toth, telephone (703) 588–3105, 4040 North Fairfax Drive, Arlington, VA 22203; e-mail: *Charlie.Toth@hq.dodea.edu*, will be acting in the capacity of the Designated Federal Officer for this committee.

Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed above at least fourteen calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the Advisory Council on Dependents' Education until its next meeting.

The Designated Federal Officer will review all timely submissions with the Advisory Council on Dependents' Education Chairpersons and ensure they are provided to all members of the Advisory Council on Dependents' Education before the meeting that is the subject of this notice.

Oral Statements by the Public to the Membership: Pursuant to 41 CFR 102–3.140(d), time will be allotted for public comments to the Advisory Council on Dependents' Education. Individual comments will be limited to a maximum of five minutes duration. The total time allotted for public comments will not exceed thirty minutes.

Dated: July 28, 2009.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–18825 Filed 8–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Strategic Environmental Research and Development Program, Scientific Advisory Board

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: This notice is published in accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463). The topic of the meeting on September 9–11, 2009 is to review new start research and development projects requesting Strategic Environmental Research and Development Program funds in excess of $1M. This meeting is open to the public. Any interested person may attend, appear before, or file statements with the Scientific Advisory Board at the time and in the manner permitted by the Board.

DATES: Wednesday, September 9, 2009 from 9 a.m. to 5:30 p.m., Thursday, September 10, 2009 from 9 a.m. to 5 p.m., and Friday, September 11, 2009 from 8:30 a.m. to 12 p.m.

ADDRESSES: SERDP Office Conference Center, 901 North Stuart Street, Suite 804, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Bunger, SERDP Office, 901 North Stuart Street, Suite 303, Arlington, VA or by telephone at (703) 696–2126.

Dated: July 31, 2009.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–18829 Filed 8–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Task Force on Sexual Assault in the Military Services

AGENCY: DoD, Office of the Assistant Secretary of Defense (Personnel and Readiness).

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meetings of the Defense Task Force on Sexual Assault in the Military Services (hereafter referred to as the Task Force) will take place:

DATES: Tuesday, September 1; Wednesday, September 2; and Thursday, September 3, 2009; 8 a.m. to 4:30 p.m. Eastern Daylight Time (hereafter referred to as EDT).

ADDRESSES: Embassy Suites Hotel, 1900 Diagonal Road, Alexandria, Virginia 22314.

FOR FURTHER INFORMATION CONTACT: Michael Molnar, Deputy to the Executive Director; 2850 Eisenhower Avenue, Suite 100, Alexandria, Virginia 22314; phone (888) 325–6640; fax (703) 325–6710; *michael.molnar@wso.whs.mil.*

SUPPLEMENTARY INFORMATION:

Purpose: Purpose of the meeting is to obtain and discuss information on the Task Force's congressionally mandated task to examine matters related to sexual assault in the Military Services through briefings from, and discussion with, Task Force staff, subject-matter experts, document review, and preparation of the Task Force report.

Agenda

Tuesday, September 1, 2009

8 a.m.–8:05 a.m. Welcome, Administrative Remarks.
8:05 a.m.–8:10 a.m. Opening Remarks.
8:10 a.m.–9:30 a.m. Content Discussion and Writing of the Final Report.
9:30 a.m.–9:45 a.m. Break.
9:45 a.m.–12 p.m. Content Discussion and Writing of the Final Report.
12 p.m.–1 p.m. Noon Meal.
1 p.m.–2:30 p.m. Content Discussion and Writing of the Final Report.
2:30 p.m.–2:45 p.m. Break.
2:45 p.m.–4:25 p.m. Content Discussion and Writing of the Final Report.
4:25 p.m.–4:30 p.m. Wrap Up.

Wednesday, September 2, 2009

8 a.m.–8:05 a.m. Welcome, Administrative Remarks.
8:05 a.m.–8:10 a.m. Opening Remarks.
8:10 a.m.–9:30 a.m. Content Discussion and Writing of the Final Report.
9:30 a.m.–9:45 a.m. Break.
9:45 a.m.–12:00 p.m. Content Discussion and Writing of the Final Report.
12 p.m.–1 p.m. Noon Meal.
1 p.m.–2:30 p.m. Content Discussion and Writing of the Final Report.
2:30 p.m.–2:45 p.m. Break.
2:45 p.m.–4:25 p.m. Content Discussion and Writing of the Final Report.
4:25 p.m.–4:30 p.m. Wrap Up.

Thursday, September 3, 2009

8 a.m.–8:05 a.m. Welcome, Administrative Remarks.
8:05 a.m.–8:10 a.m. Opening Remarks.
8:10 a.m.–9:30 a.m. Content Discussion and Writing of the Final Report.
9:30 a.m.–9:45 a.m. Break.
9:45 a.m.–12 p.m. Content Discussion and Writing of the Final Report.
12 p.m.–1 p.m. Noon Meal.
1 p.m.–2:30 p.m. Content Discussion and Writing of the Final Report.
2:30 p.m.–2:45 p.m. Break.
2:45 p.m.–4:25 p.m. Content Discussion and Writing of the Final Report.
4:25 p.m.–4:30 p.m. Wrap Up.

The public can view meeting updates at *http://www.dtic.mil/dtfsams.*

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis.

Committee's Designated Federal Officer: Colonel Cora M. Jackson-Chandler; 2850 Eisenhower Avenue, Suite 100, Alexandria, Virginia 22314; phone (888) 325–6640; fax (703) 325–6710; *cora.chandler@wso.whs.mil.*

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a) (3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the Defense Task Force on Sexual Assault in the Military Services about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the Defense Task Force on Sexual Assault in the Military Services.

All written statements shall be submitted to the Designated Federal Officer for the Defense Task Force on Sexual Assault in the Military Services, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Designated Federal Officer is provided in this notice or can be obtained from the GSA's FACA Database: *https://www.fido.gov/facadatabase/public.asp.*

Written statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the listed address above no later than 7 a.m., EDT, Wednesday, August 26, 2009. Written statements received after this date may not be provided to, or considered by, the Defense Task Force on Sexual Assault in the Military Services until its next meeting.

The Designated Federal Officer will review all timely submissions with the Defense Task Force on Sexual Assault in the Military Services Co-Chairs and ensure they are provided to all members of the Defense Task Force on Sexual Assault in the Military Services before the meeting that is the subject of this notice.

Dated: July 30, 2009.

Patricia L. Toppings,

OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. E9–18828 Filed 8–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Defense Policy Board Advisory Committee

AGENCY: Department of Defense, Defense Policy Board Advisory Committee.

ACTION: Notice.

SUMMARY: The Defense Policy Board Advisory Committee will meet in closed session on September 9, 2009 from 8 a.m. until 6 p.m. and on September 10, 2009 from 8 a.m. until 10:30 a.m. at the Pentagon.

The purpose of the meeting is to provide the Secretary of Defense, Deputy Secretary of Defense and Under Secretary of Defense for Policy with independent, informed advice on major matters of defense policy. The Board will hold classified discussions on national security matters.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law 92–463, as amended [5 U.S.C. App II (1982)], it has been determined that this meeting concerns matters listed in 5 U.S.C. 552B (c)(1)(1982), and that accordingly this meeting will be closed to the public.

FOR FURTHER INFORMATION CONTACT: Ann Hansen, (703) 571–9232.

Dated: July 30, 2009.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–18826 Filed 8–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Deauthorization of Water Resources Projects

AGENCY: Army Corps of Engineers, DoD.

ACTION: Notice of project deauthorizations; correction.

SUMMARY: The U.S. Army Corps of Engineers published a document in the **Federal Register** of July 2, 2009, listing water resources projects deauthorized on March 29, 2009. The document incorrectly included the Baltimore Harbor and Channels, MD & VA (50-ft Deepening) project.

FOR FURTHER INFORMATION CONTACT: Ms. Jitka Braden, 202–761–8816

Correction

In the **Federal Register** of July 2, 2009, in FR Doc. E9–15663, on page 31714, correct the list of ''Projects Deauthorized on 29 March 2009 Under Section 1001(B)(2) WRDA 1986, as Amended'', by deleting the Baltimore Harbor and Channels, MD & VA (50-ft Deepening) project from this list. The Baltimore Harbor and Channels, MD & VA, 50-ft Deepening project remains authorized.

Dated: July 30, 2009.

Approved by:

Patricia Rivers,

Chief, Programs Integration Division, Directorate of Military Programs.

[FR Doc. E9–18738 Filed 8–5–09; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare a Supplemental Environmental Impact Statement (SEIS) to the Final EIS for the Implementation of the Base Realignment and Closure (BRAC) 2005 Decisions and Related Actions at Eglin Air Force Base (AFB), FL

AGENCY: U.S. Air Force.

ACTION: Notice of Intent.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended (42 United States Code 4321, *et seq.*), the Council on Environmental Quality Regulations for implementing procedural provisions of NEPA (40 Code of Federal Regulations (CFR) Parts 1500–1508), and Air Force policy and procedures (32 CFR Part 989), the Air Force is issuing this notice to advise the public of its intent to prepare a Supplemental Environmental Impact Statement (SEIS) evaluating potential environmental impacts associated with implementation of a portion of the 2005 BRAC Commission's recommendations and related actions for Eglin AFB, FL.

The Air Force ''*Record of Decision, Implementation of Base Realignment and Closure (BRAC) 2005 Decisions for the Joint Strike Fighter (JSF) Initial Joint Training Site (IJTS), Eglin AFB, Florida,''* dated February 5, 2009, (FR Vol 74, No 34/February 23, 2009) (ROD) addressed the JSF IJTS, and resulted in a decision to implement a portion of the Final Environmental Impact Statement (FEIS) Alternative 1, that included the beddown of 59 F–35 Primary Assigned Aircraft (PAA), associated cantonment construction, and limited flight training operations. The ROD also determined that the intent of the National Environmental Policy Act (NEPA) would be furthered by accomplishing the SEIS, the scope of which is directed by the ROD.

The Air Force goal for the SEIS is to analyze the potential beddown of the 107 F–35 PAA discussed in the FEIS (Chap. 2, *et al.*) at Eglin AFB. Additional analysis of how to beddown the 59 F–35 PAA identified in the ROD and the consequences and potential mitigations associated with the beddown of up to 48 additional F–35 aircraft are the subjects of this SEIS, which is anticipated to be completed on or about September 2010. Where the maximum supportable number of F–35 aircraft may ultimately beddown on the Eglin Reservation, how they might be operated, and the degree to which other mitigation measures are possible are all subjects to be addressed in the SEIS. The Air Force intends to analyze a range of alternatives that will, among other things, maximize the number of flight training operations able to be conducted at Eglin AFB, preserve restricted airspace at Eglin AFB to the greatest extent possible, and consider future use of Eglin AFB as a training facility for the F–35.

The temporary operational limitations imposed in the ROD on F–35 flight training activities to avoid and minimize noise impacts will remain in place until the SEIS has been completed and the Air Force has decided how best to proceed.

The Air Force will conduct scoping meetings to solicit public input and help identify issues to be addressed in the SEIS. Oral and written comments presented at the public meetings, as well as written comments received by the Air Force during this scoping period and through public comment opportunities in the SEIS process, will be considered in the preparation of the SEIS and will be made a part of the administrative record.

Scoping meetings will be held as follows:

Date	City	Location	Meeting time
August 24, 2009	Crestview	Crestview Community Center, 1446 Commerce Center, Crestview, Florida 32539.	5:30 to 7:30 p.m.
August 25, 2009	Navarre	Days Inn and Suites, Navarre Conference Center, 8700 Navarre Parkway, Navarre, Florida 32566.	5:30 to 7:30 p.m.
August 26, 2009	Niceville	Northwest Florida State College (Niceville Campus), 100 College Blvd. E, Niceville, Florida 32578.	5:30 to 7:30 p.m.

Date	City	Location	Meeting time
August 27, 2009	Valparaiso	First Baptist Church of Valparaiso Fellowship Hall, 444 Valparaiso Parkway, Valparaiso, Florida 32580.	5:30 to 7:30 p.m.

Point of Contact: Please direct any written comments or requests for information to Mr. Michael Spaits, Public Affairs, AAC/EM–PAV, Eglin AFB, FL 32542–5000 (PH: 850–882–2878; *mike.spaits@eglin.af.mil*). Handicap assistance and translation service at the public meetings are available in advance through Mr. Spaits.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E9–18814 Filed 8–5–09; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; AmberWave Systems Corporation

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to AmberWave Systems Corporation, a revocable, nonassignable, exclusive license to practice in the field of use of substrates for optoelectronic devices, radio frequency amplifiers and power transistors; and of optoelectronic devices in the United States, the Government-owned inventions described in U.S. Patent No. 6,323,108: Fabrication of Ultra-Thin Bonded Semiconductor Layers, Navy Case No. 78,980.//U.S. Patent No. 6,328,796: Single Crystal Material on Non-Single Crystalline Substrate, Navy Case No. 78,978.//U.S. Patent No. 6,497,763: Electronic Device with Composite Substrate, Navy Case No. 82,672.//U.S. Patent No. 6,593,212: Method for Making Electro-Optical Devices Using a Hydrogen Ion Splitting Technique, Navy Case No. 79,639.//U.S. Patent No. 7,358,152: Wafer Bonding of Thinned Electronic Materials and Circuits to High Performance Substrate, Navy Case No. 84,023.//U.S. Patent No. 7,535,100: Wafer Bonding of Thinned Electronic Materials and Circuits to High Performance Substrates, Navy Case No. 84,023 and any continuations, divisionals or re-issues thereof.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than August 21, 2009.

ADDRESSES: Written objections are to be filed with the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320.

FOR FURTHER INFORMATION CONTACT: Rita Manak, Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue, SW., Washington, DC 20375–5320, telephone (202) 767–3083. Due to U.S. Postal delays, please fax (202) 404–7920, e-mail: *rita.manak@nrl.navy.mil* or use courier delivery to expedite response.

Authority: 35 U.S.C. 207, 37 CFR Part 404.

Dated: July 29, 2009.

A.M. Vallandingham,

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

[FR Doc. E9–18773 Filed 8–5–09; 8:45 am]

BILLING CODE 3810–FF–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Senior Executive Service Performance Review Board

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice.

SUMMARY: This notice announces the membership of the Defense Nuclear Facilities Safety Board (DNFSB) Senior Executive Service (SES) Performance Review Board (PRB).

DATES: *Effective Date:* August 6, 2009.

ADDRESSES: Send comments concerning this notice to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2001.

FOR FURTHER INFORMATION CONTACT: Deborah Biscieglia by telephone at (202) 694–7041 or by e-mail at *debbieb@dnfsb.gov*.

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(c)(1) through (5) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The PRB shall review and evaluate the initial summary rating of the senior executive's performance, the executive's response, and the higher level official's comments on the initial summary rating. In addition, the PRB will review and recommend executive performance bonuses and pay increases.

The DNFSB is a small, independent Federal agency; therefore, the members of the DNFSB SES Performance Review Board listed in this notice are drawn from the SES ranks of other agencies. The following persons comprise a standing roster to serve as members of the Defense Nuclear Facilities Safety Board SES Performance Review Board:

Christopher E. Aiello, Director of Human Resources, Federal Deposit Insurance Corporation

David M. Capozzi, Director of Technical and Information Services, United States Access Board

DeDe Greene, Executive Officer, Civil Rights Division, Department of Justice

Raymond Limon, Chief Human Capital Officer, Corporation for National & Community Service

Christopher W. Warner, General Counsel, U.S. Chemical Safety and Hazard Investigation Board.

Dated: July 30, 2009.

Brian Grosner,

Chairman, Executive Resources Board.

[FR Doc. E9–18879 Filed 8–5–09; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

National Assessment Governing Board; Meeting

AGENCY: Department of Education, National Assessment Governing Board.

ACTION: Notice; correction.

SUMMARY: The National Assessment Governing Board published a document in the **Federal Register** of July 24, 2009, announcing the schedule and proposed agenda of a forthcoming meeting of the National Assessment Governing Board. The meeting agenda has been revised and this notice provides the correct dates and times for the revised meeting agenda.

FOR FURTHER INFORMATION CONTACT: Munira Mwalimu at (202) 357–6906.

Correction

In the **Federal Register** of July 24, 2009, in FR DOCID: FR Doc. E9–17728 filed on July 23, 2009, Volume 74, Number 141, page 36683, third column, the second full paragraph that begins ''The full Board will meet in closed session from 12:30 p.m. to 1:30 p.m. to

receive a briefing on the NAEP 2007 State Mapping Study from Peggy Carr, the Associate Commissioner of NCES. The Governing Board will be provided with embargoed data on the State Mapping Study that cannot be discussed in an open meeting prior to their official release. Premature disclosure of data would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.'' is cancelled and replaced with the following paragraph, which was an agenda item originally scheduled for discussion on Saturday August 8 from 8:30 a.m. to 10 a.m.:

''The full Board will meet in closed session on August 7 from 12:30 p.m. to 2 p.m. to receive a demonstration on NAEP Science Interactive Computer Tasks. The interactive computer tasks are secure items and cannot be discussed in an open meeting. Premature disclosure of the test items would significantly impede implementation of the NAEP program, and is therefore protected by exemption 9(B) of section 552b(c) of Title 5 U.S.C.'' The paragraph appearing on the first full paragraph of page 36684 describing this agenda item is deleted.

Due to the agenda item change above, the times for the remaining agenda items for the August 7 and 8 sessions described on pages 36683 and 36684 of the **Federal Register** Notice are changed as follows:

(1) August 7—The presentation of Expert Panel Reports to the Ad Hoc Committee on NAEP Testing and Reporting of Students with Disabilities and English language Learners originally scheduled from 1:30 p.m. to 2:45 p.m. will now take place from 2:15 p.m. to 3:30 p.m. (instead of 1:30 p.m. to 2:45 p.m.).

(2) August 7—The Update on Common Core Standards Project will now take place from 3:30 p.m. to 4:15 p.m. (instead of 3 p.m. to 3:45 p.m.).

(3) August 7—The Update on the NAEP 2012 Technological Literacy Framework will be moved from Friday August 7 to Saturday August 8 from 8:30 a.m. to 9:15 a.m.

(4) August 8—Board Action on Policies and Committee Reports will take place from 9:30 a.m. to 11 a.m.

(5) The August 8 session of the Governing Board meeting will adjourn at 11 a.m.

Electronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–888–293–6498; or in the Washington, DC area at (202) 512–1530.

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

Dated: July 31, 2009.

Cornelia S. Orr,

Executive Director, U.S. Department of Education, National Assessment Governing Board.

[FR Doc. E9–18766 Filed 8–5–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Solicitation of Nominations for Appointment as a Member of the Biomass Research and Development Technical Advisory Committee

AGENCY: Department of Energy.

ACTION: Notice of solicitation of nominations correction.

On July 20, 2009, the Department of Energy published a notice of solicitation of nominations for appointment as a member of the Biomass Research and Development Technical Advisory Committee 74 FR 35185. In that notice, the phone number under **FOR FURTHER INFORMATION CONTACT** Laura Neal is (202) 586–0937. Today's notice is announcing that Laura Neal can be reached at (202) 586–7766.

Issued in Washington, DC on July 31, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–18811 Filed 8–5–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–444–000]

Tennessee Gas Pipeline Company; Notice of Application

July 30, 2009.

Take notice that on July 17, 2009, Tennessee Gas Pipeline Company (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed in Docket Number CP09–444–000, pursuant to section 7(c) of the Natural Gas Act (NGA), an application for authority to construct, install, modify, replace, and operate certain pipeline and compression facilities located in Pennsylvania and New Jersey that will become integral parts of Tennessee's existing 300 Line System. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Tennessee proposes to increase pipeline capacity on the 300 Line to provide an additional 350,000 dekatherms per day of firm natural gas transportation service and implement general system upgrades by replacing certain compressor station equipment in order to maintain integrity and reliability of its system. The project involves the installation of approximately 128 miles of pipeline looping and the addition of approximately 55,000 horsepower through the construction of two new compressor stations and modifications at seven existing compressor stations. Tennessee, also, proposes to replace certain compression facilities at four of the seven existing compressor stations while the modification activities are occurring. The estimated cost of the project is $634.1 million.

Any questions regarding this application should be directed to Jacquelyne Rocan, Senior Counsel, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002, phone (713) 420–4544, fax (713) 420–16–1, e-mail *jacquelyne.rocan@elpaso.com;* or Thomas Joyce, Manager, Rates and Regulatory Affairs, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002, phone (713) 420–3299, fax (713) 420–1605, e-mail *tom.joyce@elpaso.com.*

On November 4, 2008, the Commission staff granted Tennessee's request to utilize the Pre-Filing Process and assigned Docket No. PF09–1–000 to staff activities involving the 300 Line project. Now, as of the filing of this application, the Pre-Filing Process has ended. From this time forward, Tennessee's proceeding will be conducted in Docket No. CP09–444–000, as noted in the caption of this Notice.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9,

within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: August 20, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18792 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2594–013]

Northern Lights, Inc.; Notice of Application Accepted for Filing, Soliciting Motions To Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Preliminary Fishway Prescriptions

July 30, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Major License.

b. *Project No.:* 2594–013.

c. *Date filed:* July 17, 2009.

d. *Applicant:* Northern Lights, Inc. (NLI).

e. *Name of Project:* Lake Creek Hydroelectric Project.

f. *Location:* The existing project is located on Lake Creek in Lincoln County, Montana, near the City of Troy. The project does not affect federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mark Contor, Operations Manager, Northern Lights Inc., P.O. Box 269, 421 Chevy Street, Sagle, ID 83860; Telephone (800) 326–9594 ext. 134.

i. *FERC Contact:* Shana Murray, Telephone (202) 502–8333, and e-mail *shana.murray@ferc.gov.*

j. Deadline for filing motions to intervene and protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene, protests, comments, recommendations, preliminary terms and conditions, and preliminary fishway prescriptions may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''e-filing'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.''

k. This application has been accepted for filing and is now is ready for environmental analysis.

l. *The Project consists of:* (1) A 268-foot-long, 44-foot-high concrete gravity dam; (2) a 30-acre reservoir with a storage capacity of 150 acre-feet (af); (3) a reinforced concrete intake structure; (4) a 1,694-foot-long, 10-foot diameter flowline, leading to a forebay created by a reinforced concrete structure with wood superstructure; (5) a 297-foot-long, 5-foot diameter penstock, leading to Powerhouse No. 1 containing a Francis-type, turbine-generating unit with a rated capacity of 1 megawatt (MW); (6) a 441-foot-long penstock with a diameter of 8.5 feet, leading to Powerhouse No. 2 containing a Francis-type, turbine-generating unit with a rated capacity of 3.5 MW; (7) a 2.4–7.97/13.8 kilovolt step-up transformer at

Powerhouse No. 2; and (8) appurtenant facilities. The project is estimated to generate an average of 23,400,000 kilowatthours annually. The dam and existing project facilities are owned and operated by the applicant. The applicant is not proposing to add capacity or to make any modifications to the Project or its operation under the new license.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, 202–502–8659. A copy is also available for inspection and reproduction at the address in item h above.

Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must (1) Bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''PRELIMINARY TERMS AND CONDITIONS,'' or ''PRELIMINARY FISHWAY PRESCRIPTIONS''; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

o. *Procedural Schedule:* The application will be processed according to the following revised Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Filing of recommendations, preliminary terms and conditions, and preliminary fishway prescriptions	November 28, 2009.
Commission issues Draft EA or EIS	May 27, 2010.
Comments on Draft EA or EIS	July 26, 2010.
Modified Terms and Conditions	September 24, 2010.
Commission Issues Final EA or EIS	December 23, 2010.

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of this notice.

q. A license applicant must file no later than 60 days following the date of issuance of the notice of acceptance and ready for environmental analysis provided for in § 5.22: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18797 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2211–004]

Duke Energy Indiana, Inc.; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

July 30, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2211–004.

c. *Date filed:* April 24, 2009.

d. *Applicant:* Duke Energy Indiana, Inc.

e. *Name of Project:* Markland Hydroelectric Project.

f. *Location:* On the Ohio River in Switzerland County, near the towns of Florence and Vevay, Indiana, and Warsaw, Kentucky. The project affects about 1 acre of federal lands administered by the U.S. Army Corps of Engineers.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Tamara Styer, Duke Energy, Mail Code: EC12Y, P.O. Box 1006, Charlotte, NC 28201–1006, (704) 382–0293 or *tsstyer@duke-energy.com.*

i. *FERC Contact:* Dianne Rodman, (202) 502–6077 or *dianne.rodman@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

All documents (original and eight copies) should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Motions to intervene and protests may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''e-filing'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.''

k. This application has been accepted for filing, but is not ready for environmental analysis at this time.

l. The existing Markland Hydroelectric Project consists of a powerhouse integrated into the north end of the U.S. Army Corps of Engineers' (Corps) Markland dam, which was constructed by the Corps between 1959 and 1964. The project has a total installed capacity of 64.8 megawatts (MW) and produces an average annual generation of 350,454 megawatt-hours. All generated power is utilized within the applicant's electric utility system. The project operates in run-of-river mode, has no storage, and only uses flows released by the Corps.

The project consists of the following facilities: (1) A 96-foot-high, 248-foot-wide intake structure, with steel trashrack panels installed along the east side, directing flows to the connected powerhouse; (2) a powerhouse, integral to the Corps' Markland dam, containing three vertical shaft Kaplan turbine/generator units with a total installed capacity of 64.8 MW; (3) a tailrace discharging flows immediately downstream of the dam; (4) a substation about 250 feet north of the powerhouse; (5) an approximately 750-foot-long existing access road; (6) a 9.37-mile-long, 138-kilovolt transmission line in a 100-foot-wide right-of-way extending to Fairview, Indiana; and (7) appurtenant facilities. The applicant is proposing to add a new, approximately 300-foot-long access road, leading to a new parking area for recreation use at the tailrace of the dam.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified intervention deadline date, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified intervention deadline date. Applications for preliminary permits will not be accepted in response to this notice.

A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a development application. A notice of intent must be served on the applicant(s) named in this public notice.

Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

When the application is ready for environmental analysis, the Commission will issue a public notice requesting comments, recommendations, terms and conditions, or prescriptions.

All filings must (1) Bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE,'' ''NOTICE OF INTENT TO FILE COMPETING APPLICATION,'' or ''COMPETING APPLICATION;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18796 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

July 30, 2009.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC09–78–001.

Applicants: Otter Tail Corporation d/b/a Otter Tail, Cascade Investment, LLC.

Description: Response to July 2, 2009 Request for Additional Information and Amendment to Application by Cascade Investment, LLC and Otter Tail Power Company, *et al.*

Filed Date: 07/24/2009.

Accession Number: 20090724–5070.

Comment Date: 5 p.m. Eastern Time on Friday, August 07, 2009.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG09–79–000.

Applicants: Langford Wind Power, LLC.

Description: Self Certification Notice of Langford Wind Power, LLC.

Filed Date: 07/30/2009.

Accession Number: 20090730–5065.

Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–3168–010; ER04–657–011; ER04–659–011; ER04–660–011; ER04–994–006.

Applicants: Mystic Development, LLC, Fore River Development, LLC, Astoria Generating Company, LP, Boston Generating, LLC, Mystic I, LLC.

Description: Notification of Change in Status Pursuant to 18 CFR section 35.42(d).

Filed Date: 07/30/2009.

Accession Number: 20090730–5048.

Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Docket Numbers: ER00–3080–006.

Applicants: Otter Tail Power Company.

Description: Notice of Non-Material Change.

Filed Date: 07/28/2009.

Accession Number: 20090728–5087.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 18, 2009.

Docket Numbers: ER00–2887–007; ER05–1219–004; ER05–1218–004; ER06–703–003; ER07–1341–004; ER97–2414–013; ER96–149–014.

Applicants: York Generation Company LLC, Lowell Cogeneration Company Limited Part, Dartmouth Power Associates Limited Partnership, Bayonne Plant Holding, LLC, Camden Plant Holding, LLC, Pedricktown Cogeneration Company LP, Newark Bay Cogeneration Partnership, L.P.

Description: Notice of Change in Status of Bayonne Plant Holding, LLC, *et al.*

Filed Date: 07/29/2009.

Accession Number: 20090729–5106.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER01–1822–005.

Applicants: Indigo Generation LLC, Larkspur Energy LLC, Wildflower Energy LP.

Description: Notice of Change in Status Pursuant to 18 CFR 35.42(d) of Indigo Generation LLC, Larkspur Energy LLC and Wildflower Energy LP.

Filed Date: 07/29/2009.

Accession Number: 20090729–5110.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER04–734–004; ER07–981–002.

Applicants: Barclays Bank PLC, Barclays Capital Energy Inc.

Description: Notice of Non-Material Change in Status.

Filed Date: 07/30/2009.

Accession Number: 20090730–5073.

Comment Date: 5 p.m. Eastern Time on Thursday, August 20, 2009.

Docket Numbers: ER06–456–020; ER06–1271–015; ER06–880–015; ER06–954–016; ER07–424–011.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits proposed revisions to its Open Access Transmission Tariff.

Filed Date: 07/29/2009.

Accession Number: 20090730–0193.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER08–502–001.

Applicants: Linde Energy Services, Inc.

Description: Amended Application for Category 1 Seller Status of Linde Energy Services, Inc.

Filed Date: 07/27/2009.

Accession Number: 20090729–0005.

Comment Date: 5 p.m. Eastern Time on Monday, August 17, 2009.

Docket Numbers: ER08–1195–001.

Applicants: Red Hills Wind Project, LLC.

Description: Notice of Non-Material Change in Status of Red Hills Wind Project, LLC.

Filed Date: 07/29/2009.

Accession Number: 20090729–5108.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–758–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits revisions to its Membership Agreement.

Filed Date: 07/29/2009.

Accession Number: 20090730–0200.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1426–001.

Applicants: Lehman Brothers Commodity Services Inc.

Description: Lehman Brothers Commodity Services Inc. submits notice of cancellation of First Revised FERC Electric Tariff No 1.

Filed Date: 07/27/2009.

Accession Number: 20090727–0042.

Comment Date: 5 p.m. Eastern Time on Monday, August 17, 2009.

Docket Numbers: ER09–1496–000.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits First Revised Sheet 1 *et al.* to Original FERC Rate Schedule 103.

Filed Date: 07/27/2009.

Accession Number: 20090729–0008.

Comment Date: 5 p.m. Eastern Time on Monday, August 17, 2009.

Docket Numbers: ER09–1507–000.

Applicants: Morgan Stanley Capital Group, Inc.

Description: Morgan Stanley Capital Group, Inc. submits Amended and Restated Scheduling Service Agreement dated 7/28/09 with Deseret Generation & Transmission Co-operative, Inc.

Filed Date: 07/29/2009.

Accession Number: 20090729–0128.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1508–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits Second Revised Sheet 74A.01 *et al.* to Third Revised Rate Schedule FERC No. 24 to be effective 9/28/09.

Filed Date: 07/29/2009.

Accession Number: 20090730–0101.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1509–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Original Sheet 1 *et al.* to FERC Electric Tariff, Second Revised Volume 6 Service Agreement 68.

Filed Date: 07/29/2009.

Accession Number: 20090730–0102.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1510–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits First Revised Sheet 1 *et al.* to FERC Electric Tariff, 7th Rev Volume No. 11 Service Agreement 553 to be effective 9/27/09.

Filed Date: 07/29/2009.

Accession Number: 20090730–0103.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1511–000.

Applicants: Basin Electric Power Cooperative, Inc.

Description: Basin Electric Power Cooperative *et al.* submits Second Revised Sheet 160 *et al.* to FERC Electric Tariff, Second Substitute First Revised Volume 4 to be effective 10/0/09.

Filed Date: 07/29/2009.

Accession Number: 20090730–0104.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1512–000; ER09–1513–000.

Applicants: AEP Power Marketing Inc.

Description: AEP Power Marketing, Inc. submits the Notices of Cancellation to terminate its market-based rate tariff, Rate Schedule FERC No. 1.

Filed Date: 07/29/2009.

Accession Number: 20090730–0199.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Docket Numbers: ER09–1514–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits proposed revisions to its Market Administration and Control Area Services Tariff.

Filed Date: 07/29/2009.

Accession Number: 20090730–0182.

Comment Date: 5 p.m. Eastern Time on Wednesday, August 19, 2009.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES09–29–001.

Applicants: Entergy Louisiana, LLC.

Description: Supplemental Information of Entergy Louisiana, LLC.

Filed Date: 07/28/2009.

Accession Number: 20090728–5102.

Comment Date: 5 p.m. Eastern Time on Friday, August 07, 2009.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene

again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC.

There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18791 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1278–000]

AES Armenia Mountain Wind, LLC; Notice of Filing

July 30, 2009.

Take notice that, on July 28, 2009, AES Armenia Mountain Wind, LLC filed a supplement to its filing in the above captioned docket with information required under the Commission's regulations. Such filing served to reset the filing date in this proceeding.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 18, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18793 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM06–22–008]

North American Electric Reliability Corporation; Notice of Filing

July 30, 2009.

Take notice that on June 30, 2009, the North American Electric Reliability Corporation, in compliance with the Federal Energy Regulatory Commission's (Commission) Order No. 706, 122 FERC ¶ 61,040 (2008), submitted Violation Severity Levels (''VSLs'') for eight Critical Infrastructure Protection (''CIP'') Version 1 Reliability Standards, CIP–002–1 through CIP–009–1, approved by the Commission.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 20, 2009.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18798 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1488–000]

Black Bear Hydro Partners, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

July 30, 2009.

This is a supplemental notice in the above-referenced proceeding of Black Bear Hydro Partners application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 19, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18794 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1491–000]

Tilton Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

July 30, 2009.

This is a supplemental notice in the above-referenced proceeding of Tilton Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 19, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–18795 Filed 8–5–09; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2009–0430; FRL–8941–8]

Notice of Data Availability Concerning Compliance Supplement Pool Allowance Allocations Under the Clean Air Interstate Rule Federal Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: EPA is administering—under the Clean Air Interstate Rule (CAIR) Federal Implementation Plans (FIPs)—the CAIR NO_X Annual Trading Program Compliance Supplement Pool (CAIR CSP) for the States of Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin. The CAIR FIPs require the Administrator to determine by order the CAIR CSP allowance allocations for units in these States that requested and qualify for these allocations and to provide the public with the opportunity to object to the allocation determinations. In this Notice of Data Availability (NODA), EPA is making available, to the public, data and other information relating to the CAIR CSP allowance allocations and denial of allocations to individual units whose owners and operators requested such an allocation from EPA. The allocations and denial of allocations are based on each unit's emissions data reported to EPA in quarterly emissions reports submitted by the unit's owners and operators under the CAIR trading program and other programs and on EPA's interpretations of the regulation governing the allocation of CAIR CSP allowances. The NODA presents the

emissions data and other information, including the CAIR CSP allowance allocation calculations for each individual unit and the resulting allocation for each unit.

DATES: Objections must be received by September 8, 2009.

ADDRESSES: Submit your objections, identified by Docket Number OAR–2009–0430 by one of the following methods:

A. *Federal Rulemaking Portal: http://www.regulations.gov.* This NODA is not a rulemaking, but you may use the Federal Rulemaking Portal to submit objections to the NODA. To submit objections, follow the on-line instructions for submitting comments.

B. *Mail:* Air Docket, ATTN: Docket Number OAR–2009–0430, Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

C. *E-mail: A–AND–R–Docket@epa.gov.*

D. *Hand Delivery:* EPA Docket Center, 1301 Constitution Avenue, NW., Room B102, 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 objections to Docket ID No. OAR–2009–0430. EPA's policy is that all objections received will be included in the public docket without change and may be made available online at *http://www.epa.gov/edocket,* including any personal information provided, unless the objection 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 objection. If you send an e-mail objection directly to EPA without going through http://*www.regulations.gov,* your e-mail address will be automatically captured and included as part of the objection that is placed in the public docket and made available on the Internet. If you submit an electronic objection, EPA recommends that you include your name and other contact information in the body of your objection and with any disk or CD–ROM you submit. If EPA is unable to read your objection and contact you for clarification due to technical difficulties, EPA may not be able to consider your objection. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov index.* Although listed in the index, some information is not publicly available, *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 EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m, Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Questions concerning this action should be addressed to Robert L. Miller, EPA Headquarters, CAMD (6204J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone (202) 343–9077, and e-mail *miller.robertl@epa.gov.* If mailing by courier, address package to Robert L. Miller, 1310 L St., NW., Room 254B, Washington, DC 20005.

SUPPLEMENTARY INFORMATION:

Outline

1. General Information
2. What Is the Purpose of this NODA?
3. What Are the Requirements for Requesting and Receiving CAIR CSP Allowances and the Procedures for Allocating Such Allowances?
4. How Is EPA Applying to Individual CAIR Units the Requirements for Requesting and Receiving CAIR CSP Allowance Allocations?
5. How Do I Interpret the Data Made Available by This NODA?

1. General Information

EPA published the Clean Air Interstate Rule (CAIR) on May 12, 2005 (70 FR 25162 (May 12, 2005)), in which EPA determined that 28 States and the District of Columbia contribute significantly to nonattainment and interfere with maintenance of the national ambient air quality standards (NAAQS) for fine particles ($PM_{2.5}$) and/or 8-hour ozone in downwind States in the eastern half of the country. As a result, EPA required those upwind States to revise their state implementation plans (SIPs) to include control measures that reduce emissions of sulfur dioxide (SO_2), which is a precursor to $PM_{2.5}$, and/or nitrogen oxides (NO_X), which is a precursor to both ozone and $PM_{2.5}$. Under CAIR, States may implement these reduction requirements by participating in EPA-administered CAIR SO_2, NO_X annual, and NO_X ozone season trading programs or by adopting any other control measures.

On April 28, 2006, EPA promulgated FIPs for all States covered by CAIR in order to ensure the emissions reductions required by CAIR are achieved on schedule (71 FR 25328 (Apr. 28, 2006)). The CAIR FIPs require electric generating units (EGUs) to participate in EPA-administered CAIR SO_2, NO_X annual, and NO_X ozone season trading programs, as appropriate. These trading programs impose essentially the same requirements as, and are integrated with, the respective CAIR SIP trading programs. Further, as provided in a rule published by EPA on November 2, 2007, a State's CAIR FIPs are automatically withdrawn when EPA approves a SIP revision, in its entirety and without any conditions, as fully meeting the requirements of CAIR. Where only portions of the SIP revision are approved, the corresponding portions of the FIPs are automatically withdrawn and the remaining portions of the FIP stay in place. Finally, the CAIR FIPs also allow States to submit abbreviated SIP revisions that, if approved by EPA, will automatically replace or supplement certain CAIR FIP provisions (*e.g.,* the methodology for allocating NO_X allowances to sources in the State), while the CAIR FIP remains in place for all other provisions. As a result of EPA's approval of some States' CAIR-related SIP or abbreviated SIP provisions, EPA is administering the CAIR CSP provisions in the CAIR NO_X annual trading program only for the States of Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin, and the remaining States are responsible for administering the CAIR CSP for their respective CAIR units.

EPA was sued by a number of parties on various aspects of CAIR, and on July 11, 2008, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety. *North Carolina* v. *EPA,* 531 F.3d 836 (DC Cir. Jul. 11, 2008). However, in response to EPA's petition for rehearing, the Court issued an order remanding CAIR to EPA without vacating either CAIR or the CAIR FIPs. *North Carolina* v. *EPA,* 550 F.3d 1176 (DC Cir. Dec. 23, 2008). The Court thereby left CAIR in place in order to

''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008 opinion, but declined to impose a schedule on EPA for completing that action. *Id.*

This NODA provides data and other information concerning the allocation of CAIR CSP allowances under § 97.143 of the CAIR FIPs for CAIR units in Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin. That rule requires that the Administrator determine by order the CAIR CSP allowance allocations and provide an opportunity for the public to submit objections.

Does This Action Apply to Me?

This NODA applies to CAIR units in the States of Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin whose owners and operators requested on or before May 1, 2009 a CAIR CSP allowance allocation. If you have any questions regarding the applicability of this NODA to a particular entity, consult the person listed in the preceding section under ''**FOR FURTHER INFORMATION CONTACT**.''

What Should I Consider as I Prepare and Submit Any Objections for EPA?

When preparing and submitting objections, remember to:

(1) Identify the NODA by docket number and other identifying information (subject heading, **Federal Register** date and page number).

(2) Follow directions. EPA may ask you to respond to specific questions or organize objections in a specific manner.

(3) Make sure to submit your objections by the deadline identified.

To expedite EPA's review, you are encouraged to send a separate copy of your objections, in addition to the copy you submit to the official docket, to Robert L. Miller, EPA Headquarters, CAMD (6204J), 1200 Pennsylvania Ave., NW., Washington, DC 20460 and e-mail *miller.robertl@epa.gov.* If you e-mail the copy of your objections to Mr. Miller, put ''objection for Docket Number OAR–2009–0430'' in the subject line to alert Mr. Miller that an objection is included. If mailing by courier, address package to Robert L. Miller, 1310 L St., NW., Room 254B, Washington, DC 20005.

Do not submit CBI to EPA through *http://www.regulations.gov* or e-mail. Clearly mark any portion of the information that you claim to be CBI. For CBI in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the objection that includes information claimed as CBI, a copy of the objection that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Robert L. Miller, EPA Headquarters, CAMD (6204J), 1200 Pennsylvania Avenue, NW., Washington DC 20460.

2 What Is the Purpose of This NODA?

In this NODA, EPA is making available under the CAIR FIPs for Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin the following data and other information: (1) The list of each CAIR unit in these States for which the owners and operators requested, and that qualifies or does not quality for, allocation of CAIR CSP allowances, (2) the data for each such unit from quarterly emission reports submitted under EPA's monitoring, reporting, and recordkeeping rules applicable to trading programs (*i.e.,* 40 CFR part 75) by the owners and operators, and EPA's interpretations of § 97.143, on which are based the determination of each unit's qualification or failure to qualify for a CAIR CSP allowance allocation and the calculation of the amount of CAIR CSP allowances that each qualifying unit receives, (3) the calculation, and resulting amount, of the CAIR CSP allowance allocations for each qualifying unit; and (4) the basis for each allocation or denial, in whole or in part, of an allocation for each unit.

The purpose of making the data available for objection is to ensure that the data on which the applicable determinations for each unit are based are correct. EPA is providing unit owners, unit operators, and the public an opportunity to make objections to any of the data made available in this NODA. Any person objecting to any of the data should explain the basis for his or her objection, should provide alternative data and supporting documentation, and explain why the alternative data are the best available data. Supporting documentation can include, but is not limited to, spreadsheets, explanations of why the data on such spreadsheets are more accurate, and information on the data source. In general, EPA does not anticipate revising a unit's NO_X emission rate and heat input data reported to EPA in quarterly emissions reports in accordance with part 75 because, in submitting the reports, the designated representative of the unit's owners and operators certified the data's correctness, completeness, and consistency with part 75 requirements. However, EPA will consider any objections to the data.

The provisions of § 97.143—which govern the submission of requests for CAIR CSP allowance allocations and set forth the criteria for qualification for, and the methodologies for calculating, such allocations for each individual unit—are final and are not being reopened in this NODA. These provisions are described in this NODA solely for informational purposes and are not open for objection. However, EPA's interpretation of these rule provisions in applying them to each unit requesting a CAIR CSP allowance allocation, and EPA's reasons for allocating such allowances or denying such allocations are open for objection, subject to the above-described limitation that the provisions of § 97.143 themselves are not a proper subject of objection. *See* 40 CFR 97.143(d)(4) (explaining that objections must be limited to whether EPA's determination of each unit's CAIR CSP allowance allocations are in accordance with § 97.143(b), (c), and (d)(2) and (3)).

3. What Are the Requirements for Requesting and Receiving CAIR CSP Allowances and the Procedures for Allocating Such Allowances?

In the final CAIR FIPs, EPA adopted the CAIR NO_X Annual Trading Program as part of the Federal remedy for CAIR. The CAIR FIPs established, for each State subject to CAIR with respect to annual NO_X emissions, an amount of CAIR NO_X allowances—comprising the amounts in the State NO_X annual budget and the State's share of the CAIR CSP—that EPA allocates to CAIR units in the State. As explained in the preamble of the CAIR FIPs (71 FR at 25361–62), the CAIR CSP was established to provide allowances to units subject to the CAIR NO_X Annual Trading Program to incentivize early, annual NO_X emissions reductions and to prevent undue risk to the reliability of electricity supply due to compliance with 2009 CAIR NO_X annual emissions limitation. The CAIR CSP comprises 200,000 vintage 2009 CAIR NO_X allowances for the entire CAIR region, apportioned to each State. EPA is administering the allocation of the portions of the CAIR CSP for Delaware, Louisiana, Maryland,

Pennsylvania, and Wisconsin,[1] which are 843 allowances for Delaware, 2,251 allowances for Louisiana, 4,670 allowances for Maryland, 16,009 allowances for Pennsylvania, and 4,898 allowances for Wisconsin. Under § 97.143(b) and (c), the owners and operators of any unit for which CAIR CSP allowances were sought had to submit to EPA a request for CAIR CSP allowance allocations by May 1, 2009. The owners and operators of a CAIR unit in these States could request a CAIR CSP allowance allocation if (1) The unit made early NO_X reductions in 2007 or 2008 (§ 97.143(b)) or (2) if the owners and operators demonstrated that compliance with the CAIR NO_X emissions limitation for 2009 would create an undue risk to the reliability of the electricity supply during 2009 (§ 97.143(c)).

In § 97.143(b), the CAIR FIPs provide both the specific criteria for determining whether a CAIR unit qualifies to receive a CAIR CSP allowance allocation for early NO_X reductions and the methodology for determining the amount of early NO_X reductions and calculating the CAIR CSP allowance allocation based on such reductions. To qualify for a CAIR CSP allowance allocation under § 97.143(b), a unit must meet three criteria. First, the unit must have for each year (*i.e.*, 2007 and/or 2008) for which the allocation is sought, a NO_X annual emission rate below 0.25 lb/mmBtu. In addition, for any unit included in an Acid Rain Program NO_X averaging plan under § 76.11, the weighted average annual NO_X emission rate for the group of units under such averaging plan for the year for which the allocation is sought must be at or below the weighted average annual group NO_X emission rate for the year preceding that year. Lastly, the unit must demonstrate that it achieved a NO_X emission reduction in each year for which the allocation is sought.

As EPA explained in the preamble of the CAIR FIPs (71 FR 25361), the CSP under the CAIR FIP is modeled on the CSP in § 96.143 of the CAIR model trading rules. The preamble of the CAIR model trading rules in turn explained that the CSP in the CAIR model trading rules was:

> patterned after the NO_X SIP Call's CSP * * * Similarities include: Limiting the total number of allowances that can be distributed; limiting the years in which CSP allowances can be earned; populating the CSP with allowances vintaged the first compliance year; and using distribution criteria of early reductions and need. 70 Fed. Reg. 25162, 25286 (May 12, 2005).

Under the NO_X SIP Call, as originally promulgated by EPA, May 1, 2003 was the commencement date, and 2003 was the first compliance year, of the NO_X Budget Trading Program, which covered ozone season (*i.e.*, May 1–September 30) NO_X emissions, rather than annual NO_X emissions. The NO_X SIP Call CSP was a pool of 200,000 allowances available for each unit that ''reduce[d] its NO_X emission rate in the 2001 or 2002 control period [*i.e.*, ozone season]''. 40 CFR 96.55(c); *see also* 40 CFR 51.123(e)(4)(iii)(A)(2) (requiring verification of emissions reduction ''having occurred during an ozone season between September 30, 1999 and May 1, 2003''). The unit was required to monitor NO_X emissions in accordance with the NO_X Budget Trading Program (generally involving the use of continuous emissions monitoring systems in accordance with part 75) starting in the 2000 control period and thereafter. In order to qualify for NO_X SIP Call CSP allowances for 2001 or 2002 early reductions, the unit had to have a NO_X emission rate in the respective year of less than 0.25 lb/mmBtu and less than 80% of the NO_X emission rate in 2000. 40 CFR 96.55(c)(1) and (3). In short, the requirement that early reductions occurred in 2001 or 2002 meant that the unit had to have an emission rate in 2001 or 2002 respectively that was less than that unit's emission rate in the year preceding the required period (2001–2002) for the early reductions, *i.e.*, 2000. *See* 63 FR 57414 (explaining that monitored emissions data ''from the 2000 ozone season shall be used to establish a baseline emission rate'' that the unit's emission rate in 2001 or 2002 must be at least 20% below). The NO_X SIP Call CSP was also available for sources for which compliance in 2003 would create ''undue risk for the reliability of the electricity supply'' (40 CFR 51.121(e)(4)(iii)(B)(2)(i)) or comparable undue risk for a non-electric generating source or its associated industry (40 CFR 51.121(e)(4)(iii)(B)(2)(ii)).

The requirements for qualifying for the CAIR CSP—which, as discussed above, was patterned after the NO_X SIP Call CSP—are structured in a similar way to the NO_X SIP Call CSP qualification requirements. In particular, the first year for compliance under the CAIR NO_X Annual Trading Program is 2009, and, in order to qualify for the CAIR CSP for early reductions, a unit must ''achieve[ ] emissions reductions in 2007 and 2008.'' 40 CFR 97.143(b); *see also* 40 CFR 51.123(e)(4)(iii)(A)(2) (stating that emission reductions must ''have occurred during 2007 and 2008'') and 40 CFR 96.143(b) (CAIR model trading rule provision requiring emission reductions ''achieve[d] in 2007 and 2008''). Consistent with the approach adopted for determining qualification for the NO_X SIP Call CSP, EPA interprets the CAIR CSP qualification requirement for early reductions to mean that the unit must have an emission rate in 2007 or 2008 that is less than the unit's emission rate in the year before 2007–2008, *i.e.*, 2006. In short, the unit's emission rate in 2006 is used to establish the baseline emission rate for determining whether the unit reduced its emission rate in 2007 or 2008. Thus, in order to qualify for allocations from the CSP under the CAIR FIPs, a unit must—in addition to meeting in 2007 or 2008 the above-described requirements concerning the 0.25 lb/mmBtu ceiling on the annual NO_X emission rate and the weighted average group NO_X emission rate in any NO_X averaging plan covering the unit—have an annual NO_X emission rate in 2007 or 2008 below the unit's 2006 annual NO_X emission rate.

Once EPA determines which individual units in a given State meet these qualification requirements for receiving a CAIR CSP allowance allocation under § 97.143(b) for 2007 and/or 2008, EPA then determines the amount of such allocation for each qualifying unit for each of the applicable years. EPA calculates such allocation by: multiplying the difference between 0.25 lb/mmBtu and the unit's annual NO_X emission rate (rounded to the nearest hundredth) for such year by the annual heat input (in mmBtu) of the unit for such year; dividing the results by 2,000 lb/ton; and rounding to the nearest whole number of tons as appropriate.

The CAIR FIPs, like the NO_X SIP Call, provide a second means of qualifying for CSP allowance allocations. Specifically, in § 97.143(c), the CAIR FIPs set forth specific criteria that a CAIR unit must meet in order to qualify for a CAIR CSP allowance allocation in order to prevent the unit's compliance for 2009 with CAIR NO_X emission limitation under the CAIR NO_X Annual Trading Program (*i.e.*, the requirement to hold CAIR NO_X allowances covering annual NO_X emissions) from creating undue risk to the reliability of the electricity supply. A request for CAIR CSP allowances under that provision must demonstrate that, without the requested allowances, compliance for 2009 will result in such undue risk. That demonstration must include a

[1] As noted above, the remaining States covered by CAIR or the CAIR FIPs are administering the allocation of their respective portions of the CAIR CSP under their SIPs or abbreviated SIPs.

showing that it would not be feasible for the unit's owners and operators to obtain sufficient electricity from other electricity generators during the installation of emission control technology at the unit for compliance, or to obtain sufficient allowances, to avoid undue risk. If EPA determines that any individual units qualify for CAIR CSP allowances under the electric reliability criterion, EPA then determines the minimum amount of CAIR CSP allowance that each such unit needs to prevent undue risk. *See* 40 CFR 97.143(c)(1) (requiring request be for ''minimum amount'' of allowances necessary to remove undue risk) and 97.143(d)(1) (requiring EPA to adjust requests as necessary to make the requested amounts comply with the requirements of § 97.143(b) and (c)).

Finally, EPA makes any necessary adjustments under § 97.143(d)(2) and (3) to the CAIR CSP allocations calculated under § 97.143(b) and (c) in order to ensure that the total amount of CAIR CSP allowances allocated to units in a given State does not exceed that State's share of the CAIR CSP. If the sum of all of the calculated allocations for units in a given State is less than that State's portion of the CAIR CSP, then such units are allocated the full calculated amount. If the sum of all of the calculated allocations for units in a given State is greater than that State's portion of the CAIR CSP, then each unit is allocated its proportionate share, *i.e.*, the calculated amount multiplied by the State's CAIR CSP portion divided by the sum of the calculated amounts for all units in that State.

Under § 97.143(d)(4), by July 31, 2009, EPA must determine by order the CAIR CSP allowance allocations in accordance with § 97.143(d)(1) through (3) and:

> make available to the public each determination of * * * [CAIR CSP allowance allocations] and will provide an opportunity of submission of objections to the determination. Objections shall be limited to addressing whether the determination is in accordance with [§ 97.143(b), (c), and (d)(2) and (3)], as appropriate. Based on any such objections [EPA] will adjust each determination to the extent necessary to ensure that it is in accordance with such [rule provisions]. 40 CFR 97.143(d)(4).

In this NODA, EPA is carrying out its responsibilities under § 97.143(d)(4).

4. How Is EPA Applying to Individual CAIR Units the Requirements for Requesting and Receiving CAIR CSP Allowance Allocations?

On March 18, 2009, EPA sent an e-mail—to the designated representatives, alternate designated representatives, and their respective agents under the CAIR NO_X allowance tracking system for CAIR units in Delaware, Louisiana, Pennsylvania, and Wisconsin—that provided instructions on the proper submission of a CAIR CSP allowance allocation request.[2] The March 18, 2009 e-mail explained what data should be submitted with the request, depending on whether the request was made pursuant to § 97.143(b) or (c) and reminded addressees of the May 1, 2009 deadline for such requests. Among the data elements for a request under § 97.143(b) were: the annual NO_X rate of the unit for years 2006, 2007, and 2008; the annual heat input for years 2007 and 2008; data demonstrating that the unit made NO_X reductions in 2007 or 2008; and the calculations showing the number of allowances that the unit was entitled to receive under § 97.143(b)(2). Among the data elements for a request under § 97.143(c) were: The calculation of the minimum amount of allowances necessary to remove undue risk to electricity supply reliability and a demonstration that the owners and operators of the unit involved could not obtain sufficient electricity from other electricity generators, or sufficient allowances, to prevent such undue risk. Because most CAIR units have also been affected units under the Acid Rain Program since at least 2000, EPA already had access, through quarterly emissions reports submitted by the unit's owners and operators in accordance with part 75 for 2006 through 2008, to the emissions and other data needed to determine whether most of the units qualified for CAIR CSP allowance allocations based on early reductions and, if so, for how many allowances. Nevertheless, EPA requested from owners and operators the data elements set forth in the March 18, 2009 e-mail in order to ensure that there were no data errors and that the owners and operators would know the maximum number of CAIR CSP allowances the unit could expect to receive. In contrast to the information necessary to allocate CAIR CSP allowances for early reductions, the information necessary to allocate such allowances to prevent undue risk to electricity supply reliability had not previously been collected by EPA and, on its face, would reflect unit owners' and operators' unique circumstances concerning the electricity supply available to them and their customers and the owners' and operators' access to allowances. EPA therefore required that the owners and operators provide this information as part of any request for CAIR CSP allowances to prevent undue risk to electricity supply reliability.

EPA received timely requests for CAIR CSP allowance allocations for 2007 and 2008 for about 60 CAIR units in Delaware, Louisiana, Maryland, Pennsylvania, and Wisconsin.[3] Many of the CAIR CSP allowance allocation requests expressly stated that the owners and operators were seeking allowances pursuant to § 97.143(b). However, some requests did not identify the provision under which CAIR CSP allowances were being sought, but provided data that were only relevant to qualification for such allowances under § 97.143(b). Moreover, while many of the requests provided all of the data needed, and referenced in the March 18, 2009 e-mail, for determining qualification for allowances under § 97.143(b), some provided only a portion of such data or provided incorrect data. Some requests either overstated or understated the amount of allowances the unit involved was qualified to receive. In many cases, those requests were based on emissions data that differed from the EPA-accepted emissions values in the quarterly emission reports submitted and certified by the designated representatives of the owners and operators of the units under part 75, and no explanation or justification supporting the use of the values not certified under part 75 was provided. Consistent with the requirements of § 97.143(b) to use data provided in accordance with part 75 and because the quarterly emissions report values had previously been certified as correct, complete, and consistent with the requirements (such as those for quality assurance) of part 75, EPA maintains that such data are the correct data to use for purposes of allocating CAIR CSP allowances. *See* 40 CFR 97.143(b)(1) (requiring a unit to monitor and report NO_X emissions during 2007–2008 in accordance with subpart HH of the CAIR FIP NO_X annual trading program rules, which is based on, and references, 40 CFR part 75); and 40 CFR 75.64(c) (requiring certification statement in quarterly emissions reports). In other cases, the requests reflected a misunderstanding, or misapplication, of the CAIR CSP allocation methodology

[2] On April 28, 2009, Maryland sent essentially the same e-mail to the designated representatives, alternate designated representatives, and their respective agents under the CAIR NO_X allowance tracking system for CAIR units in Maryland.

[3] EPA also received requests for units in Minnesota. Because EPA recently proposed to stay the effectiveness of CAIR and the CAIR FIPs to Minnesota and sources in that State, EPA is not addressing here any requests concerning Minnesota.

(which is summarized above) in § 97.143(b). None of the requests specifically referenced § 97.143(c) or provided the information needed, and referenced in the March 18, 2009 e-mail, for determining qualification for allowances under that provision. Finally, in the case of one company's units, the request did not reference either § 97.143(b) or § 97.143(c) as the basis for receiving CAIR CSP allowances and instead requested such allowances on other grounds.

Rather than denying any request that did not provide all the necessary data, provided incorrect data, miscalculated the amount of allowances for which the unit qualified, or failed to state expressly that the request was being made under § 97.143(b) or § 97.143(c), EPA has decided to evaluate each unit for which a timely request for CAIR CSP allowances on any grounds was submitted, determine if that unit qualifies for allowances for early reductions under § 97.143(b), and, if so, determine the maximum amount of allowances that the unit can receive under that provision. EPA is taking this approach because, for the reasons discussed above, EPA already has the necessary data to make such determinations for every unit for which a timely request was submitted, and therefore requesting owners and operators to amend or correct their requests would unnecessarily delay completion of the CAIR CSP allowance allocations.

However, with regard to CAIR CSP allowance allocations to prevent undue risk to electricity supply reliability under § 97.143(c), EPA does not have the information necessary to support a request for allowances under that provision. As discussed above, this information is not already available to EPA and involves circumstances unique to the particular owners and operators involved. Consequently, EPA is taking the approach of considering a unit's qualification for CAIR CSP allowances under § 97.143(c) only if the owners and operators of the unit expressly request allowances under that provision. Because none of the requests received by EPA referenced § 97.143(c) as a basis for the unit involved obtaining CAIR CSP allowances, much less provided the necessary information to demonstrate qualification for such allowances under that provision, EPA has determined that no CAIR CSP allowances are being allocated under the provision.

Applying the approaches discussed above, EPA evaluated each individual unit for which the owners and operators submitted a request for a CAIR CSP allowance allocation and determined whether the unit qualified under § 97.143(b) for such allowances and, if so, calculated the maximum amount for which the unit qualified, reflecting any adjustment necessary to ensure that the total amount of such allowances allocated to the units in a given State would not exceed that State's portion of the CAIR CSP. The detailed unit-by-unit data, determinations, and calculations are set forth in a technical support document, which is a single Excel spreadsheet titled ''CAIR FIP CSP Allocations Data'' and is available on EPA's CAMD Web site at *http://www.epa.gov/airmarkets/cair/csp* and in the CAIR CSP Docket (Docket ID No. OAR–2009–0430). The unit-by-unit allocations and denials of allocations that are shown in the technical support document are summarized below:

For 2007:

1. Each individual unit whose 2007 annual NO_X emission rate reported in accordance with part 75 was less than 0.25 lb/mmBtu and less than the unit's 2006 annual NO_X emission rate reported in accordance with part 75 and whose NO_X averaging plan (if any) had a weighted average group NO_X emission rate for 2007 determined in accordance with part 75 that did not exceed the plan's weighted average group NO_X emission rate for 2006 reported in accordance with part 75 is allocated CAIR CSP allowances calculated in accordance with § 97.143(b) and (d). To the extent the amount allocated is less than the amount requested for the unit, EPA is denying, in part, the request, as well as providing an allocation. In virtually all cases, the basis for such denials is that the request was based on data not certified under part 75 for which no supporting explanation or justification was provided or an interpretation of § 97.143(b) and (d) that was inconsistent with the rule text or EPA's interpretation (set forth in this NODA) of the rule text.

2. Each individual unit whose 2007 annual NO_X emission rate reported in accordance with part 75 exceeded 0.25 lb/mmBtu or exceeded the unit's 2006 annual NO_X emission rate reported in accordance with part 75 or whose NO_X averaging plan (if any) had a weighted average group NO_X emission rate for 2007 determined in accordance with part 75 exceeded the plan's weighted average group NO_X emission rate for 2006 determined in accordance with part 75 is not allocated any CAIR CSP allowances. For each of these units, EPA is denying in full the requested allocation.

For 2008:

3. Each individual unit whose 2008 annual NO_X emission rate reported in accordance with part 75 was less than 0.25 lb/mmBtu and less than the unit's 2006 annual NO_X emission rate reported in accordance with part 75 and whose NO_X averaging plan (if any) had a weighted average group NO_X emission rate for 2008 determined in accordance with part 75 that did not exceed the plan's weighted average group NO_X emission rate for 2007 reported in accordance with part 75 is allocated CAIR CSP allowances calculated in accordance with § 97.143(b) and (d). To the extent the amount allocated is less than the amount requested for the unit, EPA is denying, in part, the request, as well as providing an allocation. In virtually all cases, the basis for such denials is that the request was based on data not certified under part 75 for which no supporting explanation or justification was provided or an interpretation of § 97.143(b) and (d) that was inconsistent with the rule text or EPA's interpretation (set forth in this NODA) of the rule text.

4. Each individual unit whose 2008 annual NO_X emission rate reported in accordance with part 75 exceeded 0.25 lb/mmBtu or exceeded the unit's 2006 annual NO_X emission rate reported in accordance with part 75 or whose NO_X averaging plan (if any) had a weighted average group NO_X emission rate for 2008 determined in accordance with part 75 exceeded the plan's weighted average group NO_X emission rate for 2007 determined in accordance with part 75 is not allocated any CAIR CSP allowances. For each of these units, EPA is denying in full the requested allocation.

For 2007 and 2008:

5. In addition to the basis stated in paragraphs 1 through 4 above, for allocating and for denying in full or in part a request for CAIR CSP allowance allocations, there is an additional basis for denying in full or in part the allocations for individual units covered by one request for such allocations. In that request, a company requested that each of its units in Louisiana be given a certain amount of CAIR CSP allowances (exceeding the amount allocated for the unit by EPA in this NODA) on the ground that these units were underallocated CAIR NO_X allowances and CAIR NO_X ozone season allowances. As noted by the company, EPA took the approach in CAIR of establishing State NO_X annual and NO_X ozone season budgets using, *inter alia,* the heat input for units in the State and fuel factors that gave the greatest weight to heat input from coal, less weight to heat input from oil, and the least weight to heat input from natural gas. On appeal the U.S. Court of Appeals for the

District of Columbia determined that ''EPA's approach contravenes section 110(a)(2)(D)(i)(I)'' (*North Carolina,* 531 F.3d at 921 and that ''the resulting state budgets were arbitrary and capricious'' (*id.*). Subsequently, the Court remanded CAIR, without vacatur, on this and several other issues ''so that EPA may remedy CAIR's flaws.'' *North Carolina,* 550 F.3d at 1178. According to the company, revising the State budgets and State allowance allocation methodologies to eliminate the use of the fuel factors would result in the company's units in Louisiana being allocated a total of 10,764 more CAIR NO_X annual allowances and 4,913 more CAIR NO_X ozone season allowances in 2009 under the CAIR trading programs. Entergy's April 30, 2009 Compliance Supplement Pool CAIR NOx Allowance Request at 1. In its April 30, 2009 request for CAIR CSP allowance allocations, the company requested that its units in Louisiana therefore be allocated ''from the Compliance Supplement Pool'' 10,764 CAIR NO_X annual allowances and 4,913 CAIR NO_X ozone season allowances.[4] Entergy's April 30, 2009 Compliance Supplement Pool CAIR NOx Allowance Request at 1.

In this request, the company did not reference § 97.143(b) or (c) or claim that its units should be given CAIR CSP allowances under those provisions and provided only some of the information necessary to apply § 97.143(b) and none of the information necessary to apply § 97.143(c).[5] In essence, the company requested that EPA allocate CAIR CSP allowances on grounds that § 97.143 does not allow to be used for making such allocations. Nevertheless, for reasons discussed above, EPA evaluated whether the company's units in Louisiana qualify for CAIR CSP allowance allocations under grounds provided for in § 97.143. Specifically, for the reasons discussed above, EPA is determining in this NODA that the units can be allocated CAIR CSP allowances to the extent the units qualify for allocations for early reductions under § 97.143(b). However, the amounts determined by EPA for the company's individual units are less than the amounts requested by the company, and, to the extent of the differences between these amounts for each individual unit, EPA is denying in whole (with regard to units for which EPA is allocating no CAIR CSP allowances) or in part (with regard to units for which EPA is allocating some CAIR CSP allowances) the company's request. In order to allocate the full, requested amount of CAIR CSP allowances for any of the individual units covered by the company's request, EPA would have to ignore, and contravene, the requirements of the rule (§ 97.143) governing the qualification of a unit for CAIR CSP allowance allocations and the calculation of the amount of such allocations. For these reasons, EPA denies in whole or in part (as applicable) the company's request for CAIR CSP allowance allocations for each of the company's units in Louisiana.

5. How Do I Interpret the Data Made Available by This NODA?

As discussed above, the detailed unit-by-unit data, determinations, and calculations with respect to CAIR CSP allowance allocations and denials of allocations are contained in a technical support document, which is a single Excel spreadsheet titled ''CAIR FIP CSP Allocations Data''.

The Excel spreadsheet is divided into 4 worksheets. For each year 2007 and 2008, there are two worksheets: one addressing ''allocations'' of CAIR CSP allowances, *i.e.,* the allocations for all individual units receiving some allowances, whether the amount is less than,[6] equals, or exceeds the amount requested; and the other addressing ''denials of allocations'' of CAIR CSP allowances, *i.e.,* the denials for all individual units receiving no allowances and so whose request is denied in full. The CAIR CSP allocation and denial worksheets include: the relevant data from units' quarterly emissions reports; column notes providing the basis for allocations and denials of allocations under § 97.143(b) and (d); and notes at the bottom explaining any adjustment, under § 97.143(d), of each individual unit's CAIR CSP allowance allocation to ensure that the total amount of CAIR CSP allowance allocations do not exceed the relevant State's portion of the CAIR CSP. The basis, provided in the technical support document, for each allocation and each denial (in full or in part) of allocations is summarized and supplemented in section 4 of this NODA.

Dated: July 31, 2009.

Brian McLean,

Director, Office of Atmospheric Programs.

[FR Doc. E9–18861 Filed 8–5–09; 8:45 am]

BILLING CODE 6560–50–P

[4] The company subsequently revised its calculations of additional amounts of CAIR allowances its units would be allocated as a result of eliminating the use of the fuel factors. These revisions resulted in turn in revisions of the amount of CAIR CSP allowances the company requested. *See* Entergy's July 13, 2009 Compliance Supplement Pool CAIR NO_X Allowance Request by Entergy companies (supplementing the company's April 30, 2009 request). The company also noted that the CAIR CSP does not include any CAIR NO_X ozone season allowances. The company indicated that EPA should allocate additional CAIR NO_X allowances (apparently from the CAIR CSP) equal to the amount or the value of the CAIR NO_X ozone season allowances requested by the company. *See* Entergy's July 13, 2009 Compliance Supplement Pool CAIR NO_X Allowance Request by Entergy companies (supplementing the company's April 30, 2009 request). None of these changes in the amounts of CAIR CSP allowances requested by the company change the amounts of the CAIR CSP allowances allocated by EPA for the company's individual units in Louisiana or affect the basis for EPA's allocations and denials of allocations discussed in this NODA.

[5] The company's vague statement that it ''believes that allowances may be in short supply at the end of 2009'' and so the company should receive CAIR CSP allowances to ''help ensure there is no disruption of service'' (Entergy's July 7, 2009 Compliance Supplement Pool CAIR NO_X Allowance Request by Entergy Companies at 1 (supplementing the company's April 30, 2009 request)) does not provide any of the detailed information required in § 97.143(c)(1) and (2) and is entirely unsupported.

[6] The requests of these units are being denied in part.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0603; FRL–8431–6]

Pesticide Product Registration Approval; Opportunity for Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to register the pesticide product spirotetramat containing an active ingredient not included in any previously registered products pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, and the opening of a comment period on such approval.

DATES: Comments must be received on or before September 8, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2009–0603, by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries

are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2009–0603. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rita Kumar, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8291; e-mail address: *kumar.rita @epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, pesticide manufacturer, or interested member of the public. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. FIFRA Registrations

On October 10, 2006, EPA received applications from Bayer CropScience, LLC, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709, to register three new pesticide products containing spirotetramat as an active ingredient under section 3 of FIFRA, 7 U.S.C. 136a, seeking use of spirotetramat on a wide variety of agricultural use sites and on Christmas tree plantations. Spirotetramat is a tetramic acid derivative insecticide. On February 5, 2007, EPA received another application from Bayer Environmental Science for an end-use product for use of spirotetramat for insect control in greenhouses, nurseries, and interior plantscapes and on April 27, 2007, EPA received an application from Bayer CropScience for another end-use product containing spirotetramat for agricultural use.

The applications for the technical and one end-use product were approved on June 30, 2008, as Spirotetramat Technical and Movento (EPA Registration Number 264–1049 and 264–1050, respectively) for control of insects on several agricultural crops and Christmas tree plantations. The application for Spirotetramat 240 SC Greenhouse and Nursery (EPA Registration Number 432–1471) was approved on August 8, 2008, for insect control in greenhouses, nurseries, and interior plantscapes. The application for BYI 8330 150 OD Insecticide (EPA

Registration Number 264–1051) was approved on September 24, 2008, for control of insects on several agricultural crops and Christmas tree plantations. The application for Ultor (EPA Registration Number 264–1065) was approved on December 16, 2008, for control of insects on several agricultural crops and Christmas tree plantations.

The Agency approved the applications after considering all required data on risks associated with the proposed use of spirotetramat, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of spirotetramat when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

B. FFDCA Tolerances

Along with the applications for registration of Spirotetramat Technical, Movento 240 SC Insecticide, and Movento 150 OD Insecticide filed on October 10, 2006, Bayer CropScience also filed a petition under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, to establish tolerances for residues of spirotetramat in or on the raw agricultural commodities: Citrus (Crop Group 10); cucurbit vegetables (Crop Group 9); fruiting vegetables (Crop Group 8); grape (Crop Subgroup 13F); hops; leafy *Brassica* vegetables (Crop Group 5); leafy non-*Brassica* vegetables (Crop Group 4); pome fruit (Crop Group 11); potato and other tuberous and corm vegetables (Crop Subgroup 1C); stone fruit (Crop Group 12); tree nuts (Crop Group 14); import tolerances on onions and strawberries; milk; meat, fat; and meat byproducts of cattle, goat, hog, sheep, and horse.

EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), in the **Federal Register** issue of July 25, 2007 (72 FR 40877) (FRL–8137–1) announcing the filing of this petition. EPA also issued a final rule establishing tolerances for spirotetramat in the **Federal Register** issue of July 9, 2008 (73 FR 39251) (FRL–8367–1).

III. What Action is the Agency Taking?

Although the Agency solicited comments on the application for a tolerance under FFDCA, it did not do so regarding the applications for registration under FIFRA. Therefore, EPA is now seeking comment on the registrations for the spirotetramat technical and end-use products, issued under section 3 of FIFRA. After consideration of all comments received, the Agency will take appropriate action based on that consideration and issue another **Federal Register** notice responding to comments received.

List of Subjects

Environmental protection, Chemicals, Pests and pesticides.

Dated: July 30, 2009.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E9–18955 Filed 8–5–09; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 04–286; DA 09–1585]

Third Meeting of the Advisory Committee for the 2011 World Radiocommunication Conference

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the third meeting of the WRC–11 Advisory Committee will be held at the Federal Communications Commission. The purpose of the meeting is to continue preparations for the 2011 World Radiocommunication Conference. The Advisory Committee will consider any preliminary views introduced by the Advisory Committee's Informal Working Groups.

DATES: September 1, 2009; 11 a.m. to 12 noon.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Alexander Roytblat, Designated Federal Official, WRC–11 Advisory Committee, FCC International Bureau, Strategic Analysis and Negotiations Division, at (202) 418–7501.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (FCC) established the WRC–11 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2011 World Radiocommunication Conference (WRC–11). In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the third meeting of the WRC–11 Advisory Committee. The WRC–11 Advisory Committee has an open membership. All interested parties are invited to participate in the Advisory Committee and to attend its meetings. The proposed agenda for the third meeting is as follows:

Agenda

Third Meeting of the WRC–11 Advisory Committee, Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554, September 1, 2009; 11 a.m. to 12 noon.

1. Opening Remarks.
2. Approval of Agenda.
3. Approval of the Minutes of the Second Meeting.
4. IWG Reports and Documents Relating to Preliminary Views.
5. Future Meetings.
6. Other Business.

Federal Communications Commission.

John Giusti,

Acting Chief, International Bureau.

[FR Doc. E9–18730 Filed 8–5–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier Ocean Transportation Intermediary Applicants

Offshore Logistics, LLC, 400 West Knight Road, McDonough, GA 30253. *Officers:* Gregory M. Hinton, COO (Qualifying Individual), Dennis H. Jones, CEO.

Kayla Logistics, Corp., 153–04 Rockaway Blvd., Jamaica, NY 11434. *Officers:* John S. Tomeo, Dir. of Global

Logistics (Qualifying Individual), Ahmet Kurmemaj, President.

Braid Logistics (UK) Limited, 143 Woodville Street, Glasgow G51 2RQ, United Kingdom. *Officer:* Nigel Anthony Harden Gray, Chairman (Qualifying Individual).

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Sam's Moving & Overseas Shipping, Inc., 116–09 208 Street, Cambria Heights, NY 11411. *Officers:* Colin F. Sam, President (Qualifying Individual), Herbert Edwards, Secretary.

HTNS America, Inc. dba UKO Logis, Inc., 879 W. 190th Street, Ste. 290, Gardena, CA 90248. *Officer:* Kathy Om, CFO (Qualifying Individual).

Pride Worldwide, Inc., 44 W. Jefryn Blvd., Ste. N, Deer Park, NY 11729. *Officers:* Steven Rakiec, President (Qualifying Individual), Chris Kosis, Vice President.

H.B. Shipping, 16526 Air Center Blvd., Houston, TX 77032. *Officer:* Albert E. Garcia, Jr., President (Qualifying Individual).

Thornley & Pitt, Inc., 126 Hawthorne Street, San Francisco, CA 94107. *Officer:* Jeanne M. Burns, President (Qualifying Individual).

Letter Express of Broward Inc. dba Letter Express Courier & Logistics Inc., 2111 NW. 79th Avenue, Miami, FL 33122. *Officer:* Rafael Landa, President (Qualifying Individual).

Skelton Sherborne, Inc., 1225 North Loop West, #432, Houston, TX 77008. *Officer:* Elizabeth Rivera, Secretary (Qualifying Individual).

Seaworld Express Lines LLC, 2244 Landmeier Road, Elk Grove Village, IL 60007. *Officers:* Pieter A. Broos, Member/Manager (Qualifying Individual), Stewart Brown, Manager.

POL USA Logistics Corp, 375 Blair Road, Avenel, NJ 07001. *Officers:* Lawrence D. Serronico, Vice President (Qualifying Individual), Grzegorz Giza, President.

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

MEBS Global Reach LC, 4500 Southgate Place, Ste. 700, Chantilly, VA 20151. *Officers:* Mitchell J. Martin, Director (Qualifying Individual), Bruce Oliver, Sr., Vice President.

Water Link Corp., 1835 NW. 112th Ave., Ste. 161, Miami, FL 33172. *Officers:* Luis A. Camacho, President (Qualifying Individual), Maria J. Camacho, Vice President.

Ablehelp Export Services Inc., 3217 75th Ave., Ste. 302, Landover, MD 20785. *Officer:* Moses C. Ike, President (Qualifying Individual).

Dated: August 3, 2009.

Karen V. Gregory,

Secretary.

[FR Doc. E9–18880 Filed 8–5–09; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

License No.	Name/address	Date reissued
000692F	A. R. Savage & Son, Inc., 701 Harbour Post Drive, Tampa, FL 33602	May 27, 2009.
020815N	F.E.P.A. Enterprises, Inc., dba FEPA Logistics (USA), 17010 Buffalo Peak Court, Humble, TX 77346	July 3, 2009.
004186N	Hanmi Shipping, Inc., 2694 Coyle Ave., Elk Grove Village, IL 60007	July 10, 2009.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E9–18881 Filed 8–5–09; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR Part 515, effective on the corresponding date shown below:

License Number: 003725F.
Name: Aim Worldwide Shipping, Inc.
Address: 80 Eighth Ave., Ste. 301, New York, NY 10011.
Date Revoked: July 31, 2009.
Reason: Surrendered license voluntarily.

License Number: 001175F.
Name: Benson, Solomon J. dba Benson's Forwarding Service.
Address: 2801 NW. 78th Ave., Ste. 208, Miami, FL 33122.
Date Revoked: July 16, 2009.
Reason: Failed to maintain a valid bond.

License Number: 009692N.
Name: ETS Express, Inc.
Address: 15333 JFK Blvd., Ste. 700, Houston, TX 77346.
Date Revoked: July 18, 2009.
Reason: Failed to maintain a valid bond.

License Number: 014744N.
Name: Unique Overseas, Inc.
Address: 3 Birch Place, Pine Brook, NJ 07058.
Date Revoked: July 20, 2009.
Reason: Surrendered license voluntarily.

License Number: 021123NF.
Name: Waterways Logistics (USA), Inc.
Address: 100 Middlesex Ave., Ste. A, Carteret, NJ 07008–3499.
Date Revoked: July 19, 2009.
Reason: Failed to maintain valid bonds.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E9–18883 Filed 8–5–09; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 31, 2009.

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) P.O. Box 55882, Boston, Massachusetts 02106–2204:

1. Danvers Bancorp, Inc., Danvers, Massachusetts; to acquire through merger Beverly National Corporation, and thereby acquire The Beverly National Bank, both of Beverly, Massachusetts.

Board of Governors of the Federal Reserve System, August 3, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–18823 Filed 8–5–09; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. E9–18448 published on page 38428 of the issue for Monday, August 3, 2009, 2009.

Under the Federal Reserve Bank of New York heading, the entry for Morgan Stanley, New York, New York, is revised to read as follows:

A. Federal Reserve Bank of New York (Ivan Hurwitz, Bank Applications Officer) 33 Liberty Street, New York, New York 10045–0001:

1. Morgan Stanley, New York, New York; to retain 9.2 percent, and to acquire up to 9.9 percent, of the voting shares of Community Bankers Trust Corporation, Glen Allen, Virginia, and thereby indirectly retain and acquire voting shares of Bank of Essex, Essex, Virginia.

Comments on this application must be received by August 28, 2009.

Board of Governors of the Federal Reserve System, August 3, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–18824 Filed 8–5–09; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

Identity Management; Notice of Public Meeting

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Notice of Public Meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for a meeting with the privacy advocacy community to describe Federal implementation of external identity services at Identity Assurance Level 1, as defined in OMB Memorandum M–04–04, and discuss community concerns.

DATES: August 10, 2009 from 9 a.m.–3:30 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Brant Petrick, at *brant.petrick@gsa.gov.* Information regarding agenda, time, and location will be made available on the identity management Web site at: *http://www.idmanagement.gov,* questions about the meeting should be directed to Mr. Brant Petrick, at *brant.petrick@gsa.gov.*

ADDRESSES: The American Institute of Architects, 1735 New York Ave., NW., Washington, DC 20006–5292.

SUPPLEMENTARY INFORMATION:

Type of Meeting: Open and registration is required. Further details on the meeting agenda and the registration process will be posted on the OGP Identity Management Web site at: *http://www.idmanagement.gov.*

Proposed Schedule and Agenda: The GSA, Office of Governmentwide Policy will host an open session on August 10, 2009 from 9 a.m.–3:30 p.m., at The American Institute of Architects, 1735 New York Ave., NW., Washington, DC 20006–5292. There will be a one hour break for lunch.

During this meeting, GSA is tentatively scheduled to present information on how the Government plans to implement the OpenID, infocard, and InCommon identity solutions for public interaction with Federal Government resources at identity assurance Level 1. Briefings will include the Trust Framework Provider Approval Process, the Scheme Adoption Process, Federal profiles, and how privacy considerations are being addressed. Presenters will include the Government and industry representatives. The day will end with an open question and answer period.

Members of the public interested in attending should register at *www.idmanagement.gov.*

Written questions are welcome at any time before the meeting. Please submit to: Information regarding agenda, time, and location will be made available on the identity management Web site at: *http://www.idmanagement.gov.* Questions about the meeting should be directed to Mr. Brant Petrick, at *brant.petrick@gsa.gov,* (Please note that public seating for this meeting is limited and is available on a first-come, first-served basis.)

Dated: July 31, 2009.

Michele G. Heffner,

Acting Assistant Deputy Associate Administrator, Office of Governmentwide Policy.

[FR Doc. E9–18806 Filed 8–5–09; 8:45 am]

BILLING CODE 6820–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Office of Resources and Technology; Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Functions and Delegations of Authority for the Department of Health and Human Services (HHS) is being amended as Chapter AM, Office of Resources and Technology, as last amended 74 FR 18238–89 dated 4/21/2009. This reorganization will establish the Division of the Office of the Secretary Budget (AML5) within the Office of Budget (AML) within the Office of Resources and Technology (ORT) to review and analyze the budgets of the Staff Divisions (STAFFDIVS) funded by the General Departmental Management (GDM), Office of Inspector General (OIG) and Office for Civil Rights (OCR) appropriations. This reorganization will make the following changes under Chapter AM, Office of Resources and Technology:

Under Section AM.20 Functions, delete Section AML in its entirety and replace it with the following:

Section AML.00 Mission

The Office of Budget provides advice and support to the Secretary and the Assistant Secretary for Resources and Technology (ASRT) on matters pertaining to: formulation of the HHS and President's budgets, management of program assessment and performance reporting, presentation of budgets and reconciliation legislation to OMB and the Congress, and resolution of issues arising from the execution of final appropriations.

Section AML.10 Organization

The Office of Budget is headed by the Deputy Assistant Secretary for Budget who reports to the Assistant Secretary Resources and Technology/Chief Financial Officer and includes the following:

- Division of Discretionary Programs (AML1).
- Division of Health Benefits and Income Support (AML3).
- Division of Budget Policy, Execution and Management (AML4).
- Division of the Office of the Secretary Budget (AML5).

Section AML.20 Functions

1. *Division of Discretionary Programs (AML1):* The Division of Discretionary Programs:

a. Provides analytical services and assistance to the Secretary, the Assistant Secretary for Resources and Technology (ASRT), and HHS Operating Division (OPDIV) Heads in their budgetary management of the Department's principal discretionary programs, including science and health services programs administered by the Public Health Service components; and social service programs of the Administration for Children and Families and the Administration on Aging.

b. Reviews budgets and related requests for resources, and analyzes plans and proposals for new or alternative legislation.

c. Analyzes proposed regulations, reorganizations, or program initiatives to determine their policy, resource and management implications.

d. Proposes recommendations on draft regulations, proposed legislation and reorganization proposals.

e. Proposes budget options and policy initiatives as necessary to achieve program objectives established by the Secretary.

f. Assists in the development of strategies for the presentation of the budget to the Office of Management and Budget (OMB) and the Congress, and develops materials for key Departmental officials who testify at hearings before these bodies.

g. Provides guidance to OPDIVs in the formulation of their budgets.

h. Conducts special reviews and analyses to examine assigned OPDIV program operations and management effectiveness.

i. Assists in the development of performance plans, reports, and program assessments under the Government Performance and Results Act.

j. Assists in the presentation of the Department's budget to the public by developing material for use of Departmental officials, and reviews press statements and other public documents for consistency with approved budgets and plans.

2. *Division of Health Benefits and Income Support (AML3).* The Division:

a. Provides analytical services and assistance to the Secretary, the ASRT, and the Department OPDIV Heads in the budgetary management of the Department's principal entitlement programs including Medicare, Medicaid, Family Support Payments and other entitlements in support of children and families.

b. Reviews budget and related requests for resources; analyzes plans and proposals for new legislation, regulations, or program initiatives to determine their resource, policy, and management implications; proposes recommendations for the Deputy Assistant Secretary for Budget on budget requests, draft regulations, proposed legislation, and reorganization proposals.

c. Assists the Secretary, the ASRT and the OPDIV heads in evaluating programs and budgetary proposals by developing reliable cost projections for legislative and planning proposals, and ensuring that proposals are consistent with approved plans and policies.

d. Coordinates the preparation of budget estimates and forecasts of resources required to support the programs and operations of the Department.

e. Reviews reprogramming requests and recommends appropriate action to the Deputy Assistant Secretary for Budget.

f. Provides guidance in budget formulation for the appropriate OPDIV.

g. Conducts special management reviews and analyses, and develops management options to ensure efficient and effective program operations and to encourage management improvements.

h. Proposes budget options and policy initiatives as necessary to achieve program objectives established by the Secretary.

i. Assists in the development of strategies for presentation of the budget to the Office of Management and Budget and the Congress and develops materials for key Department officials who testify at hearings before these bodies.

j. Assists in the development of performance plans, reports, and program assessments under the Government Performance and Results Act.

k. Manages the overall allocation of Health Care Fraud and Abuse Control (HCFAC) funds.

3. *Division of Budget Policy, Execution and Review (AML4).* The Division of Budget Policy, Execution and Review (DBPER):

a. Directs the formulation and presentation of the HHS budget by developing and promulgating to the OPDIVs and others the policies, procedures, guidance, and schedules for preparing budget submissions.

b. Coordinates the presentation of the Department's budget and performance plan to Congress, including preparation and submission of justifications, reports, significant items, and crosscutting materials; preparation of the Secretary's testimony before the Appropriations Committees; and coordination of transcripts, questions for the record, and other hearing materials.

c. Provides advice and analysis to support Department-wide budget decision-making.

d. Maintains active communication with Department budget officers with regard to budget events and activities with OMB, GAO, Congress and other parties.

e. Manages a computerized budget information system reflecting data on a HHS-wide basis and coordinates OPDIV input into the system.

f. Provides direct staff support to the Secretary in preparation for appropriation hearings and other budget related presentations and briefings.

g. Actively communicates with the Budget and Appropriations Committees in the Congress and provides intelligence and analyses of budget decisions to senior HHS staff and the OPDIVs.

h. Coordinates preparation of guidelines governing reprogrammings, transfers between accounts, and other crosscutting funding methods; provides recommendations and staff support in managing and processing crosscutting funding proposals.

i. Analyzes and prepares reports on HHS performance in managing Full Time Equivalent (FTE) levels and in implementing FTE policy, and provides expert advice on Department-wide staffing.

j. Provides leadership and direction in the Department-wide review, analysis and appraisal of financial elements of program execution and the development and execution of policies related to efficient allocation, expenditure and control of funds.

k. *Coordinates and tracks outlay projections:* (1) To assist OMB in the continuing effort to monitor spending and to thereby improve the management of the Government's overall cash and debt operations; and (2) in support of formulation of the budget, including the maintenance of HHS ceiling controls and the development of outlay estimates shown in the President's Budget for controllable programs.

l. Promulgates Departmental spending policies, especially in the event of Continuing Resolutions and possible suspension of operations due to the failure of the Congress to enact appropriations on time, and works with agency budget officers and the OMB in formulating agency funding plans.

m. Maintains a system of Department-wide budget execution, including the management and control of the apportionment of funds in accordance with the requirements of the Anti-Deficiency Act and OMB regulations; and requests and monitors the receipt of Treasury warrants.

n. Serves as principal staff advisor to the ASRT on all matters involving budget execution.

o. Acts as liaison on behalf of HHS with OMB, the Treasury Department, the Congressional Budget Office, and other agencies on matters involving budget execution.

p. Responsible for the development and maintenance of a system of financial information which involves the collection, organization, and maintenance of financial data in electronic form as well as the development of reporting mechanisms for making the financial information useful and available for decision making.

q. Represents the Department in government-wide activities to implement the development and implementation of performance measures and budget-related performance planning policies, requirements and processes. Manages program performance assessment activities.

r. Provides special management review services for selected activities.

4. *Division of the Office of the Secretary Budget (AML5).* The Division of the Office of the Secretary Budget (DOSB):

a. Reviews and analyzes the budgets of the Staff Divisions (STAFFDIVS) funded by the General Departmental Management (GDM), Office of Inspector General (OIG) and Office for Civil Rights (OCR) appropriations. Prepares special analyses of these budgets for use in decision-making, particularly for evaluating capacity and determining if alternative approaches are feasible. Monitors Congressional appropriations hearings in which the GDM STAFFDIVS, OIG and OCR are participants.

b. Works closely with OASAM in planning and formulating the GDM budget justification for presentation to the Secretary, OMB and the Congress.

c. Reviews budgets and related requests for resources, and analyzes plans and proposals for new or alternative legislation.

d. Analyzes proposed regulations, reorganizations, or program initiatives to determine their policy, resource and management implications.

e. Proposes recommendations on draft regulations, proposed legislation and reorganization proposals.

f. Proposes budget options and policy initiatives as necessary to achieve program objectives established by the Secretary.

g. Assists in the development of strategies for the presentation of the budget to the Office of Management and Budget (OMB) and the Congress, and develops materials for key Departmental officials who testify at hearings before these bodies.

h. Provides guidance to STAFFDIVs in the formulation of their budgets.

i. Conducts special reviews and analyses to examine assigned STAFFDIV program operations and management effectiveness.

j. Provides staff assistance to the Secretary, the ASRT, the Service and Supply Funds (SSF) Board of Directors, OPDIV Budget Officers and STAFFDIV Heads in the budgetary and financial management of the SSF.

k. Provides for budget policy management and financial integrity of the SSF in the provision of Departmental common use administrative services.

l. Assists in the planning and preparation of the SSF budget for presentation to the SSF Board, the OMB, and Congress.

m. Provides budget policy and technical support to the Program Support Center Director (and other activity managers) on all SSF activities.

n. Directs and provides technical guidance to SSF activity managers in preparing annual budgets.

o. Directs and provides technical guidance to SSF accountants in preparing annual financial statements. Assists in the planning and preparation of these statements for presentation to the SSF Board, auditors, and the Office of Management and Budget.

p. Establishes Department policy in receiving and responding to Inspector General reports and audits.

q. Prepares apportionment requests for the SSF.

Dated: July 30, 2009.

E.J. Holland, Jr.,

Assistant Secretary for Administration and Management.

[FR Doc. E9–18856 Filed 8–5–09; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (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.

Proposed Project: National Health Service Corps Site Profile—New

The National Health Service Corps (NHSC) of the Bureau of Clinician Recruitment and Service, Health Resources and Services Administration (HRSA), is committed to improving the health of the Nation's underserved by

uniting communities in need with caring health professionals and by supporting communities' efforts to build better systems of care.

The NHSC Site Profile, submitted by approved NHSC sites, provides an overview of the site. A completed profile will contain information such as, the name of the sponsoring agency, site recruiter contact information, staffing levels, service users, charges for services, employment policies, etc. Assistance in completing the site profiles may be obtained through the appropriate State Primary Care Offices, State Primary Care Associations and the NHSC. The site profiles will be posted with eligible vacancies on the NHSC Job Opportunities Web site. Site profiles are used as a marketing tool for the site to recruit prospective primary health care clinicians.

The estimated annual burden is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Application	7080	1	7080	2.5	17700
Total	7080	1	7080	2.5	17700

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 29, 2009.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E9–18813 Filed 8–5–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer on (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (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.

Proposed Project: Ready Responders Program Application—New

The HRSA National Health Service Corps (NHSC) *Ready Responder Program* is comprised of an elite cadre of Commissioned Corps officers. These officers are assigned to practice in NHSC-approved clinical sites located throughout the country within eligible Health Professional Shortage Areas. The purpose of the program is to increase access to primary care services in underserved communities and to assist sites in their efforts to recruit providers and become self-sustaining. In addition to providing direct patient care at the site where the officer is stationed, each Ready Responder typically works with the sites to develop various programs and activities such as emergency preparedness and response, patient education, staff development, staff recruitment, and sound business practices. Moreover, they are specially trained to deploy in the event of a local, regional, and national emergency.

This application will be used by NHSC sites to request the assignment of a NHSC Ready Responder. The document requires the applicant to describe the needs in their community and at their respective sites. The application also asks the site to describe the roles and responsibilities of the prospective Ready Responder. Completed applications will be collected and reviewed by NHSC staff.

The estimated annual burden is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Application	155	1	155	2.5	387.50
Total	155	1	155	2.5	387.50

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 29, 2009.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E9–18812 Filed 8–5–09; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1495–CN]

RIN 0938–AP50

Medicare Program; Inpatient Psychiatric Facilities Prospective Payment System Payment Update for Rate Year Beginning July 1, 2009 (RY 2010); Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Correction of notice.

SUMMARY: This document corrects typographical errors that appeared in the notice published in the May 1, 2009 **Federal Register** entitled, ''Inpatient Psychiatric Facilities Prospective Payment System Payment Update for Rate Year Beginning July 1, 2009 (RY 2010).''

DATES: *Effective Date:* August 6, 2009. *Applicability Date:* The correction notice is applicable for discharges occurring on or after July 1, 2009 through June 30, 2010.

FOR FURTHER INFORMATION CONTACT: Dorothy Myrick or Jana Lindquist, (410) 786–4533.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. E9–9962 of May 1, 2009 (74 FR 20362), there were several typographical errors in Addendum B, Table 1—RY 2010 Wage Index For Urban Areas Based On CBSA Labor Market Areas—that are identified and corrected in the Correction of Errors section below.

II. Correction of Errors

In FR Doc. E9–9962 of May 1, 2009 (74 FR 20362), make the following corrections: 1. On pages 20389, 20392, and 20399 in Addendum B, Table 1—RY 2010 Wage Index for Urban Areas Based on CBSA Labor Market Areas, there are typographical errors in the wage index values for several of the Core-Based Statistical Areas (CBSAs). The correct wage index values, not the values incorrectly published in the FY 2010 Inpatient Psychiatric Facilities (IPF) Prospective Payment System (PPS) notice, were implemented beginning on July 1, 2009. The following CBSAs are corrected to read as follows:

CBSA code	Urban area (constituent counties)	Wage index
26820	Idaho Falls, ID	0.9080
	Bonneville County, ID	
	Jefferson County, ID	
26900	Indianapolis-Carmel, IN	0.9908
	Boone County, IN	
	Brown County, IN	
	Hamilton County, IN	
	Hancock County, IN	
	Hendricks County, IN	
	Johnson County, IN	
	Marion County, IN	
	Morgan County, IN	
	Putnam County, IN	
	Shelby County, IN	
34900	Napa, CA	1.4520
	Napa County, CA	
49500	Yauco, PR	0.3432
	Guánica Municipio, PR	
	Guayanilla Municipio, PR	
	Peñuelas Municipio, PR	
	Yauco Municipio, PR	

III. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive this notice and comment procedure if the Secretary finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the notice.

Section 553(d) of the APA ordinarily requires a 30-day delay in the effective date of rules after the date of their publication in the **Federal Register**. This 30-day delay in the effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. This notice merely corrects typographical errors in the addendum of the RY 2010 IPF PPS notice and does not make any substantive changes to the policies or payment methodologies. The correct policies were implemented as of July 1, 2009. We are simply conforming the RY 2010 IPF PPS notice to those policies by

making the corrections identified herein. We believe that undertaking further notice and comment procedures to incorporate these corrections into the FY 2010 IPF PPS notice and delaying the effective date of these changes is unnecessary. In addition, we believe it is important for the public to have the correct information as soon as possible, and believe it is contrary to the public interest to delay the dissemination of it. Therefore, we find there is good cause to waive notice and comment procedures and the 30-day delay in the effective date for this correction notice.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 29, 2009.

Dawn Smalls,

Executive Secretary to the Department.

[FR Doc. E9–18875 Filed 8–5–09; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration (SAMHSA)

Advisory Committee for Women's Services; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Advisory Committee for Women's Services (ACWS) on August 25, 2009 in Chicago, Illinois.

The meeting is open to the public. It will include a report from the SAMHSA Acting Deputy Administrator, Updates from ACWS members, and presentations on Integrated Services for Women and Girls—a Community Health Center Perspective and Advancing Behavioral Health of Women and Girls in the Healthcare Reform Environment. The ACWS will also hold a Listening Session on Women and Trauma at the National Association of Community Health Centers' Conference at the Chicago Hilton Hotel, Chicago, Illinois from 4:45 p.m. to 6:15 p.m.

Attendance by the public will be limited to space available. Public comments are welcome. The meeting can also be accessed via audio and net-conference. To obtain the access information, to register, to submit written or brief oral comments, or to request special accommodations for persons with disabilities, please communicate with the Advisory Committee for Women's Services' Designated Federal Official, Ms. Nevine Gahed (see contact information below).

Substantive meeting information and a roster of Committee members may be obtained either by accessing the SAMHSA Committees' Web site at *https://nac.samhsa.gov/WomenServices/index.aspx,* or by contacting Ms. Gahed. The transcript for the meeting will also be available on the SAMHSA Committees' Web site within three weeks after the meeting.

Committee Name: SAMHSA's Advisory Committee for Women's Services.

Date/Time/Type: Tuesday, August 25, 2009, from 9 a.m. to 6:15 p.m.: Open.

Place: The Palmer House Hotel, 17 East Monroe Street, Chicago, Illinois 60603. Telephone: 312–726–7500.

Contact: Nevine Gahed, Designated Federal Official, SAMHSA Advisory Committee for Women's Services, 1 Choke Cherry Road, Room 8–1112, Rockville, Maryland 20857.

Telephone: (240) 276–2331; FAX: (240) 276–2220 and *E-mail: nevine.gahed@samhsa.hhs.gov.*

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. E9–18837 Filed 8–5–09; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the National Cancer Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

A portion of 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 Advisory Board; Subcommittee on Clinical Investigations.

Open: September 14, 2009, 6:30 p.m. to 8 p.m.

Agenda: Discussion on Clinical Investigations.

Place: Embassy Suites, Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Jeffrey Abrams, MD, Executive Secretary, NCAB Subcommittee on Clinical Investigations, National Cancer Institute, National Institutes of Health, 6130 Executive Boulevard, Building EPN, 7th Floor, Room 7018, Bethesda, MD 20892–7436, (301) 496–6138.

Name of Committee: National Cancer Advisory Board.

Open: September 15, 2009, 8:30 a.m. to 3:30 p.m.

Agenda: Program reports and presentations; business of the Board.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Name of Committee: National Cancer Advisory Board.

Closed: September 15, 2009, 3:30 p.m. to 5 p.m.

Agenda: Review of grant applications.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Name of Committee: National Cancer Advisory Board.

Open: September 16, 2009, 8:30 a.m. to 12 p.m.

Agenda: Program reports and presentations; business of the Board.

Place: National Institutes of Health, 9000 Rockville Pike, Building 31, C Wing, 6th Floor, Conference Room 10, Bethesda, MD 20892.

Contact Person: Dr. Paulette S. Gray, Executive Secretary, National Cancer Institute, National Institutes of Health, 6116 Executive Boulevard, 8th Floor, Room 8001, Bethesda, MD 20892–8327, (301) 496–5147.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles

will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/ncab.htm*, where an agenda and any additional information for the meeting will be posted when available.

(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, National Institutes of Health, HHS, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: July 30, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18876 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Structure and Function and Methods.

Date: August 17, 2009.

Time: 11 a.m. to 1 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: Mary Custer, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7850, Bethesda, MD 20892–7850. (301) 435–1164. *custerm@csr.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.

Name of Committee: Center for Scientific Review Special Emphasis Panel. Stem Cell Competitive Revisions.

Date: August 26, 2009.

Time: 2 p.m. to 5 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: Jonathan K. Ivins, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892. (301) 594–1245. *ivinsj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel. CB Member SEP.

Date: August 31–September 1, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jonathan Arias, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892. 301–435–2406. *ariasj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel. Skeletal Biology.

Date: September 1–3, 2009.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jo Pelham, BA, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4102, MSC 7814, Bethesda, MD 20892. (301) 435–1786. *pelhamj@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel. Cardiac Energetics.

Date: September 2, 2009.

Time: 1:30 p.m. to 5 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: Maqsood A. Wani, DVM, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2114, MSC 7814, Bethesda, MD 20892. 301–435–2270. *wanimaqs@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 30, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18878 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Review of NIEHS CORE Center Application.

Date: August 27, 2009.

Time: 8:30 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Chapel Hill, Europa, Chapel Hill, NC.

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709. (919) 541–1307. *malone@niehs.nih.gov.*

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, Review of CORE Competitive Revision Application.

Date: August 27, 2009.

Time: 11:30 a.m. to 12:45 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Chapel Hill, Europa, Chapel Hill, NC.

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research and Training, Nat. Institute Environmental Health Sciences, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709. (919) 541–1307. *malone@niehs.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk

Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: July 31, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18882 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ''Down Syndrome RFA''.

Date: August 17, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Norman Chang, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, (301) 496–1485, *changn@mail.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.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ''Mitochondrial Encephalomyopathies''.

Date: August 18, 2009.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Norman Chang, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, (301) 496–1485, *changn@mail.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. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 30, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18869 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ''Gene Expression Database for Mouse Development''.

Date: August 10, 2009.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Norman Chang, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, (301) 496–1485, *changn@mail.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.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; ''Biomarkers for Autism Treatment''.

Date: August 11, 2009.

Time: 12:15 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Norman Chang, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, (301) 496–1485, *changn@mail.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. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 30, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18872 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel; Regulaton of Placental Signaling and Function by Maternal Nutrient Restriction.

Date: August 12, 2009.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Peter Zelazowski, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510. 301–435–6902. *peter.zelazowski@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.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel. Initiation of Human Labor: Prevention of Prematurity.

Date: August 14, 2009.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Bethesda, MD (Telephone Conference Call).

Contact Person: Peter Zelazowski, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510. 301–435–6902. *peter.zelazowski@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. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: July 30, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18870 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Capacity Building Assistance (CBA) To Improve the Delivery and Effectiveness of Human Immunodeficiency Virus (HIV) Prevention Services for High-Risk and/or Racial/Ethnicity Minority Populations, Program Announcement Number PS09–906, Initial Review

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting.

Time and Date: 8:30 a.m.–5:30 p.m., August 21, 2009 (Closed).

Place: Teleconference.

Status: The meeting will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include an initial review, discussion, and evaluation of applications received in response to ''Capacity Building Assistance (CBA) to Improve the Delivery and Effectiveness of Human Immunodeficiency Virus (HIV) Prevention Services for High-Risk and/or Racial/Ethnicity Minority Populations, PS09–906.'' The meeting was initially convened June 15–18, 2009. A reviewer conflict of interest was confirmed by CDC staff during a pre-decisional site visit. The panel will be reconvened to review the four affected applications.

For More Information Contact: Monica Farmer, M.Ed., Public Health Analyst, Strategic Science and Program Unit, Office of the Director, Coordinating Center for Infectious Diseases, CDC, 1600 Clifton Road, NE., Mailstop E–60, Atlanta, GA 30333, *Telephone:* (404) 498–2277.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: July 31, 2009.

Andre Tyler,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–18808 Filed 8–5–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; SPORE in Breast, Leukemia, Prostate and Skin Cancers.

Date: September 9–10, 2009.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Caron A. Lyman, PhD, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd, Room 8119, Bethesda, MD 20892–8328, 301–451–4761, *lymanc@mail.nih.gov*.

Name of Committee: National Cancer Institute Special Emphasis Panel; SPORE in GI, HN, Lung, and Pancreatic Cancers.

Date: September 9–10, 2009.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Shamala K. Srinivas, PhD, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8123, Bethesda, MD 20892, 301–594–1224, *ss537t@nih.gov*.

(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, National Institutes of Health, HHS)

Dated: July 30, 2009.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–18877 Filed 8–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2009–0365]

Comment Request on MARPOL Annex V Wider Caribbean Region Special Area

AGENCY: Coast Guard, DHS.

ACTION: Notice of Request for Comments.

SUMMARY: The Coast Guard seeks comments from the public on the effects of implementing the special area discharge standards on vessel and reception facility operations when the Wider Caribbean region (WCR) special area comes into effect. The Coast Guard also seeks recommendations from the public on how to efficiently transition from the current standards regulating garbage discharges to the special area discharge standards in the WCR when the WCR special area comes into effect.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before November 4, 2009 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2009–0365 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail Bryana Nicholas, telephone 202–372–1429, e-mail: *Bryana.k.nicholas@uscg.mil;* or David Condino, telephone 202–372–1145, e-mail: *david.a.condino@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to submit comments and related material. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2009–0365) and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Notices'' and insert ''USCG–2009–0365'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

Viewing the comments: To view the comments, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2009–0365'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

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

Background and Purpose

The International Convention for the Prevention of Pollution from Ships (MARPOL), is an international agreement on the subject of marine pollution. The United States is a party to the Convention and has developed national regulations implementing the standards set out in MARPOL. MARPOL Annex V provides regulations for the prevention of pollution by garbage from ships. Annex V also allows for the creation of special areas with more stringent regulations for the discharge of garbage.

In September 1990, the United States proposed to the International Maritime Organization (IMO), Marine Environment Protection Committee, to establish the Gulf of Mexico as a special area under MARPOL Annex V. In November 1990, Venezuela submitted an amendment to the proposal to include the Wider Caribbean region along with the Gulf of Mexico as a special area under MARPOL Annex V. The IMO adopted the WCR special area, including the Gulf of Mexico and the Caribbean Sea, in July 1991. In August 1995, the Coast Guard added the WCR special area to the Code of Federal Regulations, as described in 33 CFR 151.06(a)(12) (see, 60 FR 43377, Aug. 21, 1995; 73 FR 35013, Jun. 19, 2008). In accordance with 33 CFR § 151.53 and paragraph 4(b) of Regulation 5 of Annex V of MARPOL, the WCR special area will enter into effect when each party to the Convention whose coastline borders the WCR special area has certified that reception facilities are available and the IMO establishes an effective date for the special area.

In accordance with MARPOL Regulations 5 and 7, the United States has provided the required notification to IMO regarding our MARPOL Annex V reception facilities. However, because all of the parties to MARPOL within the WCR special area have yet to make sufficient notifications that reception facilities exist in the WCR special area

to allow for compliance with the special area discharge standards in the Annex, the IMO has not yet established a date for the WCR special area to come into effect.

When the WCR special area enters into effect, the more restrictive discharge standards in 33 CFR 151.71 and Regulation 5 of MARPOL Annex V will also enter into effect. In general, these regulations prohibit the discharge of all garbage from a ship in special areas except food wastes. The discharge of food wastes must be made as far as practicable from land, but in any case not less than 12 nautical miles from the nearest land. However, in the WCR special area food wastes comminuted or ground and capable of passing through a screen with openings no greater than 25 millimeters may be discharged not less than 3 nautical miles from the nearest land.

The Coast Guard will not speculate as to a time line, and there currently is no time line, for the WCR special area coming into effect. In anticipation of the WCR special area entering into effect at some point in the future, the Coast Guard invites the public, commercial interests, local, State, Federal agencies, Non-Governmental Organizations (NGOs), public interest groups, trade organizations, and all other interested parties to comment on the WCR special area entering into effect.

The Coast Guard is specifically interested in identifying all issues that impact port reception facilities, commercial shipping vessels, and recreational vessels operating in the WCR special area and in obtaining recommendations to address those issues. The Coast Guard seeks input on the following general issues:

- Additional MARPOL Annex V port reception facility capacity needed when the WCR special area goes in to effect;
- The impact on MARPOL Annex V cargo residues within the WCR special area;
- Impacts of MARPOL Annex V waste collection requirements on local/regional waste disposal capacity and infrastructure located within ports in the WCR special area;
- Time needed to ensure compliance with WCR special area discharge standards.

The Coast Guard would also like to receive public input concerning the following questions:

- How many vessels operating in the WCR currently treat it as a special area and adhere to the special area discharge standards?
- What would be the operational impact to vessels discharging MARPOL Annex V garbage, including cargo residues and cargo hold wash-water containing cargo residue at a port reception facility?
- Is there current capability to accept MARPOL Annex V cargo residues and cargo residue wash-water from vessels, and do cargo vessels currently use this type of reception facility?
- How much additional MARPOL Annex V garbage would need to be offloaded at port reception facilities, and will currently adequate port reception facilities still be adequate when the WCR special area goes into effect?
- What effect, if any, will the discharge restrictions in the WCR special area have on U.S. port and terminal operators holding a Certificate of Adequacy (COA)?
- Will U.S. port and facility operators be able to meet increased quantity and capacity requirements and ensure that port reception facilities can meet the needs of all vessels calling at their ports?
- How many vessels operate solely within the WCR special area?

Written comments and responses to the above questions will be added to the docket number for this notice (USCG–2009–0365). The Coast Guard intends to review and analyze all comments received in order to develop a way forward for the implementation of the discharge standards when the WCR special area comes into effect.

This notice is issued under authority of 33 CFR 151.53(b) and 5 U.S.C. 552.

Dated: July 30, 2009.

J.G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. E9–18741 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5308–N–02]

Notice of Availability: Implementation of the Tax Credit Assistance Program (TCAP) Changes and Clarifications

AGENCY: Office of the Assistant Secretary for Communnity Planning and Development, HUD.

ACTION: Notice.

SUMMARY: On May 4, 2009, HUD posted on its Web site a notice establishing the submission requirements, eligible uses, fund commitment and expenditure deadlines, fund distribution, and other requirements for the Tax Credit Assistance Program (TCAP) authorized by section 2, Division A, Title XII of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5, approved February 17, 2009). Through this document, HUD announces that it has posted on its Web site a revised notice that changes and clarifies a number of TCAP program requirements established in the document posted on May 4, 2009. The changes to the notice include the expansion of the definition of eligible TCAP projects to include projects that have received or will receive Gulf Opportunity Zone and Midwestern Disaster Area Housing Credits, as provided for under section 1204 of the 2009 Supplemental Appropriations Act (Pub. L. 111–32, approved June 24, 2009). The revised notice also provides for the use of additional reporting information that has now become available from both the Department and the Office of Management and Budget, and the addition of acquisition, on-site demolition costs, and hazardous material remediation costs to the eligible TCAP program costs. Please see the revised document for all changes made. The revised notice is available on the HUD Web site at: *http://www.hud.gov/recovery/tax-credit.cfm.*

FOR FURTHER INFORMATION CONTACT: Clifford Taffet, Director, Office of Affordable Housing, Office of Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7162, Washington, DC 20410–3000; telephone 1–800–998–9999. Hearing- or speech-impaired individuals may access the voice telephone number listed above by calling the toll-free Federal Information Relay Service during working hours at 800–877–8339.

Dated: July 30, 2009.

Nelson R. Bregón,

General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. E9–18800 Filed 8–5–09; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

60-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: National Park Service, Interior.

ACTION: Notice and request for comments.

SUMMARY: The National Park Service (NPS) plans to submit a request to OMB to renew approval of the collection of information in 36 CFR part 51, regarding the submission of offers in response to concession opportunities. NPS will be

requesting a 3-year term of approval for this information collection activity.

DATES: Public comments on this Information Collection Request (ICR) will be accepted on or before October 5, 2009.

ADDRESSES: Send comments to: Ms. Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC 20005, or via e-mail at *jo_pendry@nps.gov,* or via fax at 202/371–2090.

To Request a Draft of Proposed Collection of Information Contact: Ms. Jo A. Pendry, Chief, Commercial Services Program, National Park Service, 1201 Eye Street, NW., 11th Floor, Washington, DC 20005 or via fax at 202/371–2090. You are entitled to a copy of the entire ICR package free-of-charge.

SUPPLEMENTARY INFORMATION: 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 Office of Management and Budget (OMB) control number.

OMB Control Number: 1024–0125.

Title: Submission of Offers in Response to Concession Opportunities.

Current Expiration Date: 01/31/2010.

Form(s): None.

Type of Request: Extension of a currently approved collection of information.

Abstract: The regulations at 36 CFR part 51 primarily implement Title IV of the National Parks Omnibus Management Act of 1998 (Pub. L. 105–391 or the Act), which provides legislative authority, policies and requirements for the solicitation, award and administration of National Park Service (NPS) concession contracts. The regulations require the submission of offers by parties interested in applying for a NPS concession contract.

Affected public: Businesses and nonprofit organizations.

Obligation to respond: Required to obtain or retain a benefit.

Frequency of response: On occasion.

Estimated total annual responses: 240.

Estimated average completion time per response: 320 hours.

Estimated annual reporting burden: 76,800 hours.

Estimated annual nonhour cost burden: $1,120,000.

Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that NPS will be able to do so. All responses to the notice will be summarized and included in the request for the Office of Management and Budget approval.

Dated: August 3, 2009.

Cartina Miller,

NPS Information Collection Clearance Officer.

[FR Doc. E9–18857 Filed 8–5–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–R–2009–N135; 70133–1265–0000–U4]

Izembek National Wildlife Refuge, Cold Bay, AK

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare an Environmental Impact Statement (EIS) for a proposed land exchange of certain lands owned by the State of Alaska and certain lands owned by the King Cove Corporation and evaluation of a road corridor through the Izembek National Wildlife Refuge and the Izembek Wilderness Area. We furnish this notice to advise the public and other agencies of our intentions and to seek information and suggestions on the scope of issues to be addressed in the EIS. Special mailings, newspaper articles, and other media releases will announce additional opportunities to provide written and oral input.

DATES: While we are initiating the EIS, progress will be dependent on specific appropriations to fund this effort. Public scoping meetings will be held in Washington, DC, as well as in Anchorage, King Cove, Cold Bay, Sand Point, and Nelson Lagoon in Alaska. At least 30 days prior to each meeting, we will announce dates, times, and locations.

ADDRESSES: Additional information concerning the proposed land exchange is at *http://izembek.fws.gov/EIS.htm.* Send your comments or requests for information by any of the following methods:

- *E-mail: izembek_eis@fws.gov;*
- *Fax: Attn:* Helen Clough, (907) 786–3965; or
- *U.S. Mail:* Helen Clough, Project Coordinator, U.S. Fish and Wildlife Service, 1011 East Tudor Rd., MS–231, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Helen Clough, 907–786–3357 (phone), or at the addresses above.

SUPPLEMENTARY INFORMATION:

The Izembek National Wildlife Refuge (417,533 acres) and the North Creek (8,452 acres) and Pavlof (1,447,264 acres) units of the Alaska Peninsula National Wildlife Refuge are located at the westernmost tip of the Alaska Peninsula. The 1,008,697-acre Unimak Island (the easternmost Aleutian Island of the Alaska Maritime National Wildlife Refuge) lies across the Isanotski Strait. To the north of the Izembek Refuge is the Bering Sea; to the south is the Pacific Ocean. The Alaska Peninsula is dominated by the rugged Aleutian Range, part of the Aleutian arc chain of volcanoes. Landforms include mountains, active volcanoes, U-shaped valleys, glacial moraines, low tundra wetlands, lakes, sand dunes, and lagoons. Elevations range from sea level to the 9,372-foot Shishaldin Volcano. Shishaldin Volcano is a designated National Natural Landmark. Several major lagoons are within the Izembek Refuge boundary. These lagoons contain some of the world's largest eelgrass beds. The lagoons are under the jurisdiction of the State of Alaska. Izembek Lagoon is designated the Izembek State Game Refuge. Birds from all over the Arctic funnel through Izembek Refuge each fall on their way to wintering grounds throughout the world. More than 98 percent of the world's Pacific black brant use Izembek Lagoon as a staging area for their fall migration to Mexico. Other birds that use the refuge include golden plovers, ruddy turnstones, western sandpipers, tundra swans, Steller's eiders, and emperor geese. The refuge also is home to large concentrations of brown bears and other large mammals such as caribou and wolves. The red, pink, chum, and silver salmon that use the waters within the refuge enrich the entire ecosystem with the nutrients they bring from the sea. The refuge also has a rich human history, from ancient settlements of Alaska Natives, through the 18th and 19th century Russian fur

traders, to a World War II outpost. The Izembek Wilderness covers much of the refuge and includes pristine streams, extensive wetlands, steep mountains, tundra, and sand dunes, and provides high scenic, wildlife, and scientific values, as well as outstanding opportunities for solitude and primitive recreation.

The King Cove Corporation is an Alaska Native Village Corporation established under the Alaska Native Claims Settlement Act of 1971 (ANCSA; 43 U.S.C. 1601 *et seq.*) Under the authority of ANCSA, Congress granted to King Cove Corporation land entitlements within and adjacent to Izembek Refuge. The State of Alaska also owns lands, submerged lands, shorelands, and tidelands within and adjacent to Izembek and Alaska Peninsula Refuges, including the Izembek State Game Refuge.

Alaska Maritime National Wildlife Refuge stretches from the Arctic Ocean to the southeast panhandle of Alaska and protects breeding habitat for seabirds, marine mammals, and other wildlife on more than 2,500 islands, spires, rocks, and coastal headlands. Sitkinak Island, which lies within the boundaries of the Alaska Maritime National Wildlife Refuge, is primarily owned by the State of Alaska, with two parcels owned by the Service.

In the Omnibus Public Land Management Act of 2009 (H.R. 146, Subtitle E; the Act), Congress directs us to prepare an EIS under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR parts 1500–1508) to evaluate the impacts of a proposed land exchange with the State of Alaska and the King Cove Corporation for the purpose of constructing a single-lane gravel road between the communities of King Cove and Cold Bay, Alaska. The land exchange would involve the removal of approximately 206 acres within the Izembek Wilderness portion of Izembek National Wildlife Refuge for the road corridor and approximately 1,600 acres of Federal land within the Alaska Maritime National Wildlife Refuge on Sitkinak Island. In exchange, we would receive approximately 43,093 acres of land owned by the State of Alaska and approximately 13,300 acres of land owned by the King Cove Corporation. These lands are located around Cold Bay and adjacent to the North Creek Unit of Alaska Peninsula National Wildlife Refuge.

The preparation of this EIS is to begin not later than 60 days after the Secretary receives notification by the State and the King Cove Corporation of their intention to exchange lands in accordance with the Act. The Secretary received notification by the King Cove Corporation on May 19, 2009, and by the State of Alaska on June 19, 2009. This notice initiates the process and opens the period for public scoping. Formal public involvement activities will begin when we receive funds appropriated to support this effort. At that time we will announce additional public involvement activities.

In accordance with Section 6402(b)(2)(B) of the Act, the EIS will analyze the proposed land exchange and the potential construction and operation of a road between the communities of King Cove and Cold Bay, Alaska, and will evaluate a specific road corridor through the Izembek Refuge that will be identified in consultation with the State of Alaska, the City of King Cove, and the Agdaagux Tribe of King Cove. The alternatives anticipated at this time include the existing situation (no land exchange or road construction) and the proposed land exchange and road construction and operation as outlined in the Act. In preparing the EIS, the Service will solicit comments from public locally, regionally, and nationally. As required in the Act, subsequent to the preparation of the EIS and in conjunction with the Record of Decision, the Secretary of the Interior will determine whether the land exchange (including the construction of the proposed road) is in the public interest.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us to withhold it from public review, we cannot guarantee we will be able to do so.

Dated: July 31, 2009.

Gary Edwards,

Acting Regional Director, U.S. Fish and Wildlife Service, Anchorage, Alaska.

[FR Doc. E9–18809 Filed 8–5–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Notice of Availability for the Record of Decision on the Final General Management Plan/Environmental Impact Statement, Minuteman Missile National Historic Site, South Dakota

AGENCY: Department of the Interior, National Park Service.

SUMMARY: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)), the National Park Service (NPS) announces the availability of the Record of Decision (ROD) for the Final General Management Plan (GMP)/Environmental Impact Statement (EIS), Minuteman Missile National Historic Site, South Dakota. On July 2, the acting regional director for the NPS Midwest Region approved the ROD for the Final GMP/EIS. As soon as practicable, the NPS will begin to implement the selected alternative.

The selected alternative, with the concept of presenting the national historic site as a symbol of the Cold War, will restore Delta One to its ready-alert status and rehabilitate Delta Nine to its stand-down appearance. These facilities will be presented as symbols commemorating the history and significance of the Cold War, the arms race, and the intercontinental ballistic missile in the second half of the 20th century.

The selected alternative includes locating a 7,700-square-foot visitor/administrative facility northwest of exit 131 on Interstate 90, built in two stages. Under the selected alternative, visitors will drive their personal cars to the Delta One facility and, with reservations, go on a ranger-led tour. Visitors will also drive their personal cars to Delta Nine for a self-guided tour. A shuttle system to Delta One will be developed for operation when the level of visitation warrants. The chain link security gate at Delta One will remain locked during business hours except during shuttle tours. The gate at Delta Nine will remain open during business hours.

Visitors benefit from this plan because of a rich range of options to see and learn about the missile sites as symbols that commemorate the Cold War, including guided tours, onsite interpretive media, and interpretive programs at the visitor/administrative facility.

The ROD includes a statement of the decision made, synopses of other alternatives considered, the basis for the decision, a description of the environmentally preferable alternative, a finding on impairment of park resources and values, a listing of measures to minimize environmental harm, and an overview of public involvement in the decision-making process.

FOR FURTHER INFORMATION CONTACT: Superintendent Mark Herberger, Minuteman Missile National Historic Site, 21280 South Dakota Highway 240,

Philip, South Dakota 57567, or by calling 605–433–5552. Copies of the ROD are available upon request from the above address or viewed online at *http://parkplanning.nps.gov/mimi.*

Dated: July 2, 2009.

David N. Given,

Acting Regional Director, Midwest Region.

[FR Doc. E9–18858 Filed 8–5–09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAC00000 L07770900 XZ0000]

Notice of Public Meeting of the Central California Resource Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Public Meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Central California Resource Advisory Council (RAC) will meet as indicated below.

DATES: The meeting will be held Friday and Saturday, Sept. 11 and 12, 2009, at the Rabobank, 1070 Main St., Cambria, CA. On Sept. 11, the members will tour Piedras Blancas Light Station from 9 a.m. to noon. There will be a short meeting of the RAC Off-Highway Vehicle Subgroup at the Rabobank at 1 p.m., followed by the RAC meeting. Members of the public are welcome to attend the tour and meeting. Field tour participants must provide their own transportation and lunch. The Advisory Council will resume its meeting at 8 a.m. on Sept. 12, at the Rabobank. Time for public comment is reserved from 9 a.m. to 10 a.m. on Sept. 12.

FOR FURTHER INFORMATION CONTACT: BLM Central California District Manager Kathy Hardy, (916) 978–4626; or BLM Public Affairs Officer David Christy, (916) 941–3146.

SUPPLEMENTARY INFORMATION: The 12-member council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management in Central California. At this meeting, agenda topics will include an update on the Resource Management plans for the Carrizo Plain National Monument and the BLM Bakersfield Field Office. Additional ongoing business will be discussed by the council. All meetings are open to the public. Members of the public may present written comments to the council. Each formal council meeting will have time allocated for public comments. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Members of the public are welcome on field tours, but they must provide their own transportation and lunch. Individuals who plan to attend and need special assistance, such as sign language interpretation and other reasonable accommodations, should contact the BLM as provided above.

Dated: July 23, 2009.

David Christy,

Public Affairs Officer.

[FR Doc. E9–18816 Filed 8–5–09; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on July 30, 2009, the proposed Consent Decree in *United States* v. *MRC Holdings, Inc.*, Case No. 8:09–cv–01453–RAL–MAP, was lodged with the United States District Court for the Middle District of Florida.

The proposed Consent Decree resolves claims of the United States, on behalf of the Environmental Protection Agency (''EPA''), under the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9601 *et seq.*, in connection with the MRI Superfund Site in Tampa, Hillsborough County, Florida (''Site'').

The proposed Consent Decree requires MRC Holdings, Inc. to perform EPA's estimated $6,700,000 groundwater remedial design/remedial action at the Site and reimburse in full EPA's interim and future costs for overseeing implementation of this remedy. A previous Consent Decree, entered by the Middle District of Florida on February 19, 2002, required MRC Holdings, Inc. to perform the estimated $2,130,111 soil cleanup at this Site and pay EPA's past costs of $700,000.

For a period of 30 days from the date of this publication, the Department of Justice will receive comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. Comments should refer to*: United States of America* v. *MRC Holdings, Inc.,* DJ # 90–11–2–07053/1.

The proposed Consent Decree may be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the proposed Consent Decree may be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy of the proposed Consent Decree, please enclose a check in the amount of $23.23 for a copy exclusive of signature pages and appendices (25 cent per page reproduction cost) or $59.00 for a copy including signature pages and appendices (25 cent per page reproduction cost) payable to the U.S. Treasury, or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–18759 Filed 8–5–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on July 31, 2009, a proposed Consent Decree (''Decree'') in *United States* v. *INEOS ABS (USA) Corporation, et al.,* Civil Action No. 1:09–CV–545, was lodged with the United States District Court for the Southern District of Ohio.

In this action the United States, on behalf of the U.S. Environmental Protection Agency (''U.S. EPA''), and the State of Ohio, on behalf of the Ohio Environmental Protection Agency (''Ohio EPA''), sought penalties and injunctive relief under the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, and the Emergency Planning and Right-to-Know Act and analogous State laws. The proposed Decree resolves alleged violations of the CAA, EPCRA and CERCLA relating to a chemical facility located in Addyston, Ohio. Under the Decree, Defendants will pay a $3.1 million civil penalty, to be

split evenly between the United States and the State of Ohio, with the State's portion being divided between Ohio EPA and the Hamilton County Department of Environmental Services. INEOS will also (1) operate its flare in accordance with specific new parameters to ensure control of volatile organic compounds (VOCs), which include hazardous air pollutants, in accordance with its 99% flare control efficiency permit requirements; (2) install a new biofilter system to reduce acrylonitrile emissions, a hazardous air pollutant; (3) conduct a comprehensive review of compliance with emergency release reporting regulations; and (4) conduct a comprehensive set of leak detection and repair (LDAR) practices that go beyond regulatory requirements.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States, et al.* v. *INEOS ABS (USA) Corporation, et al.,* D.J. Ref. 90–5–2–1–09264. The Decree may be examined at U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604. During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $21.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E9–18790 Filed 8–5–09; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Sierra Properties I, LLC*, Civil No. 8:09 CV–1400–T, was lodged with the United States District Court for the Middle District of Florida on July 28, 2009.

This proposed Consent Decree concerns a complaint filed by the United States against Sierra Properties I, LLC, pursuant to Sections 301(a) and 404(s) of the Clean Water Act, 33 U.S.C. 1311(a), 1344(s) to obtain injunctive relief and impose civil penalties against the Defendant for violating the Clean Water Act by discharging fill material in violation of a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendant to pay a civil penalty. The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to E. Kenneth Stegeby, United States Attorney's Office, Middle District of Florida, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602 and refer to *United States* v. *Sierra Properties I, LLC*, Civil No. 8:09 CV–1400–T.

The proposed Consent Decree may be examined at the Clerk's Office, Sam M. Gibbons United States Courthouse, 2nd Floor, 801 North Florida Avenue, Tampa, Florida 33603. In addition, the proposed Consent Decree may be viewed at *http://www.usdoj.gov/enrd/Consent_Decrees.html.*

Maureen M. Katz,

Assistant Section Chief, Environment & Natural Resources Division.

[FR Doc. E9–18743 Filed 8–5–09; 8:45 am]

BILLING CODE; P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before September 8, 2009. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: request.schedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. *Telephone:* 301–837–1539. *E-mail: records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of

historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1228.24(b)(3).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Risk Management Agency (N1–258–08–14, 3 items, 3 temporary items). Records relating to legal matters, including such records as legal opinions and records relating to hearings and other legal proceedings.

2. Department of Agriculture, Risk Management Agency (N1–258–08–17, 1 item, 1 temporary item). Status and activity reports related to financial priorities.

3. Department of Homeland Security, U.S. Secret Service (N1–87–09–5, 3 items, 2 temporary items). Master files associated with an electronic global positioning system that contain data of a routine nature. Also included are backup files. Data that pertains to significant events or unusual occurrences is proposed for permanent retention.

4. Department of the Interior, Office of the Secretary (N1–48–08–6, 7 items, 5 temporary items). Routine correspondence, chronological files, daily schedules, working papers, and other routine administrative records. Proposed for permanent retention are high level program correspondence files and records, such as appointment books and calendars that document the activities of the Secretary.

5. Department of Transportation, Federal Aviation Administration (N1–237–09–1, 2 items, 2 temporary items). Images of agreements relating to flight inspection services and a related data base used to track the status of agreements.

6. Department of the Treasury, Departmental Offices (N1–56–09–5, 2 items, 1 temporary item). Strategic planning records that document the preparation of strategic plans of specific organizations within the Department of the Treasury. Strategic planning records that relate to the Treasury Strategic Plan are proposed for permanent retention.

7. Department of the Treasury, Treasury Inspector General for Tax Administration (N1–56–09–6, 4 items, 4 temporary items). Records related to audits, including guidance documents, reports, studies, and an electronic information system to track audits and manage audit workflow.

8. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (N–564–09–9, 1 item, 1 temporary item). Master files associated with an electronic system used to track and collect special occupational and floor stocks taxes.

9. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (N–564–09–13, 1 item, 1 temporary item). Master files of an electronic information system used to manage library operations.

10. Department of the Treasury, Community Development Financial Institution (N1–56–09–14, 6 items, 6 temporary items). Records relating to the agency's public Web site, including operational records and Web content records.

11. Department of the Treasury, Internal Revenue Service (N1–58–09–33, 1 item, 1 temporary item). Master files associated with an electronic information system used to assist agency employees in contacting other staff who have access to the agency's integrated data retrieval system.

12. Department of the Treasury, Internal Revenue Service (N1–58–09–37, 1 item, 1 temporary item). Master files associated with an electronic information system used to update taxpayer information with the latest transactions and status.

13. Department of the Treasury, Internal Revenue Service (N1–58–09–44, 2 items, 2 temporary items). Master files and outputs associated with an electronic information system used to provide Federal tax deposit coupons to business taxpayers.

14. Department of the Treasury, Internal Revenue Service (N1–58–09–45, 1 item, 1 temporary item). Master files associated with an electronic information system used to generate notices informing taxpayers that there are discrepancies in their tax returns.

15. Equal Employment Opportunity Commission, Office of Inspector General (N1–403–08–1, 7 items, 5 temporary items). Routine investigative files, audit case files, and background materials relating to semiannual reports to Congress. Proposed for permanent retention are semiannual reports to Congress and historically significant investigative case files.

Dated: July 31, 2009.

Michael J. Kurtz,

Assistant Archivist for Records Services, Washington, DC.

[FR Doc. E9–18953 Filed 8–5–09; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0342; IA–09–026]

In the Matter of Mr. Michael T. Hackett; Confirmatory Order (Effective Immediately)

I

Mr. Michael Hackett is currently the Radiation Safety Officer (RSO) for the Department of Veterans Affairs (DVA) Medical Center, located in Lexington, Kentucky, and is named as such on Permit 16–08896–04, issued by the Department of Veterans Affairs (licensee) under the authority granted them by Master Materials License (MML) Number 03–23853–01VA.

This Confirmatory Order is the result of an agreement reached during an Alternative Dispute Resolution (ADR) mediation session conducted on June 26, 2009.

II

On September 17, 2007, the DVA National Health Physics Program (NHPP) inspectors performed an inspection at the DVA Medical Center located in Lexington, Kentucky. The Medical Center is a permitee under the DVA's MML. During the inspection, the NHPP inspectors determined that the RSO had not implemented portions of the radiation safety program including not holding periodic Radiation Safety Committee meetings; not performing annual program reviews; and not performing required hazardous material training. Furthermore, the NHPP determined that the RSO's actions were deliberate. A contributing cause was the permitee's assignment of a collateral duty to the RSO as the Controlled Substance Coordinator.

Based on the NHPP determination, the NRC began an investigation into the actions of the RSO. On December 18, 2008, the Office of Investigations issued an investigation report and on February 23, 2009, the NRC determined that violations of NRC requirements had occurred at the DVA Medical Center located in Lexington, Kentucky. The NRC also preliminarily determined that Mr. Michael Hackett's actions, as the RSO, caused the permittee to be in apparent violation of the above requirements.

The results of the investigation were sent to Mr. Michael Hackett in a letter dated April 16, 2009. This letter offered Mr. Michael Hackett the opportunity to either participate in Alternative Dispute Resolution (ADR) mediation or to attend a Predecisional Enforcement Conference. In response to the NRC's offer, Mr. Michael Hackett requested use of the NRC's ADR process to resolve the differences he had with the NRC. On May 18, 2009, the NRC and Mr. Michael Hackett agreed to mediate. On June 26, 2009, the NRC and Mr. Michael Hackett participated in an ADR session mediated by a professional mediator, arranged through Cornell University's Institute on Conflict Resolution. As used by the NRC, ADR is a process in which a neutral mediator with no decision-making authority assists the parties in reaching an agreement on resolving any differences regarding the dispute. This Confirmatory Order is issued pursuant to the agreement reached during the ADR process.

III

During the June 26, 2009, ADR session, a preliminary settlement agreement was reached. The elements of the agreement consisted of the following:

1. Mr. Michael Hackett agrees to submit to the NRC and NHPP a plan on how he will accomplish all the tasks assigned to him as RSO in the permit, and what steps he will take to ensure that the infrastructure exists for those duties with a long periodicity (*i.e.,* once a year, or once every three years) and what steps he will take to ensure that the permittee, the NHPP, and the NRC are aware that he is accomplishing his assigned duties within 60 days of the issuance of the Confirmatory Order. In addition to the above, such plan shall contain the following:

a. Within 45 days following each periodic (quarterly) Radiation Safety Committee meeting, Mr. Michael Hackett will provide minutes of the meeting to the permitee, the NHPP, and the NRC. This will continue for a period of one year from the date of the issuance of the Confirmatory Order.

b. Within 45 days following completion of the next annual program review following issuance of the Confirmatory Order, Mr. Michael Hackett will provide the results of the review to the permitee, the NHPP, and the NRC.

c. Within 45 days following completion of the next periodic training, conducted following issuance of the Confirmatory Order, regarding transportation and receipt of radioactive material, Mr. Michael Hackett will provide a curriculum of subjects covered and a list of individuals who were required to attend and a list of attendees [with personal privacy information redacted] to the permitee, the NHPP, and the NRC.

d. Within 45 days, Mr. Michael Hackett agrees to inform the NRC if he has been assigned, and has accepted, the responsibility for any additional collateral duties that may impact his ability to successfully fulfill his responsibilities as the Radiation Safety Officer. This will include his evaluation of how he will monitor the collateral duties to ensure that they do not overwhelm his primary RSO responsibilities. This will continue for one year from the issuance of the Confirmatory Order.

2. If, at any time, Mr. Michael Hackett is unable to perform any of his Radiation Safety Officer responsibilities, he will notify the NHPP and the NRC within 30 days.

3. Within 90 days following the issuance of the Confirmatory Order, Mr. Michael Hackett agrees to prepare and submit to the NRC an article, for subsequent submittal and consideration for publication by the NHPP, to inform others of: (1) The importance of ensuring that a VA radiation safety program fulfills all NRC safety requirements; and (2) developing the necessary infrastructure and communication paths to identify and resolve competing priorities that may preclude successful implementation of a VA radiation safety program. Within 30 days following receipt of approval from the NRC, Mr. Michael Hackett will submit the article to the NHPP for publication.

4. Mr. Michael Hackett agrees that he will inform the NRC if he leaves his RSO position before the terms of this Order are completed. The terms of the Order will remain in abeyance and will be reinstated if he accepts a position as or resumes the duties of an RSO within two years of the date of the Order.

5. The NRC agrees not to pursue any further enforcement action in connection with the NRC's April 16, 2009, letter to Mr. Michael Hackett. This does not prohibit NRC from taking enforcement action in accordance with the NRC Enforcement Policy if Mr. Michael Hackett commits a similar violation in the future or violates this Order.

6. Within 45 days, Mr. Michael Hackett agrees to inform the NRC of any condition that may preclude him from complying with any of the conditions of this Order. In such event, Mr. Michael Hackett may request relief from the associated requirements of the Order.

7. Mr. Michael Hackett has made no admission that he violated any NRC requirements and this agreement is settlement of a disputed claim in order to avoid litigation and further action by the NRC.

On July 9, 2009, Mr. Michael Hackett consented to issuing this Order with the commitments, as described in Section V below. Mr. Michael Hackett further agreed that this Order is to be effective upon issuance and that he has waived his right to a hearing.

IV

Since Mr. Michael Hackett has agreed to take additional actions to address NRC concerns, as set forth in Item III above, the NRC has concluded that its concerns can be resolved through issuance of this Order.

I find that Mr. Michael Hackett's commitments as set forth in Section V are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the

foregoing, I have determined that public health and safety require that Mr. Michael Hackett's commitments be confirmed by this Order. Based on the above, and Mr. Michael Hackett's consent, this Order is immediately effective upon issuance.

V

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 30, *it is hereby ordered, effective immediately:*

1. Mr. Michael Hackett agrees to submit to the NRC and NHPP a plan on how he will accomplish all the tasks assigned to him as RSO in the permit, and what steps he will take to ensure that the infrastructure exists for those duties with a long periodicity (*i.e.,* once a year, or once every three years) and what steps he will take to ensure that the permittee, the NHPP, and the NRC are aware that he is accomplishing his assigned duties within 60 days of the issuance of the Confirmatory Order. In addition to the above, such plan shall contain the following:

a. Within 45 days following each periodic (quarterly) Radiation Safety Committee meeting, Mr. Michael Hackett will provide minutes of the meeting to the permitee, the NHPP, and the NRC. This will continue for a period of one year from the date of the issuance of the Confirmatory Order.

b. Within 45 days following completion of the next annual program review following issuance of the Confirmatory Order, Mr. Michael Hackett will provide the results of the review to the permitee, the NHPP, and the NRC.

c. Within 45 days following completion of the next periodic training, conducted following issuance of the Confirmatory Order, regarding transportation and receipt of radioactive material, Mr. Michael Hackett will provide a curriculum of subjects covered and a list of individuals who were required to attend and a list of attendees [with personal privacy information redacted] to the permitee, the NHPP, and the NRC.

d. Within 45 days, Mr. Michael Hackett agrees to inform the NRC if he has been assigned, and has accepted, the responsibility for any additional collateral duties that may impact his ability to successfully fulfill his responsibilities as the Radiation Safety Officer. This will include his evaluation of how he will monitor the collateral duties to ensure that they do not overwhelm his primary RSO responsibilities. This will continue for one year from the issuance of the Confirmatory Order.

2. If, at any time, Mr. Michael Hackett is unable to perform any of his Radiation Safety Officer responsibilities, he will notify the NHPP and the NRC within 30 days.

3. Within 90 days following the issuance of the Confirmatory Order, Mr. Michael Hackett agrees to prepare and submit to the NRC an article, for subsequent submittal and consideration for publication by the NHPP, to inform others of: (1) The importance of ensuring that a VA radiation safety program fulfills all NRC safety requirements; and (2) developing the necessary infrastructure and communication paths to identify and resolve competing priorities that may preclude successful implementation of a VA radiation safety program. Within 30 days following receipt of approval from the NRC, Mr. Michael Hackett will submit the article to the NHPP for publication.

4. Mr. Michael Hackett agrees that he will inform the NRC if he leaves his RSO position before the terms of this Order are completed. The terms of the Order will remain in abeyance and will be reinstated if he accepts a position as or resumes the duties of an RSO within two years of the date of the Order.

5. Within 45 days, Mr. Michael Hackett agrees to inform the NRC of any condition that may preclude him from complying with any of the conditions of this Order. In such event, Mr. Michael Hackett may request relief from the associated requirements of the Order.

Notifications to the NRC, as outlined in the above items, should be made to the Regional Administrator, NRC Region III, 2443 Warrenville Road, Lisle, Illinois 60532.

The Regional Administrator, NRC Region III, may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Michael Hackett of good cause.

VI

Any person adversely affected by this Confirmatory Order, other than Mr. Michael Hackett, may request a hearing within 20 days of the Order's publication in the **Federal Register**. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be directed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and include a statement of good cause for the extension.

A request for a hearing must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August, 2007, 72 FR 49,139 (Aug. 28, 2007). The E-Filing process requires participants to submit and serve documents over the Internet or, in some cases, to mail copies on electronic optical storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements associated with E-Filing, at least five days prior to the filing deadline the requestor must contact the Office of the Secretary by e-mail at *hearingdocket@nrc.gov*, or by calling (301) 415–1677, to request: (1) A digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any NRC proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances when the requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each 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 also is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for a hearing through EIE. 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 document through EIE. To be timely, electronic filings 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 document on those participants separately. Therefore, any others who wish to participate in the

proceeding (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request is filed so that they may obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory e-filing system may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC 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 good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

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. 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 works.

If a person other than Mr. Michael Hackett requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.309(d) and (f).

If the hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section V above shall be final 20 days from the date this Order is published in the **Federal Register** without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section V shall be final when the extension expires, if a hearing request has not been received. *A request for hearing shall not stay the immediate effectiveness of this order.*

Dated this 28th day of July 2009.

For the Nuclear Regulatory Commission.

Mark A. Satorius,

Regional Administrator, Region III.

[FR Doc. E9–18821 Filed 8–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0345]

Draft Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Draft Regulatory Guide, DG–5034, ''Protection of Safeguards Information.''

FOR FURTHER INFORMATION CONTACT: Robert Norman, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: (301) 415–2278 or e-mail *Robert.Norman@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide (DG), entitled, ''Protection of Safeguards Information,'' is temporarily identified by its task number, DG–5034, which should be mentioned in all related correspondence. DG–5034 will be a new regulatory guide. Title 10, section 73.21, ''Protection of Safeguards Information: Performance Requirements,'' of the *Code of Federal Regulations* (10 CFR 73.21) requires, in part, that each licensee, certificate holder, applicant, or other person who produces, receives, or acquires Safeguards Information (SGI) shall ensure that it is protected against unauthorized disclosure.

This guide describes a method that the staff of the NRC considers acceptable to implement the general performance requirements specified in 10 CFR 73.21(a)(i) and (ii) that establish, implement, and maintain an information protection system that includes the applicable measures for SGI specified in 10 CFR 73.22, ''Protection of Safeguards Information: Specific Requirements,'' or 10 CFR 73.23, ''Protection of Safeguards Information—Modified Handling: Specific Requirements.'' This guide applies to all licensees, certificate holders, applicants, or other persons who produce, receive, or acquire SGI (including SGI with the designation or marking: ''Safeguards Information—Modified Handling'' (SGI–M)).

The guidance and criteria contained in this document pertain to the protection of SGI as defined in 10 CFR part 73, ''Physical Protection of Plants and Materials.'' It is intended to assist licensees and other persons who produce, receive, or acquire SGI to establish an information protection system that addresses (1) Information to be protected, (2) conditions for access, (3) protection while in use or storage, (4) preparing and marking documents or other matter, (5) reproduction of matter containing SGI, (6) external transmission of documents and material, (7) processing SGI on electronic systems, (8) removal from the SGI category, and (9) destruction of matter containing SGI.

II. Further Information

The NRC staff is soliciting comments on DG–5034. Comments may be accompanied by relevant information or supporting data and should mention DG–5034 in the subject line.

Comments submitted in writing or in electronic form will be made available to the public in their entirety through

the NRC's Agencywide Documents Access and Management System (ADAMS).

Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed. You may submit comments by any of the following methods:

1. *Mail comments to:* Rulemaking and Directives Branch, Mail Stop: TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

2. *Federal e-Rulemaking Portal:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2009–0345]. Address questions about NRC dockets to Carol Gallagher, 301–492–3668; e-mail *Carol.Gallagher@nrc.gov*.

3. *Fax comments to:* Rulemaking and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 492–3446.

Requests for technical information about DG–5034 may be directed to the NRC contact, Robert Norman at (301) 415–2278 or e-mail to *Robert.Norman@nrc.gov*.

Comments would be most helpful if received by October 1, 2009. Comments received after that date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Electronic copies of DG–5034 are available through the NRC's public Web site under Draft Regulatory Guides in the ''Regulatory Guides'' collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/*. Electronic copies are also available in ADAMS (*http://www.nrc.gov/reading-rm/adams.html*), under Accession No. ML090930608.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR) located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov*.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

Dated at Rockville, Maryland, this 30th day of July, 2009.

For the Nuclear Regulatory Commission.

John N. Ridgely,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E9–18817 Filed 8–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0343; Docket No. 030–01239]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendment to Byproduct Materials License No. 06–00253–04 for Amendment of the License and Unrestricted Release of the Hartford Hospital's Research Facilities in Hartford, CT

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No Significant Impact for License Amendment.

FOR FURTHER INFORMATION CONTACT: Penny Lanzisera, Senior Health Physicist, Medical Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406; telephone (610) 337–5169; fax number (610) 337–5269; or by e-mail: *penny.lanzisera@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of a license amendment to Byproduct Materials License No. 06–00253–04. This license is held by Hartford Hospital (the Licensee), for, in part, Surgical Research on the second floor of the Crane-East Building, Medical Research on the third floor of the Crane-East Building, Animal Care and Research on the fourth floor of the Crane-East Building, Immunochemistry Research on the third floor of the Bliss Wing, and Special Hematology Research on the third floor of the High Building (the Facility), located at 80 Seymour Street in Hartford, Connecticut. Issuance of the amendment would authorize release of the Facility for unrestricted use. The Licensee requested this action in a letter dated March 28, 2008. The NRC has prepared an Environmental Assessment (EA) in support of this proposed action in accordance with the requirements of Title 10, Code of Federal Regulations (CFR), Part 51 (10 CFR Part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed action. The amendment will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register**.

II. Environmental Assessment

Identification of Proposed Action

The proposed action would approve the Licensee's March 28, 2008 license amendment request, resulting in release of the Facility for unrestricted use. License No. 06–00253–04 was issued on October 11, 1956, pursuant to 10 CFR Part 30, and has been amended periodically since that time. This license authorized the Licensee to use, in part, unsealed byproduct material for purposes of conducting research and development activities on laboratory bench tops and in hoods.

The Facility consists of office space and laboratories located in three buildings. The Facility is located in a commercial area. Within the Facility, use of licensed materials was confined to 13,350 square feet in the Crane—East Building, 2,400 square feet in the Bliss Wing, and 210 square feet in the High Building.

In July 2002, the Licensee ceased licensed activities and initiated a survey and decontamination of the Facility. Based on the Licensee's historical knowledge of the site and the conditions of the Facility, the Licensee determined that only routine decontamination activities, in accordance with their NRC-approved, operating radiation safety procedures, were required. The Licensee was not required to submit a decommissioning plan to the NRC because worker cleanup activities and procedures are consistent with those approved for routine operations. The Licensee conducted surveys of the Facility and provided information to the NRC to demonstrate that it meets the criteria in Subpart E of 10 CFR Part 20 for unrestricted release.

Need for the Proposed Action

The Licensee has ceased conducting licensed activities at the Facility, and seeks the unrestricted use of its Facility.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the Facility shows that such activities involved use of the following radionuclides with half-lives greater than 120 days: Hydrogen-3 and carbon-14. Prior to performing the final status survey, the Licensee conducted decontamination activities, as necessary, in the areas of the Facility affected by these radionuclides.

The Licensee conducted a final status survey on March 26, 2000, with follow-up surveys conducted on April 9, 2009. This survey covered all laboratories, counting rooms, offices, and animal facilities located in the three research buildings. The final status survey report was attached to the Licensee's amendment request dated March 28, 2008, with follow-up surveys provided on April 14, 2009. The Licensee elected to demonstrate compliance with the radiological criteria for unrestricted release as specified in 10 CFR 20.1402 by using the screening approach described in NUREG–1757, ''Consolidated NMSS Decommissioning Guidance,'' Volume 2. The Licensee used the radionuclide-specific derived concentration guideline levels (DCGLs), developed there by the NRC, which comply with the dose criterion in 10 CFR 20.1402. These DCGLs define the maximum amount of residual radioactivity on building surfaces, equipment, and materials, and in soils, that will satisfy the NRC requirements in Subpart E of 10 CFR Part 20 for unrestricted release. The Licensee's final status survey results were below these DCGLs and are in compliance with the As Low As Reasonably Achievable (ALARA) requirement of 10 CFR 20.1402. The NRC thus finds that the Licensee's final status survey results are acceptable.

Based on its review, the staff has determined that the affected environment and any environmental impacts associated with the proposed action are bounded by the impacts evaluated by the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC–Licensed Nuclear Facilities'' (NUREG–1496) Volumes 1–3 (ML042310492, ML042320379, and ML042330385). The staff finds there were no significant environmental impacts from the use of radioactive material at the Facility. The NRC staff reviewed the docket file records and the final status survey report to identify any non-radiological hazards that may have impacted the environment surrounding the Facility. No such hazards or impacts to the environment were identified. The NRC has identified no other radiological or non-radiological activities in the area that could result in cumulative environmental impacts.

The NRC staff finds that the proposed release of the Facility for unrestricted use is in compliance with 10 CFR 20.1402. Based on its review, the staff considered the impact of the residual radioactivity at the Facility and concluded that the proposed action will not have a significant effect on the quality of the human environment.

Environmental Impacts of the Alternatives to the Proposed Action

Due to the largely administrative nature of the proposed action, its environmental impacts are small. Therefore, the only alternative the staff considered is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment request. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d), requiring that decommissioning of byproduct material facilities be completed and approved by the NRC after licensed activities cease. The NRC's analysis of the Licensee's final status survey data confirmed that the Facility meets the requirements of 10 CFR 20.1402 for unrestricted release. Additionally, denying the amendment request would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this Environmental Assessment to the Connecticut Department of Environmental Protection for review on June 8, 2009. On July 14, 2009, the Connecticut Department of Environmental Protection responded by e-mail. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. Letter dated March 28, 2008 requesting amendment (ML081050466).
2. Letter dated April 7, 2009 providing additional information (ML090980511).
3. Swipe Survey Analysis information dated April 9, 2009 (ML091110096).
4. Letter dated May 28, 2009 providing additional information (ML091490256).
5. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance;''
6. Title 10 Code of Federal Regulations, Part 20, Subpart E, ''Radiological Criteria for License Termination;''
7. Title 10, Code of Federal Regulations, Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions;'' and
8. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC–Licensed Nuclear Facilities.''

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR)

Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at Region I, 475 Allendale Road, King of Prussia, PA this 28th day of July 2009.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E9–18819 Filed 8–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2008–0639; Docket Nos. 030–05224 and 040–08478]

Notice of Availability of Environmental Assessment and Finding of No Significant Impact for License Amendments to Byproduct Materials License No. 29–00170–03 and Source Materials License No. SMB–1260, Incorporating the Decommissioning Plan for Bell Laboratories Murray Hill Facility in Murray Hill, NJ

AGENCY: Nuclear Regulatory Commission.

ACTION: Issuance of Environmental Assessment and Finding of No Significant Impact for License Amendment.

FOR FURTHER INFORMATION CONTACT: Steve Hammann, Health Physicist, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I, 475 Allendale Road, King of Prussia, Pennsylvania; telephone 610–337–5399; fax number 610–337–5269; or by e-mail: *stephen.hammann@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of license amendments to Byproduct Materials License No. 29–00170–03 and Source Materials License No. SMB–1260. The licenses are held by Bell Laboratories (the Licensee), for its Murray Hill Facility, located at 600 Mountain Avenue in Murray Hill, New Jersey (the Facility). Issuance of the amendments would incorporate the Decommissioning Plan (DP) into the licenses to allow completion of decommissioning activities at the site and subsequent release of the Facility, except one room in the Radiation Lab, for unrestricted use and the termination of its NRC materials licenses. The room which is not being released is covered by NRC License No. 29–00170–08. The NRC has evaluated and approved the Licensee's DP. The findings of this evaluation are documented in a Safety Evaluation Report which will be issued along with the amendments. The Licensee requested these actions in a letter dated June 12, 2008. The Licensee's amendment requests were noted in the **Federal Register** on December 8, 2008 (73 FR 74529). This **Federal Register** notice also provided an opportunity for a hearing on these licensing actions. No hearing requests were received. The NRC has prepared an Environmental Assessment (EA) in support of the proposed actions in accordance with the requirements of Title 10, Code of Federal Regulations (CFR), Part 51 (10 CFR Part 51). Based on the EA, the NRC has concluded that a Finding of No Significant Impact (FONSI) is appropriate with respect to the proposed actions. The amendments will be issued to the Licensee following the publication of this FONSI and EA in the **Federal Register**.

II. Environmental Assessment

Identification of Proposed Action

The proposed actions would approve the Licensee's June 12, 2008 license amendment requests to incorporate the DP into the licenses, resulting in decommissioning of the facility and subsequent release of the Facility, except one room in the Radiation Lab, for unrestricted use and the termination of its NRC materials licenses. The room which is not being released is covered by NRC License No. 29–00170–08. License No. 29–00170–03 was issued on January 25, 1957, pursuant to 10 CFR Part 30, and License No. SMB–1260 was issued on December 2, 1975, pursuant to 10 CFR Part 40. Both licenses have been amended periodically since the issue dates. These licenses authorized the Licensee to use sealed and unsealed byproduct material and source material for the purpose of conducting research and development activities on laboratory bench tops and in hoods.

The Facility is situated on 196 acres and encompasses fifteen buildings. The buildings in which licensed materials were used consist of office space and laboratories. The Facility is located in a mixed residential/commercial area. Within the Facility, use of licensed materials was confined to Buildings 1,2,6,7 and 15. Notification that all licensed activities had ceased was received April 26, 2007.

Need for the Proposed Action

The proposed actions are to approve the DP so that the Licensee may complete Facility decommissioning activities. Completion of the decommissioning activities will reduce residual radioactivity at the Facility. NRC regulations require licensees to begin timely decommissioning of their sites, or any separate buildings that contain residual radioactivity, upon cessation of licensed activities, in accordance with 10 CFR 30.36(d) and 10 CFR 40.42(d). The proposed licensing actions will support such a goal. NRC is fulfilling its responsibilities under the Atomic Energy Act to make a decision on the proposed license amendments for decommissioning that ensures protection of the public health and safety.

Environmental Impacts of the Proposed Action

The historical review of licensed activities conducted at the Facility shows that such activities involved research and development activities using sealed and unsealed byproduct material and source material. The licensed materials were always stored and used inside buildings with no releases.

The NRC staff has reviewed the Licensee amendment requests for the Facility and examined the impacts of these license amendment requests. Potential impacts include water resource impact (*e.g.,* water may be used for dust control), air quality impacts from dust emissions, temporary local traffic impacts resulting from transporting debris, human health impacts, noise impacts from equipment operation, scenic quality impacts, and waste management impacts.

Based on its review, the staff has determined that no surface water or ground water impacts are expected from the decommissioning activities. Additionally, the staff has determined that significant air quality, noise, land use, and off-site radiation exposure impacts are also not expected. No significant air quality impacts are anticipated because of the limited amount of contamination and the controls that will be implemented by the Licensee during decommissioning activities. In addition, the environmental impacts associated with the decommissioning activities are bounded by impacts evaluated by NUREG–0586, ''Final Generic Environmental Impact Statement on the Decommissioning of Nuclear Facilities,'' (GEIS). Generic impacts for this type of decommissioning process were

previously evaluated and described in the GEIS, which concludes that the environmental consequences are small. The risk to human health from the transportation of all radioactive material in the U.S. was evaluated in NUREG–0170, ''Final Environmental Statement on the Transportation of Radioactive Materials by Air and Other Modes.'' The principal radiological environmental impact during normal transportation is direct radiation exposure to nearby persons from radioactive material in the package. The average annual individual dose from all radioactive material transportation in the U.S. was calculated to be approximately 0.5 millirem, well below the 10 CFR 20.1301 limit of 100 millirem for a member of the public. These proposed actions will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Thus, waste management and transportation impacts from the decommissioning will not be significant.

Occupational health was also considered in the ''Final Environmental Impact Statement on the Transportation of Radioactive Material by Air and Other Modes.'' Shipment of these materials would not affect the assessment of environmental impacts or the conclusions in the ''Final Environmental Impact Statement on the Transportation of Radioactive Material by Air and Other Modes.''

The Staff also finds that the proposed license amendments will meet the radiological criteria for unrestricted release as specified in 10 CFR 20.1402. The Licensee demonstrated this through the development of derived concentration guideline limits (DCGLs) for its Facility. The Licensee conducted site-specific dose modeling using parameters specific to the Facility that adequately bounded the potential dose.

The Licensee will maintain an appropriate level of radiation protection staff, procedures, and capabilities, and, through its Radiation Safety Officer, will implement an acceptable program to keep exposure to radioactive materials as low as reasonably achievable (ALARA). Work activities are not anticipated to result in radiation exposures to the public in excess of ten percent of the 10 CFR 20.1301 limits.

The NRC also evaluated whether cumulative environmental impacts could result from an incremental impact of the proposed action when added to other past, present, or reasonably foreseeable future actions in the area. The proposed NRC approval of the license amendment requests, when combined with known effects on resource areas at the site, including further site remediation, are not anticipated to result in any cumulative impacts at the site.

Environmental Impacts of the Alternatives to the Proposed Action

The only alternative to the proposed action of decommissioning the Facility is the no-action alternative, under which the staff would leave things as they are by simply denying the amendment requests. This no-action alternative is not feasible because it conflicts with 10 CFR 30.36(d) and 10 CFR 40.42(d), requiring that decommissioning of byproduct material and source material facilities be completed and approved by the NRC after licensed activities cease. Additionally, denying the amendment requests would result in no change in current environmental impacts. The environmental impacts of the proposed action and the no-action alternative are therefore similar, and the no-action alternative is accordingly not further considered.

Conclusion

The NRC staff has concluded that the proposed action is consistent with the NRC's unrestricted release criteria specified in 10 CFR 20.1402. Because the proposed action will not significantly impact the quality of the human environment, the NRC staff concludes that the proposed action is the preferred alternative.

Agencies and Persons Consulted

NRC provided a draft of this Environmental Assessment to the New Jersey Department of Environmental Protection for review on June 3, 2009. On July 8, 2009, the New Jersey Department of Environmental Protection responded by letter. The State agreed with the conclusions of the EA, and otherwise had no comments.

The NRC staff has determined that the proposed action is of a procedural nature, and will not affect listed species or critical habitat. Therefore, no further consultation is required under Section 7 of the Endangered Species Act. The NRC staff has also determined that the proposed action is not the type of activity that has the potential to cause effects on historic properties. Therefore, no further consultation is required under Section 106 of the National Historic Preservation Act.

III. Finding of No Significant Impact

The NRC staff has prepared this EA in support of the proposed action. On the basis of this EA, the NRC finds that there are no significant environmental impacts from the proposed action, and that preparation of an environmental impact statement is not warranted. Accordingly, the NRC has determined that a Finding of No Significant Impact is appropriate.

IV. Further Information

Documents related to this action, including the application for license amendments and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The documents related to this action are listed below, along with their ADAMS accession numbers.

1. NUREG–1757, ''Consolidated NMSS Decommissioning Guidance;''
2. Title 10, Code of Federal Regulations, Part 20, Subpart E, ''Radiological Criteria for License Termination;''
3. Title 10, Code of Federal Regulations, Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions;'' and
4. NUREG–1496, ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination of NRC–Licensed Nuclear Facilities.''
5. Submittal Letter dated June 12, 2008 (ML081910071).
6. Decommissioning Plan, Volume 1 (ML081910076).
7. Decommissioning Plan, Volume 2 (ML081910083).
8. Review of Decommissioning Plan dated April 6, 2009 (ML090960301).
9. Deficiency Response Letter dated May 21, 2009 (ML091470227).
10. **Federal Register** Notice of Consideration (ML083360193).

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.* These documents may also be viewed electronically on the public computers located at the NRC's PDR, O 1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents for a fee.

Dated at 475 Allendale Road, King of Prussia, PA, this 28th day of July 2009.

For the Nuclear Regulatory Commission.

James P. Dwyer,

Chief, Commercial and R&D Branch, Division of Nuclear Materials Safety, Region I.

[FR Doc. E9–18820 Filed 8–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0341]

Nuclear Regulatory Commission's Involvement With the Navy's Remediation of the Hunters Point Shipyard Site in San Francisco, CA

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of jurisdiction and future involvement.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has decided that it will take a limited involvement approach to stay informed about the Navy's ongoing remediation of the Hunters Point Shipyard (HPS) site in San Francisco, California. NRC will rely on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) process and the U.S. Environmental Protection Agency (EPA) Region 9 oversight. This notice discusses NRC's jurisdiction and future limited involvement at the HPS site and how it plans on staying informed about the Navy's remediation in the future.

FOR FURTHER INFORMATION CONTACT: Robert L. Johnson, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, Mail Stop T–8F5, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* (301) 415–7282; *e-mail: Robert.Johnson2@nrc.gov*.

SUPPLEMENTARY INFORMATION: In July 2007 the Navy requested clarification about NRC's jurisdiction and potential involvement with the Navy's ongoing remediation of radioactive material at the HPS site. In response to the Navy's request, NRC reviewed key HPS site documents, met with the Navy, and conducted a site visit in October 2007. NRC also met with representatives from EPA Region 9, the State of California agencies involved with the HPS site, and the City of San Francisco. In addition to evaluating potential NRC involvement, these meetings were used to obtain an understanding of the site, the Navy's remediation, and the oversight roles and issues of the key parties involved with the remediation. Based on this information, the NRC staff evaluated NRC's jurisdiction for the materials at the HPS site and evaluated options for NRC involvement. These options and the staff's recommendations were provided to the Commission in SECY–08–0077. This Commission paper also gives background about the HPS and the Navy's ongoing remediation. The Commission provided its direction to the staff on June 26, 2008, in SRM–SECY–08–0077. The results of the staff's evaluation and the Commission's decision are summarized in the answers to the following questions:

1. What is NRC's regulatory jurisdiction for the Navy's remediation of the HPS site?

Atomic Energy Commission (AEC) licenses for radioactive material used by the Navy in both the shipyard and the Navy Radiological Defense Laboratory (NRDL) at the HPS site were terminated in the 1970s after extensive radiological surveys of the facilities confirmed that the facilities met the radiological standards at that time. Therefore, after termination of the AEC licenses, neither the NRC nor its predecessor, AEC, exercised direct regulatory authority over the residual contamination at the HPS site. Subsequently, the Navy conducted radiological surveys and completed a Historical Radiological Assessment of the site in 2004. These studies provided new information about the suspected and confirmed radiological contamination for the entire HPS site. Based on this new information, the Navy and NRC assume that any remaining licensable material is likely commingled with atomic weapons testing material. Both types of radioactive material were used at the NRDL. NRC has jurisdiction for the licensable material. However, under Section 91(b) of the AEA, the atomic weapons testing material is outside of NRC's jurisdiction.

2. What is NRC's future involvement with the Navy's ongoing remediation of the HPS site?

NRC will rely on the ongoing Navy remediation under the CERCLA process and EPA regulatory oversight for the licensable radioactive material assumed to be present at the HPS site. NRC would not exercise its regulatory authority and would not require compliance with its decommissioning regulations. NRC would not conduct any formal regulatory reviews or participate in the ongoing CERCLA comment process for the Navy's remediation. The NRC staff would have a limited involvement to stay informed about the Navy's remediation of the remaining parcels, which is expected to take about 10 years.

The basis for this approach is that NRC can reasonably rely on the CERCLA process and EPA oversight of this Superfund site because the process should result in a level of protection of public health and safety and the environment that is generally equivalent to what would be provided if the NRC's decommissioning process was used. NRC believes that this is a reasonable approach because: (1) The licensable materials are inextricably commingled with the atomic weapons testing material over which NRC has no jurisdiction; (2) over-laying NRC requirements and oversight on the CERCLA process overseen by EPA provides no clear public health and safety benefit; (3) dual NRC–EPA regulation is avoided; (4) remediation can proceed under CERCLA; and (5) NRC would be in a position to respond to stakeholder questions in a timely and effective manner. NRC considered, but did not select the option of regulating the remediation through the Navy's Masters Material License with NRC. This option would have resulted in dual regulation, unnecessary expenditure of resources, and no benefit to public health and safety.

3. How will NRC stay informed about the Navy's remediation of the HPS site?

NRC anticipates that it would stay informed throughout the remediation process using existing mechanisms, such as documents received through standard distributions or that are available on the Administrative Record (*e.g.,* records of decision and completion documents such as the finding of suitability to transfer). If necessary, NRC would request access to documents. Staff would read selected documents and conduct an annual site visit and progress meeting with the Navy, EPA, State agencies, and the City of San Francisco. The staff would use a risk-informed approach to focus on those elements of the Navy's remediation that are most important to the protection of public health and safety. The staff would also focus on those elements that are currently being planned but not yet implemented such as formal establishment of the institutional controls and engineered controls. Finally, NRC would also reserve the option of commenting to EPA if necessary to justify our continued reliance on the CERCLA process.

4. Have the Navy and EPA Region 9 agreed to NRC's approach?

On January 16, 2009, NRC sent letters to both the Navy and EPA Region 9 that explained NRC's limited involvement approach and requested agreement to support the approach at the Hunters Point site. The Navy provided a response on April 1, 2009, that agreed to support NRC's approach. Similarly, EPA Region 9 provided a response on May 7, 2009, that also supported NRC's approach.

5. What documents are available that provided additional information about NRC's involvement with the HPS site?

The NRC staff's evaluation of jurisdiction and options for involvement is documented in a May 30, 2008, Commission paper (SECY–08–0077) that is electronically available on NRC's Web site at: *http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2008/secy2008–0077/2008–0077scy.pdf.*

The Commission's decision and direction to the staff is documented in a June 30, 2008, Staff Requirements Memorandum (SRM–SECY–08–0077) that is also electronically available on NRC's Web site at: *http://www.nrc.gov/reading-rm/doc-collections/commission/srm/2008/2008–0077srm.pdf.*

The letters mentioned above from the NRC, the Navy, and EPA Region 9 are available from the NRC's Agencywide Document Access and Management System using the following accession numbers:

NRC's January 16, 2009, letter to the Navy ML083440652.

NRC's January 16, 2009, letter to the EPA ML083430426.

Navy's April 1, 2009, letter to NRC ML091120805.

EPA's May 7, 2009, letter to NRC ML091460102.

Dated at Rockville, MD, this 29th day of June, 2009.

For the Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. E9–18822 Filed 8–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0344]

Regulatory Guide Withdrawal

AGENCY: Nuclear Regulatory Commission.

ACTION: Withdrawal of Regulatory Guide 1.135, Normal Water Level and Discharge at Nuclear Power Plants.

FOR FURTHER INFORMATION CONTACT: Henry Jones, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–1463 or e-mail *Henry.Jones@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The Nuclear Regulatory Commission (NRC) is withdrawing Regulatory Guide (RG) 1.135, ''Normal Water Level and Discharge at Nuclear Power Plants.'' Regulatory Guide 1.135 was issued for comment in September 1977 and never finalized. The RG was intended to provide guidance on estimating the normal ground and surface water elevations at a nuclear power plant site. The determination of normal and flood water elevation is one of the site characteristics required by Title 10 of the *Code of Federal Regulations*, part 100, ''Reactor Site Criteria,'' section 10, ''Factors to be considered when evaluating sites,'' (10 CFR 100.10) for test reactors and stationary power reactor site applications dated before January 10, 1997 and by 10 CFR 100.20, ''Factors to be Considered When Evaluating Sites,'' for stationary power reactor site applications dated on or after January 10, 1997.

General Design Criterion (GDC) 2, ''Design Basis for Protection Against Natural Phenomena,'' of Appendix A, ''General Design Criteria for Nuclear Power Plants,'' to 10 CFR part 50 requires facilities to be designed for protection against the most severe of the natural phenomena that have been historically reported for the site and surrounding area. This includes events such as floods, tsunami, and seiches. A determination of the normal pool level as described in RG 1.135 is not required by GDC 2 and thus, compliance with GDC 2 is not impacted by the withdrawal of RG 1.135.

The guidance in RG 1.135 is no longer current; section 2.4.1, ''Hydrologic Description'' in Chapter 2, ''Sites Characteristics,'' of NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants'' (the SRP) contains more current guidance for complying with the site criteria regulations. Additionally, a review of updated Final Safety Analysis Reports (FSARs) from licensees and applicants determined that only a few FSARs referenced RG 1.135 and no applicant or licensee is currently using it. Applicants and licensees use the guidance in the SRP and ANSI/ANS–2.8–1992, ''Determining Design Basis Flooding at Power Reactor Sites'' for water level determinations. Revising this guide could be potentially confusing for the staff and applicant.

Regulatory Guide 1.135 is being withdrawn because it is outdated, the staff is unaware of its use by any current licensee or applicant, and it does not provide guidance that is not more current and more readily available in the SRP or ANSI/ANS–2.8–1992.

II. Further Information

Withdrawal of RG 1.135 does not, in and of itself, alter any prior or existing licensing commitments based on its use. The guidance provided in this RG is no longer necessary. Regulatory Guides may be withdrawn when their guidance is superseded by Congressional action, the methods or techniques described in the Regulatory Guide no longer describe a preferred approach, or the Regulatory Guide does not provide useful information.

Regulatory guides are available for inspection or downloading through the NRC's public Web site under ''Regulatory Guides'' in the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* Regulatory guides are also available for inspection at the NRC's Public Document Room (PDR), Room O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738. The PDR's mailing address is US NRC PDR, Washington, DC 20555–0001. You can reach the staff by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 29th day of July, 2009.

For the Nuclear Regulatory Commission.

John N. Ridgely,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E9–18818 Filed 8–5–09; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–28840]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

July 31, 2009.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of July, 2009. A copy of each 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. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on August 25, 2009, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

For Further Information Contact: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street, NE., Washington, DC 20549–4041.

Waddell & Reed Advisors Municipal Bond Fund, Inc. [File No. 811–2657]; Waddell & Reed Advisors High Income Fund, Inc. [File No. 811–2907]; Waddell & Reed Advisors Cash Management, Inc. [File No. 811–2922]; Waddell & Reed Advisors Fixed Income Funds, Inc. [File No. 811–3458]; Waddell & Reed Advisors Municipal High Income Fund, Inc. [File No. 811–4427]; Waddell & Reed Advisors Global Bond Fund, Inc. [File No. 811–4520]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On January 30, 2009, each applicant transferred its assets to Waddell & Reed Advisors Funds, based on net asset value. Expenses of approximately $32,052, $66,879, $109,131, $29,201, $31,474 and $46,466, respectively, incurred in connection with the reorganizations were paid by each applicant.

Filing Dates: The applications were filed on May 28, 2009 and amended on July 24, 2009.

Applicants' Address: 6300 Lamar Ave., Shawnee Mission, KS 66202–4200.

Putnam High Yield Municipal Trust [File No. 811–5795]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On February 19, 2008, common shares of applicant were exchanged for common shares of Putnam Managed Municipal Income Trust (the ''Surviving Fund''), based on the relative net asset values of each fund. Applicant's preferred shares were exchanged for the preferred shares of the Surviving Fund based on the aggregate liquidation preference of each fund. Expenses of approximately $169,159 incurred in connection with the reorganization were paid by applicant.

Filing Dates: The application was filed on May 28, 2009 and amended July 20, 2009.

Applicant's Address: One Post Office Sq., Boston, MA 02109.

First Investors Single Payment and Periodic Payment Plans for the Accumulation of Shares of First Investors Global Fund, Inc. [File No. 811–575]; First Investors Single Payment and Periodic Payment Plans II for Investment in First Investors Global Fund, Inc. [File No. 811–1359]; First Investors Single Payment and Periodic Payment Plans for Investment in First Investors Fund for Income, Inc. [File No. 811–1472]; First Investors Single Payment and Periodic Payment Plans I for Investment in First Investors Global Fund, Inc. [File No. 811–1984]; First Investors Periodic Payment Plans for Investment in First Investors High; Yield Fund, Inc. [File No. 811–2564]; First Investors Single Payment and Periodic Payment Plans for Investment in First Investors Insured Tax Exempt Fund, Inc. [File No. 811–2691]; First Investors Single Payment and Periodic Payment Plans for Investment in First Investors Government Fund, Inc. [File No. 811–4609]

Summary: Each applicant, a unit investment trust, seeks an order declaring that it has ceased to be an investment company. On or about February 23, 2009, each applicant made a liquidating distribution to its unitholders, based on net asset value. Expenses of $2,755, $1,174, $3,634, $252, $797, $1,551 and $1,450, respectively, incurred in connection with the liquidations were paid by applicants' sponsor, First Investors Corporation.

Filing Dates: The applications were filed on May 22, 2009 and amended on July 16, 2009.

Applicants' Address: 110 Wall St., New York, NY 10005.

RMR Real Estate Fund [File No. 811–21241]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On June 17, 2009, applicant transferred its assets to RMR Real Estate Income Fund, based on net asset value. Each holder of applicant's preferred shares received preferred shares of RMR Real Estate Income Fund having an aggregate liquidation preference equal to the aggregate liquidation preference attributable to applicant's preferred shares. Expenses of $1,064,947 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on June 18, 2009.

Applicant's Address: 400 Centre St., Newton, MA 02458.

Church Capital Investment Trust [File No. 811–21753]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On March 25, 2009, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $24,328 incurred in connection with the liquidation were paid by Church Capital Management, LLC, applicant's investment adviser.

Filing Date: The application was filed on July 7, 2009.

Applicant's Address: The PNC Financial Services Group, Two PNC Plaza, 620 Liberty Ave., Pittsburgh, PA 15222.

Seligman Select Municipal Fund, Inc. [File No. 811–5976]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On March 12, 2009, applicant redeemed all of its outstanding shares of preferred stock. On March 27, 2009, applicant transferred its assets to National Municipal Class, a series of Seligman Municipal Fund Series, Inc., based on net asset value. Expenses of $219,836 incurred in connection with the reorganization were paid by

RiverSource Investments, LLC, applicant's investment adviser.

Filing Date: The application was filed on June 10, 2009.

Applicant's Address: 901 Marquette Ave. South, Suite 2810, Minneapolis, MN 55402–3268.

Morgan Stanley Nasdaq-100 Index Fund [File No. 811–10343]; Morgan Stanley Allocator Fund [File No. 811–21248]; Morgan Stanley Institutional Strategies Fund [File No. 811–21899]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On June 27, 2008, each applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $6,636, $4,936 and $2,690, respectively, incurred in connection with the liquidations were paid by Morgan Stanley Investment Advisors Inc., applicants' investment adviser.

Filing Date: The applications were filed on July 6, 2009.

Applicants' Address: c/o Morgan Stanley Investment Advisors Inc., 522 Fifth Ave., New York, NY 10036.

Fiduciary/Claymore Dynamic Equity Fund [File No. 811–21687]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On May 29, 2009, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $404,609 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on June 29, 2009.

Applicant's Address: 2455 Corporate West Dr., Lisle, IL 60532.

Putnam Tax Smart Funds Trust [File No. 811–9289]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 29, 2008, applicant transferred its assets to Putnam Investors Fund, based on net asset value. Expenses of approximately $66,055 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on June 29, 2009.

Applicant's Address: One Post Office Sq., Boston, MA 02109.

Putnam Municipal Bond Fund [File No. 811–7270]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On February 22, 2008, applicant's preferred shares were exchanged for preferred shares of Putnam Municipal Opportunities Trust based on the aggregate liquidation preference of each fund. On February 25, 2008, applicant transferred its assets to Putnam Municipal Opportunities Trust, based on net asset value. Expenses of approximately $261,103 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on June 29, 2009.

Applicant's Address: One Post Office Sq., Boston, MA 02109.

Morgan Stanley American Franchise Fund [File No. 811–21699]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. Applicant has never made a public offering of its securities and does not propose to make a public offering or engage in business of any kind.

Filing Date: The application was filed on June 17, 2009.

Applicant's Address: c/o Morgan Stanley Investment Advisors Inc., 522 Fifth Ave., New York, NY 10036.

RMR Hospitality and Real Estate Fund [File No. 811–21502]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On June 19, 2009, applicant transferred its assets to RMR Real Estate Income Fund, based on net asset value. Each holder of applicant's preferred shares received preferred shares of RMR Real Estate Income Fund having an aggregate liquidation preference equal to the aggregate liquidation preference attributable to applicant's preferred shares. Expenses of $334,479 incurred in connection with the reorganization were paid by applicant.

Filing Date: The application was filed on June 22, 2009.

Applicant's Address: 400 Centre St., Newton, MA 02458.

Claymore/Raymond James SB–1 Equity Fund [File No. 811–21863]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On September 3, 2008, applicant transferred its assets to Claymore/Raymond James SB–1 Equity ETF, a series of Claymore Exchange-Traded Fund Trust, based on net asset value. Expenses of $390,462 incurred in connection with the reorganization were paid by applicant and Claymore Advisors, LLC, applicant's investment adviser.

Filing Dates: The application was filed on July 2, 2009 and amended on July 10, 2009.

Applicant's Address: 2455 Corporate West Dr., Lisle, IL 60532.

Skyhawk Funds Trust [File No. 811–21957]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On May 15, 2009, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $1,300 incurred in connection with the liquidation were paid by Skyhawk Capital Management, LLC, applicant's investment adviser.

Filing Date: The application was filed on July 15, 2009.

Applicant's Address: 8000 Town Centre Dr., Suite 400, Broadview Heights, OH 44147.

Hatteras Global Private Equity Partners, LLC [File No. 811–22237]; Hatteras Global Private Equity Partners Master Fund, LLC [File No. 811–22256]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants have never made a public offering of their securities and do not propose to make a public offering or engage in business of any kind.

Filing Date: The applications were filed on July 15, 2009.

Applicants' Address: 8540 Colonnade Center Dr., Suite 401, Raleigh, NC 27615.

Cash Management Trust of America [File No. 811–2380]; U.S. Treasury Money Fund of America [File No. 811–6235]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On July 10, 2009, each applicant transferred its assets to American Funds Money Market Fund, based on net asset value. Expenses of $1,317,159 and $260,568, respectively, incurred in connection with the reorganizations were paid by each applicant.

Filing Date: The applications were filed on July 13, 2009.

Applicants' Address: 333 South Hope St., Los Angeles, CA 90071.

Morgan Stanley Multi-Asset Class Fund [File No. 811–8283]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On July 25, 2008, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $30,445

incurred in connection with the liquidation were paid by Morgan Stanley Investment Advisors, Inc., applicant's investment adviser.

Filing Date: The application was filed on July 6, 2009.

Applicant's Address: c/o Morgan Stanley Investment Advisors Inc., 522 Fifth Ave., New York, NY 10036.

Old RMR Asia Pacific Real Estate Fund [File No. 811–21856]; RMR Asia Real Estate Fund [File No. 811–22007]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On June 16, 2009, each applicant transferred its assets to RMR Asia Pacific Real Estate Fund, based on net asset value. Expenses of $76,184 and $196,584, respectively, incurred in connection with the reorganizations were paid by applicants.

Filing Dates: The applications were filed on June 17, 2009.

Applicants' Address: 400 Centre St., Newton, MA 02458.

JNLNY Variable Fund I LLC [File No. 811–9357]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. At a meeting held August 21 and August 22, 2007, Applicant's Board of Managers approved the liquidation and deregistration of Applicant after all of Applicant's assets had previously been distributed pursuant to a merger of each series of Applicant into a series of another fund. Applicant has no remaining shareholders. Applicant's adviser, Jackson National Asset Management, LLC, paid all expenses incurred in connection with the liquidation and deregistration.

Filing Dates: The application was filed on January 22, 2009 and amended on June 23, 2009.

Applicant's Address: JNLNY Variable Fund I LLC, 1 Corporate Way, Lansing, MI 48951.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–18765 Filed 8–5–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IA–2909]

Approval of Investment Adviser Registration Depository Filing Fees

AGENCY: Securities and Exchange Commission.

ACTION: Order.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is, for five months, waiving Investment Adviser Registration Depository annual and initial filing fees for investment advisers.

DATES: *Effective Date:* The order will become effective on August 1, 2009.

FOR FURTHER INFORMATION CONTACT: Keith Kanyan, IARD System Manager, at 202–551–6737, Daniel S. Kahl, Branch Chief, at 202–551–6730, or *Iarules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: Section 204(b) of the Investment Advisers Act of 1940 (''Advisers Act'') authorizes the Commission to require investment advisers to file applications and other documents through an entity designated by the Commission, and to pay reasonable costs associated with such filings.[1] In 2000, the Commission designated the Financial Industry Regulatory Authority Regulation (''FINRA'') as the operator of the Investment Adviser Registration Depository (''IARD'') system. At the same time, the Commission approved, as reasonable, filing fees.[2] The Commission later required advisers registered or registering with the SEC to file Form ADV through the IARD.[3] Over 11,000 advisers now use the IARD to register with the SEC and make state notice filings electronically through the Internet.

Commission staff, representatives of the North American Securities Administrators Association, Inc. (''NASAA''),[4] and representatives of FINRA periodically hold discussions on IARD system finances. In the early years of operations, SEC-associated IARD revenues exceeded projections while SEC-associated IARD expenses were lower than estimated, resulting in a surplus. In 2005, FINRA wrote a letter to SEC staff recommending a waiver of annual fees for a one-year period. The Commission concluded that this was appropriate and waived the annual fees.[5] In 2006 and 2008, FINRA wrote to the staff again, this time recommending a two-year waiver and a nine-month waiver, respectively, of all fees to continue to reduce the surplus. The Commission agreed and issued another two orders waiving all IARD fees.[6] As a result of these three waivers, the surplus was reduced from $9 million in 2005 to approximately $3 million today.

FINRA has again written to Commission staff, recommending that the waiver of annual IARD fees and the waiver of initial IARD filing fees for SEC-registered advisers be extended for an additional five months to December 31, 2009. Based on projections of expected SEC-associated IARD revenues and SEC-associated IARD expenses for the next five months, the Commission believes that the current SEC-associated surplus exceeds the amount needed for operations and system enhancements during this period, and accordingly believes that an extension of the current waiver of both annual and initial filing fees through December 31, 2009 is appropriate in order to continue reducing the SEC-associated surplus. This action is expected to waive approximately $300,000 in IARD system fees that SEC-registered advisers would incur, and should reduce the SEC-associated surplus to approximately $2 million. The fee waiver will apply to all annual updating amendments filed by SEC-registered advisers from August 1, 2009 through December 31, 2009 and to all initial applications for registration filed by advisers applying for SEC registration from August 1, 2009 through December 31, 2009.

It is therefore ordered, pursuant to sections 204(b) and 206(A) of the Investment Advisers Act of 1940, that:

For annual updating amendments to Form ADV filed from August 1, 2009

[1] 15 U.S.C. 80b–4(b).

[2] Designation of NASD Regulation, Inc., to Establish and Maintain the Investment Adviser Registration Depository; Approval of IARD Fees, Investment Advisers Act Release No. 1888 (July 28, 2000) [65 FR 47807 (Aug. 3, 2000)]. FINRA was formerly known as the National Association of Securities Dealers, Inc.

[3] Electronic Filing by Investment Advisers; Amendments to Form ADV, Investment Advisers Act Release No. 1897 (Sept. 12, 2000) [65 FR 57438 (Sept. 22, 2000)].

[4] The IARD system is used by both advisers registering or registered with the SEC and advisers registered or registering with one or more state securities authorities. NASAA represents the state securities administrators in setting IARD filing fees for state-registered advisers.

[5] Approval of Investment Adviser Registration Depository Filing Fees, Investment Advisers Act Release No. 2439 (Oct. 7, 2005) [70 FR 59789 (Oct. 13, 2005)].

[6] Approval of Investment Adviser Registration Depository Filing Fees, Investment Advisers Act Release Nos. 2564 (Oct. 26, 2006) and 2806 (Oct. 30, 2008) [73 FR 65900 (Nov. 5, 2008)].

through December 31, 2009, the fee otherwise due from SEC-registered advisers is waived, and for initial applications to register as an investment adviser with the SEC filed from August 1, 2009 through December 31, 2009, the fee otherwise due from the applicant is waived.

By the Commission.

Dated: July 31, 2009.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–18761 Filed 8–5–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60409; File No. 4–587]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Declaring Effective a Proposed Plan for the Allocation of Regulatory Responsibilities Among the Financial Industry Regulatory Authority, Inc., New York Stock Exchange LLC, NYSE Regulation, Inc. and NYSE Amex LLC

July 30, 2009.

Notice is hereby given that the Securities and Exchange Commission (''Commission'' or ''SEC'') has issued an Order pursuant to Section 17(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 17d–2 thereunder[2] approving and declaring effective a plan dated December 15, 2008 for the allocation of regulatory responsibilities (''17d–2 Plan'' or the ''Plan'') filed with the Commission on July 29, 2009 pursuant to Rule 17d–2 of the Act, by the New York Stock Exchange LLC (''NYSE''), NYSE Regulation, Inc. (''NYSE Regulation''), NYSE Amex LLC (''NYSE Amex''), and the Financial Industry Regulatory Authority, Inc. (''FINRA'') (each individually, a ''Party'' and collectively, the ''Parties'').

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.[4] Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary expenses for common members and their SROs.

Section 17(d)(1) of the Act[5] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[6] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[7] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[8] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the Federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[9] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if, after providing for appropriate notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors; to foster cooperation and coordination among the SROs; to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system; and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. Proposed Plan

On January 17, 2008, NYSE Euronext, Inc. and The Amex Membership Corporation, a New York not-for-profit company and parent of the American Stock Exchange LLC (''Amex'') entered into an Agreement and Plan of Merger, whereby NYSE Euronext would acquire Amex and as a result, Amex would become a wholly-owned subsidiary of NYSE Group, Inc. and would be renamed ''NYSE Amex.''[10] In connection with the merger, the Commission approved proposed rule changes to permit the merger and related transactions, including the adoption of an operating agreement for NYSE Amex.[11] The Commission also approved an NYSE Amex rule proposal to adopt new rules governing member organizations, member firm conduct, and equity trading.[12] NYSE Amex's new membership and member conduct rules are closely modeled on, and largely identical to, existing NYSE membership and firm conduct rules,[13] many of which are ''common rules'' under the existing 17d–2 plan between NYSE and FINRA.[14]

The purpose of the Plan is to add NYSE Amex as a party to the existing 17d–2 plan by and among National Association of Securities Dealers, Inc.

[1] 15 U.S.C. 78q(d).

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[5] 15 U.S.C. 78q(d)(1).

[6] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[7] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[8] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

[9] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

[10] On March 13, 2009, the exchange then known as NYSE Alternext U.S. LLC filed for immediate effectiveness a proposal to change its name to NYSE Amex LLC. *See* Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR–NYSEALTR–2009–24).

[11] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–Amex–2008–62 and SR–NYSE–2008–60).

[12] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63).

[13] *See id.* at 58995.

[14] *See id.; See also* Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order declaring effective the plan between NYSE and FINRA).

(''NASD'') (n/k/a FINRA), NYSE, and NYSE Regulation without altering the scope of that plan. Accordingly, the proposed 17d–2 Plan is intended to reduce regulatory duplication for firms that are common members of either NYSE and FINRA or NYSE Amex and FINRA. Pursuant to the proposed 17d–2 Plan, FINRA would assume certain examination, enforcement, and surveillance responsibilities for members of either NYSE and FINRA or NYSE Amex and FINRA as well as the associated persons therewith (''Common Members'') with respect to certain rules.

The text of the Plan delineates the proposed regulatory responsibilities with respect to the Parties. Included in the proposed Plan is Exhibit 1 (the ''List of Common Rules'') that lists every NYSE rule, and NYSE Amex Equities rule, for which FINRA would bear responsibility under the Plan for overseeing and enforcing with respect to Common Members.

Specifically, under the 17d–2 Plan, FINRA would assume examination and enforcement responsibility relating to compliance by Common Members with the rules of NYSE and NYSE Amex that are substantially similar to the applicable rules of FINRA (''Common Rules'').[15] The 17d–2 Plan would not include the application of any Common Rule to the extent that it pertains to matters covered by a separate agreement under Rule 17d–2.[16] In the event that a Common Member is the subject of an investigation, examination, or enforcement proceeding, the 17d–2 Plan acknowledges that any Party may, in its discretion, exercise concurrent jurisdiction.[17]

While NYSE Amex has adopted a number of NYSE member firm conduct rules, NYSE Amex equities rules do not include all NYSE rules.[18] Accordingly, certain Common Rules between NYSE and FINRA that have not been adopted by NYSE Amex (*e.g.,* NYSE Rule 414 and the NYSE Series 700 Rules) will not be Common Rules among NYSE, NYSE Amex, and FINRA. In addition, certain other NYSE Amex equities trading rules that qualify as Common Rules have been modified to reflect the difference in products trading at NYSE Amex (*e.g.,* NYSE Amex Equities Rules 345 (Employees—Registration, Approval, Records) and 408 (Discretionary Power in Customers' Accounts)).

Under the Plan, each of NYSE and NYSE Amex would retain full responsibility for surveillance and enforcement with respect to trading activities or practices involving the systems and facilities of the respective exchange. Each of NYSE and NYSE Amex also would retain regulatory responsibility for examinations of conduct or action of a Common Member that is not covered under the Common Rules and/or by related Federal regulations or laws; processing of applications for membership in the respective exchange; qualification and registration of member firm personnel to effect transactions on the floor of the exchange; and regulatory responsibility for the application of any Common Rule as it pertains to matters other than member firm regulation.[19]

The text of the proposed 17d–2 Plan is as follows:

* * * * *

Agreement by and Among Financial Industry Regulatory Authority, Inc., New York Stock Exchange LLC, NYSE Regulation, Inc., and NYSE Amex LLC Pursuant to SEC Rule 17d–2 Promulgated by the Securities and Exchange Commission Under the Securities Exchange Act of 1934

This Agreement, (''Agreement'') by and among Financial Industry Regulatory Authority, Inc., a Delaware non-stock, not-for-profit membership corporation (''FINRA''), New York Stock Exchange LLC, a New York limited liability company (''NYSE LLC''), NYSE Regulation, Inc., a New York not-for-profit corporation and an indirectly wholly-owned subsidiary of NYSE Group, Inc. (''NYSE Regulation''), and NYSE Amex LLC (''NYSE Amex''), a Delaware limited liability company and wholly-owned subsidiary of NYSE Group, Inc. (herein collectively referred to as the ''Participants''), dated as of December 15, 2008, pursuant to the provisions of Rule 17d–2 promulgated by the Securities and Exchange Commission (the ''Commission'') under the Securities Exchange Act of 1934, as amended (the ''Act''), which authorizes agreements between self-regulatory organizations for plans to reduce or eliminate regulatory duplication.

This Agreement amends and restates the agreement entered into among National Association of Securities Dealers, Inc. (''NASD'' n/k/a FINRA), NYSE LLC, and NYSE Regulation on July 30, 2007, entitled ''Agreement between National Association of Securities Dealers, Inc., New York Stock Exchange LLC, and NYSE Regulation, Inc., pursuant to SEC Rule 17d–2 promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934'' (the ''July 30, 2007 Agreement'').

Whereas, NYSE Euronext, a Delaware corporation and the parent entity of NYSE Group (as hereinafter defined), and The Amex Membership Corporation, a New York not-for-profit corporation and parent company of the American Stock Exchange LLC (''Amex''), entered into an Agreement and Plan of Merger, dated January 17, 2008 (''Merger Agreement''), whereby, through a series of mergers, on October 1, 2008, NYSE Euronext acquired Amex (''Merger Transaction'') and as a result of these mergers, Amex became a wholly-owned subsidiary of NYSE Group and was renamed NYSE Amex; and

Whereas, the Participants are desirous of reducing duplication in the regulation of broker-dealer firms and associated persons therewith that are members of NYSE, NYSE Amex, and FINRA (''Common Members'') and allocating regulatory responsibilities with respect to such Common Members and for which they are subject to Common Rules (as hereinafter defined); and

Whereas, the Participants intend that FINRA will perform various functions formerly performed by NYSE Regulation; and

Whereas, the Participants intend this Agreement to describe the functions to be performed by FINRA pursuant to Section 17(d) of the Act and Rule 17d–2 promulgated thereunder, and intend to file such with the Commission for its approval.

Now, therefore, in consideration of the foregoing, the mutual covenants contained hereinafter, and other good and valuable consideration, the Participants hereby agree as follows:

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[15] *See* paragraph 1(a) of the proposed 17d–2 Plan.

[16] *See, e.g.,* the Multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act among the American Stock Exchange LLC, the BATS Exchange, Inc., the Boston Stock Exchange, Inc., the CBOE Stock Exchange, LLC, the Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., the International Securities Exchange, LLC, the NASDAQ Stock Market LLC, the National Stock Exchange, Inc., the New York Stock Exchange, LLC, NYSE Arca Inc., NYSE Regulation, Inc., and the Philadelphia Stock Exchange, Inc., approved by the Commission on October 17, 2008, as may be amended from time to time, involving the allocation of regulatory responsibilities with respect to common members for compliance with the surveillance, investigation, and enforcement of common insider trading rules. *See* Securities Exchange Act Release No. 58806 (October 17, 2008), 73 FR 63216 (October 23, 2008); *see also* paragraph 20 of the proposed 17d–2 Plan.

[17] *See* paragraph 7 of the proposed 17d–2 Plan.

[18] For example, NYSE Amex has not adopted rules based on the following NYSE products: Cabinet Securities (NYSE Rule 85), Options (NYSE Series 700 Rules), Index and Currency Warrants (NYSE Rule 414), and Basket Trades (NYSE Series 800 Rules).

[19] *See* paragraphs 2(d) and 2(e) of the proposed 17d–2 Plan.

1. Assumption of Regulatory Responsibilities

(a) On the effective date, which shall be the date that the Commission has declared effective this Agreement, FINRA will assume regulatory responsibilities for all Common Members for the list of rules attached as *Exhibit 1* (''Common Rules'') to this Agreement and made part hereof including examination, enforcement and surveillance responsibilities for such Common Rules to the extent that such responsibilities involve member firm regulation (the ''Regulatory Responsibilities''). The Participants agree that the NYSE and NYSE Amex rules listed on Exhibit 1 are identical or substantially similar to the corresponding FINRA rule.

(b) FINRA shall not charge NYSE or NYSE Amex for performing the Regulatory Responsibilities except for the reasonable notification expenses and travel and out-of-pocket expenses, as provided in paragraphs 4(c) and 5.

2. Scope of Regulatory Responsibilities

(a) Whenever a Participant proposes to make a change to the substance of any of the Common Rules, before filing such proposal with the SEC, it shall inform the other Participants to determine whether the other Participants will agree to promptly propose a conforming change to its version of the Common Rule. In the event the Participants do not agree to propose conforming changes, the Participants agree that they will file with the SEC for approval an amendment to this Agreement deleting such rule from the list of Common Rules, such amendment to be effective no earlier than the date of SEC approval of the change to the Common Rule proposed by the NYSE, NYSE Amex, or FINRA, as the case may be.

(b) *Common Rulebook.* FINRA intends to create a single set of Rules to replace the FINRA NASD Rules and the NYSE Rules incorporated by FINRA. There is a substantial likelihood that each FINRA rule that would replace an existing NYSE Rule incorporated by FINRA and applicable to Common Members would be substantially different from the then-existing NYSE Rule or NYSE Amex Rule. In such case, pursuant to paragraph 2(a) above, NYSE and NYSE Amex would need to file with the Commission a proposal to amend their respective corresponding Rules to conform to the new FINRA Rule. As provided in Section 13, the Participants may make certain amendments to the list of Common Rules in *Exhibit 1* without constituting an amendment to this Agreement.

(c) Each year within 30 days of the anniversary date of Commission approval of this Agreement, or more frequently if required by changes in the rules of a Participant, NYSE and NYSE Amex will submit to FINRA an updated list of Common Rules for review. This updated list may add to Exhibit 1 rules that qualify as Common Rules, shall delete from Exhibit 1 rules of that Participant that are no longer identical or substantially similar to the Common Rules, and shall confirm that the remaining rules of the Participant included on Exhibit 1 continue to qualify as Common Rules. Within 30 days from the date that FINRA has received revisions to Exhibit 1, FINRA shall confirm in writing to NYSE and NYSE Amex whether the rules listed in Exhibit 1 are Common Rules.

(d) Notwithstanding anything contained in this Agreement to the contrary, NYSE shall retain regulatory responsibility for the following (collectively, the ''NYSE Retained Responsibilities''):

(i) Examinations of conduct or action by a Common Member that is otherwise covered by NYSE rules that are not Common Rules (the ''NYSE-only Rules'') and/or by related Federal laws or regulations;

(ii) Surveillance of, and investigation and enforcement with respect to, conduct or action undertaken in connection with trading on or through the systems and facilities of the NYSE, or conduct or actions by a Common Member that are otherwise covered by NYSE-only Rules, additionally, in all such cases, surveillance, investigation and enforcement with respect to how such conduct may constitute a violation of applicable Federal laws or regulations;

(iii) Processing of applications for trading licenses or other indicia of membership in the NYSE, including without limitation applying NYSE's rules relating to the rights and obligations of Common Members that hold a trading license to effect transactions on the floor of the NYSE or through any systems or facilities of the NYSE;

(iv) Qualification and registration of member firm personnel to effect transactions or work as Floor employees on the Floor of the NYSE, pursuant to the NYSE's applicable rules regarding qualifications and registration; and

(v) The application of any Common Rule as it pertains to matters other than member firm regulation, including matters relating to NYSE's exclusive responsibility for (ii)–(iv) above (the ''Non-Exclusive Common Rules''). The Participants have identified the Non-Exclusive Common Rules, which are specifically designated on *Exhibit 1,* as those rules for which both NYSE and FINRA will bear responsibility when performing their respective regulatory responsibilities.

(e) Notwithstanding anything contained in this Agreement to the contrary, NYSE Amex shall retain regulatory responsibility for the following (collectively, the ''NYSE Amex Retained Responsibilities''):

(i) Examinations of conduct or action by a Common Member that is otherwise covered by NYSE Amex rules that are not Common Rules (the ''NYSE Amex-only Rules'') and/or by related Federal laws or regulations;

(ii) Surveillance of, and investigation and enforcement with respect to, conduct or action undertaken in connection with trading on or through the systems and facilities of the NYSE Amex, or conduct or actions by a Common Member that are otherwise covered by NYSE Amex-only Rules, additionally, in all such cases, surveillance, investigation and enforcement with respect to how such conduct may constitute a violation of applicable Federal laws or regulations;

(iii) Processing of applications for trading licenses or other indicia of membership in the NYSE Amex, including without limitation applying NYSE Amex rules relating to the rights and obligations of Common Members that hold a trading license to effect transactions on the floor of the NYSE Amex or through any systems or facilities of the NYSE Amex;

(iv) Qualification and registration of member firm personnel to effect transactions or work as Floor employees on the Floor of the NYSE Amex, pursuant to the NYSE Amex's applicable rules regarding qualifications and registration; and

(v) The application of any Common Rule as it pertains to matters other than member firm regulation, including matters relating to NYSE Amex's exclusive responsibility for (ii)–(iv) above (the ''Non-Exclusive Common Rules''). The Participants have identified the Non-Exclusive Common Rules, which are specifically designated on *Exhibit 1,* as those rules for which both NYSE Amex and FINRA will bear responsibility when performing their respective regulatory responsibilities.

3. Violations

(a) Should FINRA become aware of potential violations of another Participant's rules that are not within the scope of the Regulatory Responsibilities, FINRA will promptly notify the other Participant of those

potential violations, and such matters will be handled by the Participant responsible for those regulatory responsibilities.

(b) Should a Participant other than FINRA become aware of potential violations of Common Rules, the Participant will promptly notify FINRA of those potential violations, and such matters will be handled by FINRA as provided in this Agreement.

4. Applications for, Qualification for, and Termination of, Membership

(a)(i) Common Members subject to this Agreement will be required to submit to FINRA, and FINRA will be responsible for processing, and acting upon, all applications (each an ''Application'') submitted on behalf of the Common Member and any individual associated with such Common Member required to be approved by the rules of NYSE, NYSE Amex, and FINRA (collectively, an ''Applicant'').

(ii) Promptly upon receipt of any complete Application, but in any event no later than seven (7) business days thereafter, FINRA shall advise NYSE and NYSE Amex of the qualifications and registration status of the Applicant required to be approved pursuant to the rules of NYSE, NYSE Amex, and FINRA. The NYSE and NYSE Amex each reserve the right to require additional qualifications or registrations prior to approving an Applicant as a member of the NYSE and NYSE Amex, pursuant to the process described in NYSE and NYSE Amex rules.

(b) FINRA shall promptly advise NYSE and NYSE Amex of information regarding changes in status of any person required to be approved pursuant to the rules of NYSE, NYSE Amex, and FINRA that relates to a statutory disqualification, involuntary termination from employment or any other submission made to FINRA pursuant to Incorporated NYSE Rule 351(a)–(c). The NYSE and NYSE Amex each reserve the right to disqualify a member pursuant to the process described in their respective rules.

(c) Common Members will be required to send to FINRA all letters, termination notices or other material respecting persons required to be approved pursuant to the rules of NYSE, NYSE Amex, and FINRA. When as a result of processing said submissions FINRA becomes aware of a statutory disqualification as defined in the Act with respect to a Common Member or person associated with a Common Member, FINRA will determine pursuant to Section 15A(g) or 6(c) of the Act the acceptability or continued acceptability of the person to whom such disqualification applies but will not make a determination regarding NYSE or NYSE Amex membership or participation, or association of a person with an NYSE or NYSE Amex member. FINRA shall advise the other Participants in writing of its actions in this regard. The other Participants shall, within 30 days of receiving such information from FINRA, determine whether to permit a Common Member that has been determined to be statutorily disqualified by FINRA from becoming or remaining an NYSE or NYSE Amex member or a participant, or a person associated with a member. The other Participant will advise FINRA of its decision.

The other Participant will reimburse FINRA for reasonable expenses incurred in notifying a Participant of FINRA's decision regarding a statutory disqualification under Section 15A(g) or Section 6(c) of the Act.

FINRA will also be responsible for processing and, if required, acting upon all requests for the opening, address changes, and terminations of branch offices by Common Members and any other applications required of Common Members under the Common Rules.

5. Information Sharing

The Participants agree to share information as follows:

(a) General.

A Participant shall promptly furnish to the other Participants any information that it determines indicates possible financial or operational problems that may affect the continued ability of any Common Member to conduct business.

(b) Reports and Other Documents.

A Participant shall upon request promptly make available to the other Participants at no cost any existing financial, operational, or related report filed with that Participant by a Common Member, as well as any existing files, information on customer complaints, termination notices, copies of an examination report, examination workpapers, investigative material, enforcement referrals or other documents involving compliance with the Federal securities laws and regulations and the rules of the Participants by the Common Member, or other documents in the possession of the Participant relating to the Common Member as necessary to assist the other Participants in fulfilling their Retained Responsibilities.

(c) Third-party Complaints.

If a Participant receives a copy of a complaint from any third party, including but not limited to a report from a Common Member pursuant to FINRA Incorporated NYSE Rule 351 or NYSE Amex Equities Rule 351, relating to possible violations by a Common Member or persons associated with a Common Member that is not within the scope of that Participant's regulatory responsibilities and is within the scope of another Participant's regulatory responsibilities, that Participant shall promptly forward to the other Participant copies of such complaints. The Participant with the regulatory responsibilities vis-à-vis such complaint shall have responsibility to review and take any appropriate action with respect to such complaint.

(d) Information on Formal and Informal Discipline.

A Participant shall promptly make available to the other Participants information on (1) formal disciplinary actions taken by that Participant involving a Common Member or persons associated with a Common Member; and (2) informal disciplinary actions taken by that Participant involving a Common Member. For purposes of this paragraph (d), informal disciplinary actions shall mean Cautionary Actions and MRVP (if FINRA) and Letters of Education, Letters of Admonition, and Summary Fines (if NYSE or NYSE Amex).

(e) Participants to Make Personnel Available as Witnesses.

A Participant shall make its personnel available to the other Participants to serve as testimonial or non-testimonial witnesses as necessary to assist the respective Participant in fulfilling the self-regulatory responsibilities retained by it under this Agreement. The Participant requiring the services of such witnesses shall pay all reasonable travel and other out-of-pocket expenses incurred by the other Participant's employees to the extent that the requesting Participant requires such employees to serve as a witness, and provide information or other assistance pursuant to this Agreement.

(f) Confidentiality. The Participants agree that documents or information shared shall be held in confidence, and be used only for the purposes of carrying out their respective regulatory obligations. No Participant shall assert regulatory or other privileges as against the others with respect to documents or information that is required to be shared pursuant to this Agreement.

(g) No Waiver of Privilege. The sharing of documents or information among the Participants pursuant to this Agreement shall not be deemed a waiver as against third parties of regulatory or other privileges relating to the discovery of documents or information.

(h) Periodic Meetings. The Participants agree that they shall conduct regular joint meetings among them for the purposes of reporting on the conduct of the Regulatory Responsibilities and current investigations involving significant rule violations by a Common Member, and identifying issues or concerns with respect to the regulation of Common Members.

6. Arbitration of Disputes Under This Agreement

(a) Regulatory Services Manager. The Participants hereby each appoint the employee identified on *Exhibit 2* hereto as its respective Regulatory Services Manager (the ''Regulatory Services Manager'') to, among other things, resolve disputes pursuant to Section 6(b) of this Agreement and oversee day-to-day management of the services and activities contemplated by this Agreement. On reasonable prior written notice to the other, the Participants shall each have the right to replace its respective Regulatory Services Manager with an employee or officer with comparable knowledge, expertise and decision-making authority.

(b) Dispute Resolution. Except as otherwise expressly set forth in this Agreement, any dispute arising out of or relating to this Agreement shall be submitted for resolution to the Regulatory Services Managers. In the event the Regulatory Services Managers fail to resolve a dispute pursuant to this Section 6(b) within a reasonable time of receiving notice of such dispute from a Participant, then the Participants shall refer the dispute to the employee identified on *Exhibit 2* as its respective Senior Officer (the ''Senior Officer'') and such Senior Officers shall attempt in good faith to conclusively resolve any such dispute. On reasonable prior written notice to the other, the Participants shall each have the right to replace its respective Senior Officer with an officer with comparable rank, knowledge, expertise and decision-making authority. If the Senior Officers are unable to resolve the dispute amicably within 30 days, the dispute will be resolved by binding arbitration between or among the Participants as provided herein. Arbitration shall be conducted by a single arbitrator agreed upon by the Participants in accordance with the arbitration rules of the American Arbitration Association (the ''AAA''); *provided,* that, if the Participants cannot agree on the identity of the arbitrator, then the arbitrator shall be chosen by the AAA in accordance with its rules. All arbitration hearings shall be conducted in New York, New York. Each Participant shall pay its own costs for the arbitration, with the cost of the arbitrator to be equally divided between or among the Participants; *provided,* that the arbitrator may, in his or her discretion, award reasonable attorneys' fees and expenses to the prevailing Participant. The arbitrator will have no authority to award punitive damages or any other damages not measured by the prevailing Participant's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Agreement. A judgment upon an award may be entered in any court having jurisdiction. No Participant or the arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the other Participants, other than to the Commission. Except as otherwise expressly set forth in this Agreement, the procedures set forth in this Section 6(b) must be satisfied as a condition precedent to a Participant commencing any arbitration in connection with any dispute arising hereunder. A Participant's failure to comply with the preceding sentence shall constitute cause for the dismissal without prejudice of any such arbitration.

(c) Continuity of Services. Each Participant acknowledges that the timely and complete performance of its obligations pursuant to this Agreement is critical to the business and operations of the other Participants. In the event of a dispute between or among the Participant, the Participants will continue to perform their respective obligations under this Agreement in good faith during the resolution of such dispute unless and until this Agreement is terminated in accordance with its provisions. Nothing in this Section 6(c) will interfere with a Participant's right to terminate this Agreement as set forth in this Agreement.

7. No Restrictions on Regulatory Action

Nothing contained in this Agreement shall restrict or in any way encumber the right of a Participant to conduct its own independent or concurrent investigation, examination or enforcement proceeding of or against Common Members, as a Participant, in its sole discretion, shall deem appropriate or necessary.

8. Limitation of Liability

None of the Participants nor any of their respective directors, governors, officers, employees, affiliates or agents shall be liable to any other Participants or such Participant's directors, governors, officers, employees, affiliates or agents for any liability, loss or damage resulting from any delays, inaccuracies, errors or omissions with respect to its performing or failing to perform its obligations under this Agreement, except as otherwise provided for under the Act or for any liability, loss or damage resulting from the gross negligence, willful misconduct, reckless disregard or breach of confidentiality by a Participant or its directors, governors, officers, employees, affiliates or agents. The Participants understand and agree with each other that the Regulatory Responsibilities are being performed on a good faith and best effort basis and no warranties, express or implied, are made by any Participant to any other Participant with respect to any of the obligations to be performed by the Participants hereunder.

9. Commission Approval

(a) The Participants agree to file promptly this Agreement with the Commission for its review and approval. This Agreement shall be effective upon approval of the Commission.

(b) If approved by the Commission, FINRA will notify Common Members of the general terms of the Agreement and its impact on such members. The notice will be sent on behalf of all Participants and, prior to being sent, NYSE and NYSE Amex will review and approve the notice.

10. Applicability of Certain Laws

Notwithstanding any provision hereof, this Agreement shall be subject to any applicable Federal or State statute, or any rule or order of the Commission reassigning regulatory responsibilities between self-regulatory organizations. To the extent such statute, rule, or order is inconsistent with one or more provisions of this Agreement, such statute, rule, or order shall supersede the provision(s) hereof to the extent necessary to be properly effectuated and the provision(s) hereof in that respect shall be null and void.

11. Definitions

Unless otherwise defined in this Agreement, or unless the context otherwise requires, the terms used in this Agreement shall have the same meaning as they have under the Act and the rules and regulations promulgated by the Commission thereunder.

12. Severability

Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or

unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.

13. Amendment

This Agreement may be amended in writing duly approved by each Participant. All such amendments, other than modifications to the list of Common Rules in *Exhibit 1* pursuant to (i) a Commission order or other effective proposed rule change to FINRA approving the deletion of an NYSE Rule incorporated by FINRA or the creation of a FINRA rule to replace an NYSE Rule incorporated by FINRA, and (ii) a Commission order or other effective proposed rule change to NYSE or NYSE Amex approving the deletion of an NYSE or NYSE Amex Equities Rule or an amendment to an NYSE or NYSE Amex rule that makes such NYSE or NYSE Amex rule substantially identical to a FINRA rule, must be filed with and approved by the Commission before they become effective.

14. Termination

This Agreement may be terminated by a Participant at any time upon the approval of the Commission after 180 days written notice to the other Participants.

15. General

The Participants agree to perform all acts and execute all supplementary instruments or documents that may be reasonably necessary or desirable to carry out the provisions of this Agreement.

16. Liaison and Notices

All questions regarding the implementation of this Agreement shall be directed to the persons identified in subsections (a), (b) and (c), as applicable, below. All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon (i) actual receipt by the notified Participant or (ii) constructive receipt (as of the date marked on the return receipt) if sent by certified or registered mail, return receipt requested, to the following addresses:

(a) If to NYSE Regulation: NYSE Regulation, Inc., 11 Wall Street, New York, New York 10005. Telephone: (212) 656–3000. Facsimile: (212) 656–8101. Attention: General Counsel, Regulatory Services Manager.

(b) If to New York Stock Exchange LLC: New York Stock Exchange LLC, 11 Wall Street, New York, NY 10005. Telephone: (212) 656–3000. Facsimile: (212) 656–8101. Attention: General Counsel.

(c) If to FINRA: Financial Industry Regulatory Authority, Inc., 1735 K Street, NW., Washington, DC 20006–1500. Telephone: (202) 728–8071. Facsimile: (202) 728–8075. Attention: General Counsel, Regulatory Services Manager.

(d) If to NYSE Amex LLC: NYSE Amex LLC, 11 Wall Street, New York, NY 10005. Telephone: (212) 656–3000. Facsimile: (212) 656–8101. Attention: General Counsel, Regulatory Services Manager.

17. Relief From Regulatory Responsibility

Pursuant to Section 17(d)(1)(A) of the Act, and Rule 17d-2 thereunder, the Participants jointly request the SEC, upon its approval of this Agreement, to relieve the NYSE and NYSE Amex of any and all responsibilities with respect to the matters allocated to FINRA pursuant to this Agreement for purposes of Sections 17(d) and 19(g) of the Act.

18. Governing Law

This Agreement shall be deemed to have been made in the State of New York, and shall be construed and enforced in accordance with the law of the State of New York, without reference to principles of conflicts of laws thereof. Each of the Participants hereby consents to submit to the jurisdiction of the courts by or for the State of New York or the United States District Court for the Southern District of New York in connection with any action or proceeding relating to this Agreement.

19. Survival of Provisions

Provisions intended by their terms or context to survive and continue notwithstanding delivery of the regulatory services by FINRA, the payment of the price by the NYSE or NYSE Amex, and any termination of this Agreement shall survive and continue.

20. Prior Agreements

This Agreement is wholly separate from: (a) The multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act among the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange LLC, the National Association of Securities Dealers, Inc., the New York Stock Exchange, LLC, the NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc. involving the allocation of regulatory responsibilities with respect to common members for compliance with common rules relating to the conduct by broker-dealers of accounts for listed options or index warrants entered into on June 5, 2008, and as may be amended from time to time; (b) the multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act among the American Stock Exchange LLC, the BATS Exchange, Inc. the Boston Stock Exchange, Inc., the CBOE Stock Exchange, LLC, the Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., the International Securities Exchange, LLC, the NASDAQ Stock Market LLC, the National Stock Exchange, Inc., the New York Stock Exchange, LLC, NYSE Arca Inc., NYSE Regulation, Inc., and the Philadelphia Stock Exchange, Inc., approved by the Commission on October 17, 2008, as may be amended from time to time, involving the allocation of regulatory responsibilities with respect to common members for compliance with the surveillance, investigation, and enforcement of common insider trading rules; and (c) the multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act among American Stock Exchange LLC, Boston Stock Exchange, Inc., Chicago Board Options Exchange, Incorporated, the International Securities Exchange LLC, Financial Industry Regulatory Authority, Inc., NYSE Arca, Inc., The NASDAQ Stock Market LLC, and the Philadelphia Stock Exchange, Inc. involving the allocation of regulatory responsibilities with respect to common members for compliance with common rules relating to certain options-related market surveillance matters entered into on March 31, 2008, as amended October 1, 2008, and as may be amended from time to time.

21. Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and such counterparts together shall constitute but one and the same instrument.

In witness whereof, the Participants hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

Financial Industry Regulatory Authority
By: _____
Name: _____
Title: _____

New York Stock Exchange, LLC
By: _____
Name: _____
Title: _____

Nyse Regulation, Inc.
By: _____
Name: _____
Title: _____
NYSE AMEX LLC
By: _____
Name: _____
Title: _____

Exhibit 1

List of Common Rules

As referenced in paragraph 2(d)(v) of the Agreement, rules designated with a ''*'' are Non-Exclusive Common Rules, and NYSE and NYSE Amex shall retain regulatory responsibility for these rules insofar as necessary to discharge their respective Retained Responsibilities.

NYSE Rule	NYSE Amex Equities Rule	FINRA Rule
*Rule 1 ''The Exchange''	*Rule 1 ''The Exchange''	NYSE Rule 1 ''The Exchange''.
*Rule 2 ''Member,'' ''Membership,'' ''Member Firm,'' etc.	*Rule 2 ''Member,'' ''Membership,'' ''Member Firm,'' etc.	NYSE Rule 2 ''Member,'' ''Membership,'' ''Member Firm,'' etc.
*Rule 2A ''Jurisdiction''	*Rule 2A ''Jurisdiction''	NYSE Rule 2A ''Jurisdiction''.
*Rule 2B No Affiliation between Exchange and any Member Organization.	*Rule 2B No Affiliation between Exchange and any Member Organization.	NYSE Rule 2B No Affiliation between Exchange and any Member Organization.
*Rule 3 ''Security''	*Rule 3 ''Security''	NYSE Rule 3 ''Security''.
*Rule 4 ''Stock''	*Rule 4 ''Stock''	NYSE Rule 4 ''Stock''.
*Rule 5 ''Bond''	*Rule 5 ''Bond''	NYSE Rule 5 ''Bond''.
*Rule 6 ''Floor''	*Rule 6 ''Floor''	NYSE Rule 6 ''Floor''.
*Rule 8 ''Delivery''	*Rule 8 ''Delivery''	NYSE Rule 8 ''Delivery''.
*Rule 9 ''Branch Office Manager''	*Rule 9 ''Branch Office Manager''	NYSE Rule 9 ''Branch Office Manager''.
*Rule 10 ''Registered Representative''	*Rule 10 ''Registered Representative''	NYSE Rule 10 ''Registered Representative''.
*Rule 11 Effect of Definitions	*Rule 11 Effect of Definitions	NYSE Rule 11 Effect of Definitions.
*Rule 12 ''Business Day''	*Rule 12 ''Business Day''	NYSE Rule 12 ''Business Day''.
*Rule 134 Differences and Omissions—Cleared Transactions.	*Rule 134 Differences and Omissions —	NYSE Rule 134 Differences and Omissions—Cleared Transactions.
Rule 176 Delivery Time	Rule 176 Delivery Time	NYSE Rule 176 Delivery Time.
Rule 177 Delivery Time—''Cash'' Contracts	Rule 177 Delivery Time—''Cash'' Contracts	NYSE Rule 177 Delivery Time—''Cash'' Contracts.
Rule 180 Failure to Deliver	Rule 180 Failure to Deliver	NYSE Rule 180 Failure to Deliver.
Rule 282 Buy-in Procedures	Rule 282 Buy-in Procedures	NYSE Rule 282 Buy-in Procedures.
Rule 291 Failure to Fulfill Closing Contract	Rule 291 Failure to Fulfill Closing Contract	NYSE Rule 291 Failure to Fulfill Closing Contract.
Rule 292 Restrictions on Members' Participation in Transaction to Close Defaulted Contracts.	Rule 292 Restrictions on Members' Participation in Transaction to Close Defaulted Contracts.	NYSE Rule 292 Restrictions on Members' Participation in Transaction to Close Defaulted Contracts.
Rule 293 Closing Contracts in Suspended Securities.	Rule 293 Closing Contracts in Suspended Securities.	NYSE Rule 293 Closing Contracts in Suspended Securities.
Rule 294 Default in Loan of Money	Rule 294 Default in Loan of Money	NYSE Rule 294 Default in Loan of Money.
Rule 296 Liquidation of Securities Loans and Borrowings.	Rule 296 Liquidation of Securities Loans and Borrowings.	NYSE Rule 296 Liquidation of Securities Loans and Borrowings.
Rule 311 Formation and Approval of Member Organizations.	Rule 311 Formation and Approval of Member Organizations.	NYSE Rule 311 Formation and Approval of Member Organizations.
Rule 312 Changes Within Member Organizations.	Rule 312 Changes Within Member Organizations.	NYSE Rule 312 Changes Within Member Organizations.
Rule 313 Submission of Partnership Articles—Submission of Corporate Documents.	Rule 313 Submission of Partnership Articles—Submission of Corporate Documents.	NYSE Rule 313 Submission of Partnership Articles—Submission of Corporate Documents.
Rule 319 Fidelity Bonds	Rule 319 Fidelity Bonds	NYSE Rule 319 Fidelity Bonds.
Rule 321 Formation of Acquisition of Subsidiaries.	Rule 321 Formation of Acquisition of Subsidiaries.	NYSE Rule 321 Formation of Acquisition of Subsidiaries.
Rule 322 Guarantees by, or Flow Through Benefits for Members or Member Organizations.	Rule 322 Guarantees by, or Flow Through Benefits for Members or Member Organizations.	NYSE Rule 322 Guarantees by, or Flow Through Benefits for Members or Member Organizations.
*Rule 325 Capital Requirements Members Organizations.	*Rule 325 Capital Requirements Members Organizations.	NYSE Rule 325 Capital Requirements Members Organizations.
Rule 326(a) Growth Capital Requirement	Rule 326(a) Growth Capital Requirement	NYSE Rule 326(a) Growth Capital Requirement.
Rule 326(b) Business Reduction Capital Requirement.	Rule 326(b) Business Reduction Capital Requirement.	NYSE Rule 326(b) Business Reduction Capital Requirement.
Rule 326(c) Business Reduction Capital Requirement.	Rule 326(c) Business Reduction Capital Requirement.	NYSE Rule 326(c) Business Reduction Capital Requirement.
Rule 326(d) Reduction of Elimination of Loans and Advances.	Rule 326(d) Reduction of Elimination of Loans and Advances.	NYSE Rule 326(d) Reduction of Elimination of Loans and Advances.
Rule 328 Sale-and-Leasebacks, Factoring, Financing and Similar Arrangements.	Rule 328 Sale-and-Leasebacks, Factoring, Financing and Similar Arrangements.	NYSE Rule 328 Sale-and-Leasebacks, Factoring, Financing and Similar Arrangements.
*Rule 342 Offices—Approval, Supervision and Control.	*Rule 342 Offices—Approval, Supervision and Control.	NYSE Rule 342 Offices—Approval, Supervision and Control.
Rule 343 Offices—Sole Tenancy, Hours, Display of Membership Certificates.	Rule 343 Offices—Sole Tenancy, Hours, Display of Membership Certificates.	NYSE Rule 343 Offices—Sole Tenancy, Hours, Display of Membership Certificates.
Rule 344 Research Analysts and Supervisory Analysts.	Rule 344 Research Analysts and Supervisory Analysts.	NYSE Rule 344 Research Analysts and Supervisory Analysts.

NYSE Rule	NYSE Amex Equities Rule	FINRA Rule
Rule 345 Employees—Registration, Approval, Records.	Rule 345 Employees—Registration, Approval, Records.	NYSE Rule 345 Employees—Registration, Approval, Records.
Rule 345A Continuing Education for Registered Persons.	Rule 345A Continuing Education for Registered Persons.	NYSE Rule 345A Continuing Education for Registered Persons.
Rule 346 Limitations—Employment and Association with Members and Member Organizations.	Rule 346 Limitations—Employment and Association with Members and Member Organizations.	NYSE Rule 346 Limitations—Employment and Association with Members and Member Organizations.
Rule 351 Reporting Requirements	Rule 351 Reporting Requirements	NYSE Rule 351 Reporting Requirements.
Rule 352 Guarantees, Sharing in Accounts, and Loan Arrangements.	Rule 352 Guarantees, Sharing in Accounts, and Loan Arrangements.	NYSE Rule 352 Guarantees, Sharing in Accounts, and Loan Arrangements.
Rule 353 Rebates and Compensation	Rule 353 Rebates and Compensation	NYSE Rule 353 Rebates and Compensation.
Rule 354 Reports to Control Persons	Rule 354 Reports to Control Persons	NYSE Rule 354 Reports to Control Persons.
*Rule 375 Missing the Market	*Rule 375 Missing the Market	NYSE Rule 375 Missing the Market.
Rule 382 Carrying Agreements	Rule 382 Carrying Agreements	NYSE Rule 382 Carrying Agreements.
Rule 387 COD Orders	Rule 387 COD Orders	NYSE Rule 387 COD Orders.
Rule 401A Customer Complaints	Rule 401A Customer Complaints	NYSE Rule 401A Customer Complaints.
Rule 402 Customer Protection—Reserves and Custody of Securities.	Rule 402 Customer Protection—Reserves and Custody of Securities.	NYSE Rule 402 Customer Protection—Reserves and Custody of Securities.
Rule 404 Individual Members Not To Carry Accounts.	Rule 404 Individual Members Not To Carry Accounts.	NASD Rule 1014.
Rule 405 Diligence as to Accounts	Rule 405 Diligence as to Accounts	NYSE Rule 405 Diligence as to Accounts.
Rule 406 Designation of Accounts	Rule 406 Designation of Accounts	NYSE Rule 406 Designation of Accounts.
*Rule 407 Transactions—Employees of Members, Member Organizations and the Exchange.	*Rule 407 Transactions—Employees of Members, Member Organizations and the Exchange.	NYSE Rule 407 Transactions—Employees of Members, Member Organizations and the Exchange. [20]
*Rule 407A Disclosure of All Member Accounts	*Rule 407A Disclosure of All Member Accounts.	NYSE Rule 407A Disclosure of All Member Accounts.
Rule 408 Discretionary Power in Customers' Accounts.	Rule 408 Discretionary Power in Customers' Accounts.	NYSE Rule 408 Discretionary Power in Customers' Accounts.
Rule 409 Statements of Accounts to Customers	Rule 409 Statements of Accounts to Customers.	NYSE Rule 409 Statements of Accounts to Customers.
Rule 409A SIPC Disclosures	Rule 409A SIPC Disclosures	NYSE Rule 409A SIPC Disclosures.
*Rule 410 Records of Orders	*Rule 410 Records of Orders	NYSE Rule 410 Records of Orders.
*Rule 411 Erroneous Reports	*Rule 411 Erroneous Reports	NYSE Rule 411 Erroneous Reports.
Rule 412 Customer Account Transfer Contracts	Rule 412 Customer Account Transfer Contracts.	NASD Rule 11870.
Rule 413 Uniform Forms	Rule 413 Uniform Forms	NYSE Rule 413 Uniform Forms.
*Rule 416 Questionnaires and Reports	*Rule 416 Questionnaires and Reports	NYSE Rule 416 Questionnaires and Reports.
*Rule 416A Member and Member Organization Profile Information Updates and Quarterly Certifications Via The Electronic Filing Platform.	*Rule 416A Member and Member Organization Profile Information Updates and Quarterly Certifications Via The Electronic Filing Platform.	NYSE Rule 416A Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform.
Rule 418 Audit	Rule 418 Audit	NYSE Rule 418 Audit.
Rule 420 Reports of Borrowings and Subordinate Loans for Capital Purposes.	Rule 420 Reports of Borrowings and Subordinate Loans for Capital Purposes.	NYSE Rule 420 Reports of Borrowings and Subordinate Loans for Capital Purposes.
Rule 421 Periodic Reports	Rule 421 Periodic Reports	NYSE Rule 421 Periodic Reports.
Rule 430 Partial Delivery of Securities to Customers on C.O.D. Purchases.	Rule 430 Partial Delivery of Securities to Customers on C.O.D. Purchases.	NYSE Rule 430 Partial Delivery of Securities to Customers on C.O.D. Purchases.
Rule 431 Margin Requirements	Rule 431 Margin Requirements	NYSE Rule 431 Margin Requirements.
Rule 432 Daily Record of Required Margin	Rule 432 Daily Record of Required Margin	NYSE Rule 432 Daily Record of Required Margin.
Rule 434 Required Submission of Requests for Extensions of Time for Customers.	Rule 434 Required Submission of Requests for Extensions of Time for Customers.	NYSE Rule 434 Required Submission of Requests for Extensions of Time for Customers.
*Rule 435 Miscellaneous Prohibitions (Excessive Trading by Members).	*Rule 435 Miscellaneous Prohibitions (Excessive Trading by Members).	NYSE Rule 435 Miscellaneous Prohibitions (Excessive Trading by Members).
*Rule 440 Books and Records	*Rule 440 Books and Records	NYSE Rule 440 Books and Records.
Rule 440A Telephone Solicitation	Rule 440A Telephone Solicitation	NYSE Rule 440A Telephone Solicitation.
Rule 440I Records of Compensation Arrangements—Floor Brokerage.	Rule 440I Records of Compensation Arrangements—Floor Brokerage.	NYSE Rule 440I Records of Compensation Arrangements—Floor Brokerage.
Rule 445 Anti-Money Laundering Compliance Program.	Rule 445 Anti-Money Laundering Compliance Program.	NYSE Rule 445 Anti-Money Laundering Compliance Program.
Rule 446 Business Continuity and Contingency Plans.	Rule 446 Business Continuity and Contingency Plans.	NASD Rule 3510 Business Continuity Plans and NASD Rule 3520 Emergency Contact Information.
Rule 472 Communications with the Public	Rule 472 Communications with the Public	NYSE Rule 472 Communications with the Public.
*Rule 3130 (Annual Certification of Compliance and Supervisory Processes).	*Rule 3130 (Annual Certification of Compliance and Supervisory Processes).	*Rule 3130 (Annual Certification of Compliance and Supervisory Processes). [21]
Rule 3220 (Influencing or Rewarding Employees of Others).	Rule 3220 (Influencing or Rewarding Employees of Others).	Rule 3220 (Influencing or Rewarding Employees of Others).
Rule 4560 (Short-Interest Reporting)	Rule 4560 (Short-Interest Reporting)	Rule 4560 (Short-Interest Reporting).

NYSE Rule	NYSE Amex Equities Rule	FINRA Rule
*Rule 5190 (Notification Requirements for Offering Participants).	*Rule 5190 (Notification Requirements for Offering Participants).	*Rule 5190 (Notification Requirements for Offering Participants).[22]
*Rule 6140 (Other Trading Practices)	*Rule 6140 (Other Trading Practices)	*Rule 6140 (Other Trading Practices).

Exhibit 2

For purposes of this Agreement, the Regulatory Services Managers required under paragraph 6 shall be:

For NYSE Regulation (on behalf of both NYSE and NYSE Amex): Clare F. Saperstein, Managing Director, NYSE Regulation, Inc., 20 Broad Street, 24th Floor, New York, NY 10005 (212) 656–2355 (phone). (212) 656–2333 (fax).

For FINRA: James F. Price, Jr., Senior Vice President, Business and Exchange Solutions, FINRA, 9509 Key West Avenue, Rockville, MD 20850–33329. (240) 386–4608 (phone). (240) 386–5139 (fax).

For purposes of this Agreement, the Senior Officers required under paragraph 6 shall be: For NYSE Regulation (on behalf of both NYSE and NYSE Amex): James F. Duffy, Interim Chief Executive Officer, NYSE Regulation, Inc., 11 Wall Street, New York, NY 10005. (212) 656–2789 (phone). (212) 656–5809 (fax).

For FINRA: Stephen I. Luparello, Senior Executive Vice President, FINRA, 1735 K Street, NW., Washington, DC 20006. (202) 728–6947 (phone). (202) 728–8075 (fax).

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–587 on the subject line.

Paper Comments

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

All submissions should refer to File Number 4–587. 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/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the plan also will be available for inspection and copying at the principal offices of FINRA, NYSE, and NYSE Amex. 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 4–587 and should be submitted on or before August 27, 2009.

IV. Discussion

Pursuant to paragraph (c) of Rule 17d–2,[23] the Commission may, after appropriate notice and comment, declare a plan effective if the Commission finds that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among self-regulatory organizations, or to remove impediments to and foster the development of the national market system and a national system for the clearance and settlement of securities transactions and in conformity with the factors set forth in Section 17(d) of the Act.

In this instance, the Commission believes that appropriate notice and comment can take place after the proposed Plan is effective. The purpose of this Plan is to add NYSE Amex as a party to the existing 17d-2 plan between NYSE, NYSE Regulation, and FINRA. As NYSE Amex has adopted many of the NYSE rules covered by the existing plan,[24] the proposed Plan does not change the scope of that existing plan. Consequently, the Commission does not believe that the Plan raises any new regulatory issues that the Commission has not previously considered in the context of the existing plan between NYSE, NYSE Regulation, and FINRA. By declaring the Plan effective today, the Commission can reduce regulatory duplication for common members of FINRA and NYSE Amex, the latter of which has adopted many of the NYSE rules crossed by the Plan, as it has done for common members of FINRA and NYSE, and the new Plan can be implemented without delay.

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d) of the Act[25] and Rule 17d–2(c) thereunder[26] in that the Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. In particular, the Commission believes that the Plan will reduce unnecessary regulatory duplication by fostering cooperation and coordination between NYSE, NYSE Amex, and FINRA, and will thereby remove impediments to the development of the national market system. In particular, the Plan will allocate to FINRA certain responsibilities for Common Members that would otherwise be performed by

[20] Those portions of the NYSE and NYSE Amex Equities Rules 407(a) and 407.10 that concern Exchange employees, which differ from the FINRA Incorporated NYSE Rule 407, are not Common Rules and FINRA will not be allocated regulatory responsibility for compliance with those portions of the rules.

[21] Those portions of NYSE and NYSE Amex Equities Rule 3130(c)(1), 3130.03, and 3130.10 that relate to compliance with Exchange Rules are not Common Rules and FINRA will not be allocated regulatory responsibility for compliance with those portions of the rules.

[22] Those portions of NYSE and NYSE Amex Equities Rules 5190(c)(1) requiring notice to the Exchange and 5190(e) that relate to placing or transmitting a stabilizing bid or filing are not Common Rules and FINRA will not be allocated regulatory responsibility for compliance with those portions of the rules.

[23] 17 CFR 240.17d–2.

[24] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex–2008–63).

[25] 15 U.S.C. 78q(d).

[26] 17 CFR 240.17d–2(c).

both NYSE and FINRA or NYSE Amex and FINRA. Accordingly, the Plan promotes efficiency by reducing costs to Common Members. Furthermore, because FINRA, NYSE, and NYSE Amex will coordinate their regulatory functions in accordance with the Plan, the Plan should promote investor protection and the public interest.

In particular, the Commission notes that, under the proposed Plan, FINRA, NYSE, and NYSE Amex have allocated regulatory responsibility for Common Rules to the extent that such responsibilities involve member firm regulation. The Plan also sets forth those areas for which NYSE and NYSE Amex will retain regulatory responsibility, including: examinations of conduct or actions by a Common Member covered by NYSE-only or NYSE Amex-only rules and/or by related Federal laws or regulations; surveillance, investigation, and enforcement with respect to conduct or action relating to trading on or through the systems and facilities of NYSE or NYSE Amex and conduct otherwise covered by NYSE-only or NYSE Amex-only rules, as well as whether such conduct may constitute a violation of Federal laws or regulations; processing of applications for trading licenses or other membership in NYSE or NYSE Amex; and qualification and registration of member firm personnel to effect transactions or work on the floor of NYSE or NYSE Amex pursuant to such SRO's rules.[27]

In addition, the proposed Plan provides that NYSE and NYSE Amex will retain regulatory responsibility for the application of any Common Rule as it pertains to matters other than member firm regulation, including matters relating to such SRO's retained responsibilities as set forth in the Plan (the ''Non-Exclusive Common Rules''). The Non-Exclusive Common Rules are specifically annotated in the List of Common Rules and include those rules for which FINRA, NYSE, and NYSE Amex will each bear their respective regulatory responsibilities, consistent with the scope of the 17d–2 Plan. Such rules are ''non-exclusive'' in the sense that they may relate to member firm regulation (for which FINRA would assume regulatory responsibility) as well as matters other than member firm regulation (for which NYSE or NYSE Amex would retain regulatory responsibility). Accordingly, NYSE and NYSE Amex will each bear responsibility for the application of their Non-Exclusive Common Rules concerning their particular regulatory responsibilities.

According to the Plan, whenever any Party seeks to make a change to any of its rules that are Common Rules, before filing a proposed rule change with the Commission, it will inform the other Parties of the intended change to determine whether the other Parties will propose a conforming change to its version of the Common Rule. If the Parties do not agree to propose conforming changes, the Parties agree to file with the Commission an amendment to the 17d–2 Plan to delete such rule from the list of Common Rules.[28] Finally, the proposed Plan requires the Parties annually (or more frequently if required by changes in the rules of a Party) to confirm in writing the accuracy of the list of Common Rules.[29] This provision ensures that the Parties keep the Common Rules up-to-date vis-à-vis the other Parties and should facilitate the ability of the Parties to accurately administer their responsibilities under the proposed Plan consistent with the scope of the Plan declared effective by the Commission herein.

The proposed Plan also requires the Parties to share information on a number of matters, including, for example, financial and operational matters of Common Members, third-party complaints, and disciplinary actions.[30] The Commission believes that the information-sharing provisions contained in the proposed Plan fosters cooperation and coordination among the Parties, thereby promoting investor protection and removing impediments to the development of a national market system.

Finally, the Plan permits any Party to terminate the Plan at any time, subject to 180 days written notice to the other Parties and subject to Commission approval.[31]

V. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4–587. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

It is therefore ordered, pursuant to Section 17(d) of the Act,[32] that the Plan, made by and among NYSE, NYSE Regulation, NYSE Amex, and FINRA, that is contained in File No. 4–587 and filed pursuant to Rule 17d–2, is hereby approved and declared effective.

It is therefore ordered that NYSE and NYSE Amex are relieved of those responsibilities allocated to FINRA under the Plan in File No. 4–587.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[33]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–18762 Filed 8–5–09; 8:45 am]

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[27] *See* paragraphs 2(d)(i)–(iv) and (e)(i)–(iv) of the proposed 17d–2 Plan.

[28] *See* paragraph 2(a) of the proposed 17d–2 Plan.

[29] *See* paragraph 2(c) of the proposed 17d–2 Plan.

[30] *See* paragraph 5 of the proposed 17d–2 Plan.

[31] *See* paragraph 14 of the proposed 17d–2 Plan. The Commission notes that, as reflected in paragraph 14, Commission approval is required for any Party to terminate its participation in the Plan.

[32] 15 U.S.C. 78q(d).

[33] 17 CFR 200.30–3(a)(34).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60405; File No. 4–546]

Joint Industry Plan; Order Approving the National Market System Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the 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.

July 30, 2009.

I. Introduction

The proposed Options Order Protection and Locked/Crossed Market Plan (''Proposed Plan'') was filed jointly, pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934 (''Act'') (''Regulation NMS'') (''Rule 608''),[1] by the International Securities Exchange, LLC (''ISE'') and NYSE Arca, Inc. (''NYSE Arca'') on September 13, 2007 and September 18, 2007, respectively, with the Securities and Exchange Commission (''Commission'').[2] On December 11, 2007, ISE and NYSE Arca separately filed Amendment No. 1 to the Proposed Plan.[3] On April 24, 2008, and April 17, 2008, ISE and NYSE Arca, respectively, filed Amendment No. 2 to the Proposed Plan.[4] On November 10,

[1] 17 CFR 242.608.

[2] *See* letter from Michael J. Simon, General Counsel, ISE, to Nancy M. Morris, Secretary, Commission, dated September 12, 2007 (''ISE Letter 1''); and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Nancy M. Morris, Secretary, Commission, dated September 14, 2007 (''NYSE Arca Letter 1'').

[3] *See* letter from Michael J. Simon, General Counsel, ISE, to Nancy M. Morris, Secretary, Commission, dated December 10, 2007; and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Nancy M. Morris, Secretary, Commission, dated December 10, 2007.

[4] Amendment No. 2 superseded Amendment No. 1 and replaced it in its entirety. *See* letter from

2008 and October 31, 2008, ISE and NYSE Arca, respectively, filed Amendment No. 3 to the Proposed Plan.[5] On April 30, 2008, May 8, 2008, June 18, 2008, June 18, 2008, and July 9, 2008, respectively, Chicago Board Options Exchange, Incorporated (''CBOE''), The NASDAQ Stock Market LLC (''Nasdaq''), American Stock Exchange LLC (''Amex'') (f/k/a NYSE Alternext US LLC, ''NYSE Alternext,'' n/k/a NYSE Amex LLC, ''NYSE Amex''), Philadelphia Stock Exchange, Incorporated (n/k/a NASDAQ OMX PHLX, Inc., ''Phlx''), and Boston Stock Exchange, Inc. (''BSE'') (n/k/a NASDAQ OMX BX, Inc., ''BX'' and together with ISE, NYSE Arca, CBOE, Nasdaq, Amex, and Phlx, the ''Proposing Exchanges'') filed with the Commission the Proposed Plan.[6] On November 25, 2008, November 26, 2008, December 2, 2008, December 4, 2008, and December 5, 2008, CBOE, NYSE Alternext, BSE, Phlx, and Nasdaq, respectively, filed Amendment No. 1 to the Proposed Plan.[7] On April 2, 2009, a detailed summary of the Proposed Plan was published for comment in the **Federal Register.**[8]

The Commission received one comment on the Proposed Plan.[9]

This order approves the Proposed Plan, with changes as the Commission deems necessary or appropriate, thus authorizing CBOE, ISE, Nasdaq, BX, Phlx, Amex, and NYSE Arca to act jointly to implement the Proposed Plan, as modified herein, as a means of facilitating a national market system in accordance with the requirements of Section 11A of the Act.[10]

II. Background

A. Section 11A of the Act

In 1975, Congress directed the Commission, through the enactment of Section 11A of the Act,[11] to facilitate the establishment of a national market system to link together the individual markets that trade securities. Congress found the development of a national market system to be in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure fair competition among the exchange markets.[12] Section 11A(a)(3)(B) of the Act directs the Commission, ''by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities.'' [13] The Commission's approval of a national market system plan is conditioned upon a finding that the proposed plan is ''necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system, or otherwise in furtherance of the purposes of the Act.'' [14]

B. Current Plan

Currently, the Proposing Exchanges are signatories to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (''Current Plan''). The Current Plan is a national market system plan linking its participants. The Commission approved the Current Plan on July 28, 2000.[15] Subsequently, both Pacific Exchange, Inc. (n/k/a ''NYSE Arca'') and Phlx submitted proposed amendments to the Current Plan to become participants to the Current Plan. These proposed amendments were approved on November 16, 2000.[16] On February 5, 2004, BSE's proposed amendment to become a participant to the Current Plan became effective.[17] Further, Nasdaq's proposed amendment to become a participant to the Current Plan became effective on March 21, 2008.[18]

The Current Plan requires its participants to avoid, absent reasonable justification and during normal market conditions, trading at a price inferior to that displayed on another market (''trade-through'').[19] The Current Plan provides for several exceptions to trade-through liability, including, among other things, systems malfunction, failure of the receiving market to respond to an incoming order within 30 seconds, failure of the market traded through to complain within the specified time period, complex trades, trading rotations, and non-firm quotations on the market that was traded through.[20] The Current Plan also provides a mechanism by which a member of a participating exchange

Michael J. Simon, General Counsel, ISE, to Nancy M. Morris, Secretary, Commission, dated April 16, 2008; and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Nancy M. Morris, Secretary, Commission, dated April 16, 2008.

[5] *See* letter from Michael J. Simon, General Counsel, ISE, to Florence Harmon, Acting Secretary, Commission, dated November 7, 2008 (''ISE Letter 2''); and letter from Peter G. Armstrong, Managing Director, Options, NYSE Arca, to Florence Harmon, Acting Secretary, Commission, dated October 30, 2008 (''NYSE Arca Letter 2'').

[6] In their respective filings of the Proposed Plan, Amex, BSE, CBOE, Nasdaq, and Phlx incorporated the changes made by ISE and NYSE Arca in Amendment No. 2. *See* letters from Jeffrey P. Burns, Vice President and Associate General Counsel, Amex, to Nancy M. Morris, Secretary, Commission, dated June 17, 2008 (''Amex Letter 1''); Bruce Goodhue, Chief Regulatory Officer, BSE, to Florence Harmon, Acting Secretary, Commission, dated July 8, 2008 (''BSE Letter 1''); Edward J. Joyce, President and Chief Operating Officer, CBOE, to Nancy M. Morris, Secretary, Commission, dated April 29, 2008 (''CBOE Letter 1''); Jeffrey S. Davis, Vice President and Deputy General Counsel, The NASDAQ OMX Group, Inc., to Nancy M. Morris, Secretary, Commission, dated May 7, 2008 (''Nasdaq Letter 1''); and Richard S. Rudolph, Vice President and Counsel, Phlx, to Nancy M. Morris, Secretary, Commission, dated June 17, 2008 (''Phlx Letter 1'').

[7] In their respective Amendment No. 1 to the Proposed Plan, BSE, CBOE, NYSE Alternext, Phlx, and Nasdaq made changes identical to those made by ISE and NYSE Arca in Amendment No. 3. *See* letters from Edward J. Joyce, President and Chief Operating Officer, CBOE, to Florence Harmon, Acting Secretary, Commission, dated November 25, 2008 (''CBOE Letter 2''); Jeffrey P. Burns, Managing Director, NYSE Alternext, to Florence Harmon, Acting Secretary, Commission, dated November 25, 2008 (''Amex Letter 2''); John Katovich, Vice President, BSE, to Florence Harmon, Acting Secretary, Commission, dated December 1, 2008 (''BSE Letter 2''); Richard S. Rudolph, Vice President and Counsel, Phlx, to Florence Harmon, Acting Secretary, Commission, dated December 3, 2008 (''Phlx Letter 2''); and Jeffrey S. Davis, Vice President and Deputy General Counsel, The NASDAQ OMX Group, Inc., to Florence Harmon, Acting Secretary, Commission, dated December 4, 2008 (''Nasdaq Letter 2'').

[8] Securities Exchange Act Release No. 59647 (March 30, 2009), 74 FR 15010 (File No. 4–546) (''Proposed Plan Notice''). The full text of the Proposed Plan submitted by the Proposing Exchanges, is available on the Commission's Web site at *http://sec.gov/rules/sro/nms/nmsarchive/nms2007.shtml#4-546,* at each Proposing Exchange, and at the Commission's Public Reference Room.

[9] Letter from John C. Nagel, Managing Director & Deputy General Counsel, Citadel Investment Group L.L.C. (''Citadel'') to Nancy M. Morris, Secretary, Commission, dated July 18, 2008 (''Citadel Letter''). The Citadel Letter cited to Citadel's comments made in a letter from John C. Nagel, Managing Director & Deputy General Counsel, Citadel to Nancy M. Morris, Secretary, Commission, dated July 15, 2008 (Petition for Rulemaking to Address Excessive Access Fees in the Options Markets) (''Petition for Rulemaking'').

[10] 15 U.S.C. 78k–1. *See also* 17 CFR 242.608(b)(2). The approved Options Order Protection and Locked/Crossed Market Plan, which incorporates the changes the Commissions deems necessary or appropriate, is attached here as *Appendix A* and is referred to herein as the ''Options Linkage Plan.''

[11] 15 U.S.C. 78k–1.

[12] 15 U.S.C. 78k–1(a)(1)(C).

[13] 15 U.S.C. 78k–1(a)(3)(B).

[14] 17 CFR 242.608(b)(2).

[15] *See* Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (File No. 4–429).

[16] *See* Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) (File No. 4–429) and 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000) (File No. 4–429).

[17] *See* Securities Exchange Act Release No. 49198 (February 5, 2004), 69 FR 7029 (February 12, 2004) (File No. 4–429).

[18] *See* Securities Exchange Act Release No. 57545 (March 21, 2008), 73 FR 16394 (March 27, 2008) (File No. 4–429).

[19] Section 8(c) of the Current Plan.

[20] Section 8(c)(iii) of the Current Plan.

could seek satisfaction if a customer order is traded through.[21]

Under the Current Plan, its participants agree that the dissemination of ''locked'' or ''crossed'' markets should be avoided, and, if their members lock or cross a market, they should take remedial actions to unlock or uncross such market.[22] Further, the Current Plan contains provisions to address trade comparison, clearing, trading halts, non-firm quotations, and administration of the Current Plan.[23] Except with respect to the addition of new participants and the withdrawal of current participants, any proposed change to the Current Plan must be approved unanimously by its participants.[24]

The participating exchanges comply with the requirements of the Current Plan, including the prohibition against trade-throughs, by utilizing a stand alone system (''Linkage Hub'') to send and receive specific order types. The Linkage Hub is a centralized data communications network that electronically links the options exchanges to one another. The Options Clearing Corporation (''OCC'') operates the Linkage Hub.[25]

There are three defined order types under the Current Plan that its participants could route through the Linkage Hub to limit trade-throughs: orders represented by eligible market makers on behalf of customers (''Principal Acting as Agent Orders'' or ''P/A Orders''); [26] orders for the principal accounts of market makers and specialists (''Principal Orders''); [27] and orders intended to satisfy trade-through liabilities (''Satisfaction Orders'').[28] Non-market-maker broker-dealers do not have access to the Linkage Hub.

C. Proposed Plan

The Proposing Exchanges are now seeking approval of an alternative linkage plan, the Proposed Plan. As described in more detail below, the Proposed Plan would not require a central linkage mechanism akin to the Current Plan's Linkage Hub, and would introduce certain new features to linkages between options markets, including an Intermarket Sweep Order (''ISO'') similar to that available for NMS stocks under Regulation NMS.[29]

III. Discussion

As discussed above, in 1975, Congress directed the Commission, through the enactment of Section 11A of the Act,[30] to facilitate the development of a national market system consistent with the objectives of the Act. In particular, Section 11A(a)(3)(B) of the Act [31] authorizes the Commission ''by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this title in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities.'' Rule 608 establishes the procedures for filing, amending, and approving a national market system plan. Approval of such a plan is conditioned upon a finding that the proposed plan ''is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.'' [32]

After careful review, the Commission has determined to approve the Proposed Plan, pursuant to Section 11A(a)(3)(B) of the Act [33] and Rule 608 thereunder,[34] with changes set forth herein as the Commission has deemed necessary and appropriate.[35] Specifically, the Commission finds that changes to the Proposed Plan set forth herein are necessary and appropriate in the public interest. The Commission further finds that the Options Linkage Plan is in furtherance of the purposes of the Act in that it requires the protection of the best priced displayed quotes and avoidance and reconciliation of locked and crossed markets, and thus is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system.[36]

The Commission believes that Proposed Plan's decentralized structure will allow the Proposing Exchanges to take advantage of new technology that allow for efficient routing and executions. The Proposed Plan will give the Proposing Exchanges greater flexibility for order handling as it would allow the exchanges to utilize private linkages, instead of requiring each Proposing Exchange to connect to, and participate in the maintenance of, a centralized hub. In addition, the Proposed Plan would permit the use of ISOs in the options markets. As such, the Proposed Plan would allow the Proposing Exchanges to move towards the market structure approved by the Commission for NMS stocks under Regulation NMS.[37] The Commission believes that the Options Linkage Plan will allow the Proposing Exchanges to update the way in which they accomplish effective quote protection and locked and crossed market reconciliation. For the reasons described above, the Commission believes that these provisions of the Options Linkage Plan will provide benefits to the options markets, including the Proposing Exchanges and market participants generally.

In its comment letter on the Proposed Plan, Citadel referenced the comments it made with regard to access fees in the options markets in its Petition for Rulemaking.[38] There, Citadel encouraged the Commission to institute a rulemaking proceeding to limit the fees that options exchanges may charge non-members to obtain access to quotations.[39] Commission staff is currently considering Citadel's petition.

A. Order Protection

1. Requirement of Reasonable Policies and Procedures

The Options Linkage Plan requires each Participant [40] to establish,

[21] Section 8(c)(ii) of the Current Plan.

[22] Section 7(a)(i)(C) of the Current Plan.

[23] Sections 5, 9, and 10 of the Current Plan.

[24] Section 5(c)(i) of the Current Plan.

[25] *See* ISE Letter 2 and NYSE Arca Letter 2, *supra* note 5; *see also* Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, *supra* note 7.

[26] Sections 2(16)(a) and 7(a)(ii)(A), (B) of the Current Plan.

[27] Sections 2(16)(b) and 7(a)(ii)(C) of the Current Plan.

[28] Sections 2(16)(c) and 7(a)(ii)(D) of the Current Plan.

[29] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (File No. S7–10–04) (''NMS Release''); 17 CFR 242.600 *et seq.*

[30] 15 U.S.C. 78k–1.

[31] 15 U.S.C. 78k–1(a)(3)(B).

[32] 17 CFR 242.608.

[33] 15 U.S.C. 78k–1(a)(3)(B).

[34] 17 CFR 242.608.

[35] The Commission has modified the Proposed Plan to amend Section 7 of the Proposed Plan relating to the implementation date of the plan (*see infra* notes 140–143 and accompanying text).

[36] 17 CFR 242.608(b)(2).

[37] *See supra* note 29.

[38] *See* Citadel Letter, *supra* note 9.

[39] *See* Petition for Rulemaking, *supra* note 9.

[40] The Options Linkage Plan defines ''Participant'' to mean an Eligible Exchange whose participation in the plan has become effective pursuant to Section 3(c) of the Options Linkage Plan. *See* Section 2(15) of the Options Linkage Plan. The Options Linkage Plan defines ''Eligible Exchange'' to mean a national securities exchange registered with the Commission in accordance with Section 6(a) of the Act that, among other things, is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws) and is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan). ''OPRA Plan'' means the plan filed by the Options Price Reporting Authority with the Commission pursuant to Section 11A(a)(1)(C)(iii) of the Act and approved by the

maintain, and enforce written policies and procedures as approved by the Commission that are reasonably designed to prevent Trade-Throughs in that Participant's market in Eligible Options Classes.[41] A ''Trade-Through'' [42] is defined as a transaction in an option series, either as principal or agent, at a price that is lower than a Protected Bid or higher than a Protected Offer. A ''Protected Bid'' or a ''Protected Offer'' [43] means a bid or offer in an option series that is displayed by an Eligible Exchange, is disseminated pursuant to the OPRA Plan, and is the Best Bid or Best Offer of an Eligible Exchange. A ''Best Bid'' or ''Best Offer'' [44] means the highest bid price or the lowest offer price communicated by a member of an Eligible Exchange to any broker-dealer or to any customer at which such member is willing to buy or sell, either as principal or agent.

The Options Linkage Plan also requires each Participant to agree to conduct surveillance of its market on a regular basis to ascertain the effectiveness of the policies and procedures to prevent Trade-Throughs and to take prompt action to remedy deficiencies in such policies and procedures.[45]

As is the case currently for NMS stocks under Regulation NMS,[46] the Commission believes the Options Linkage Plan's policies and procedures-based approach to preventing Trade-Throughs in options is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets, and is consistent with Section 11A(a)(1)(C) of the Act.[47] The requirement in Section 5(a)(i) of the Options Linkage Plan is virtually identical to the requirement in Rule 611(a) of Regulation NMS. The Commission expects the Participants in the Options Linkage Plan will establish, maintain, and enforce written policies and procedures comparable to those established, maintained and enforced by the market centers subject to Rule 611(a). The Commission believes that a policies and procedures-based approach to preventing Trade-Throughs in options is reasonable given the increasingly high volume of trading in options, and the latencies and other discrepancies in the delivery and receipt of quotation data. The requirement of written policies and procedures, as well as the responsibility assigned to Participants to regularly surveil to ascertain the effectiveness of their procedures and take prompt remedial steps, is designed to achieve the objective of eliminating all Trade-Throughs that reasonably can be prevented, while also recognizing the inherent difficulties of eliminating Trade-Through transactions that, despite a Participant's reasonable efforts, may occur.

The Commission believes that each Participant's policies and procedures must enable it to monitor, on a real-time basis, the Protected Quotations displayed by Eligible Exchanges so as to determine the prices at which the Participant can and cannot execute trades. In addition, the Commission believes that a Participant's policies and procedures must establish objective standards and parameters governing its use of the exceptions set forth in Section 5(b) of the Options Linkage Plan, discussed below, and expects each Participant's order-handling and trading systems to be programmed in accordance with these policies and procedures. Finally, the Participant must take such steps as are necessary to enable it to enforce its policies and procedures effectively. For example, the Commission believes that Participants will need to establish procedures such as regular exception reports to evaluate their trading and order-routing practices. The Commission believes that each Participant Exchange will need to examine such reports to affirm that its policies and procedures have been followed by its personnel and properly coded into its systems and, if not, to promptly identify the reasons and take remedial action.[48]

Participants' obligations under the Options Linkage Plan to maintain and enforce policies and procedures reasonably designed to prevent Trade-Throughs is reinforced by the Options Linkage Plan's explicit assignment of responsibility to Participants to surveil to ascertain the effectiveness of their policies and procedures. Participants cannot merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures continue to satisfy the requirements of the Options Linkage Plan. Rather, the Commission believes that Participants must regularly assess the continuing effectiveness of their procedures and take prompt action when needed to remedy deficiencies. In particular, Participants must engage in regular surveillance to determine whether Trade-Throughs are occurring without an applicable exception and whether they have failed to implement and maintain policies and procedures that would have reasonably prevented such Trade-Throughs. Further, this requirement is an important element of a Participant's obligations under Rule 608(c) of Regulation NMS, which require that each self-regulatory organization, absent reasonable justification or excuse, enforce compliance with any national market system plan by its members and persons associated with its members.[49]

2. Exceptions to Trade-Throughs

The Options Linkage Plan provides exceptions for certain transactions from the prohibition against Trade-Throughs.[50] The Options Linkage Plan also provides that, if a Participant relies on an exception, it would be required to establish, maintain, and enforce written policies and procedures reasonably designed to assure compliance with the terms of the exception.[51] Except for the proposed exception for stopped orders and price improvement,[52] the exceptions in the Options Linkage Plan correspond to trade-through exceptions found in either the Current Plan or in Regulation NMS.[53] The Options Linkage Plan includes the following exceptions from the prohibition against Trade-Throughs: system issues; [54] trading rotations; [55] crossed markets; [56] intermarket sweep orders; [57] quote flickering; [58] non-firm quotes; [59] complex trades; [60] customer stopped orders; [61] stopped orders and price

Commission and declared effective as of January 22, 1976, as from time to time amended. *See* Section 2(14) of the Options Linkage Plan. For the definitions of ''Trade-Through,'' ''Best Bid'' or ''Best Offer,'' ''Locked Market,'' and ''Crossed Market,'' *see infra* notes 42, 44, and 119 and accompanying texts.

[41] Section 5(a)(i) of the Options Linkage Plan.

[42] Section 2(21) of the Options Linkage Plan.

[43] Section 2(17) of the Options Linkage Plan. Protected Bid and Protected Offer, together are referred to herein as ''Protected Quotation.'' *See* Section 2(18) of the Options Linkage Plan.

[44] Sections 2(1) and 2(2) of the Options Linkage Plan.

[45] Section 5(a)(ii) of the Options Linkage Plan.

[46] *See* Rule 611(a) of Regulation NMS (17 CFR 242.611(a)).

[47] 15 U.S.C. 78k–1(a)(1)(C).

[48] *See* NMS Release at 37535, *supra* note 29.

[49] 17 CFR 242.608(c).

[50] *See* Proposed Plan Notice at 15012, *supra* note 8, for a more detailed description of the proposed Trade-Through exceptions.

[51] Section 5(a)(i) of the Options Linkage Plan.

[52] Section 5(b)(x) of the Options Linkage Plan.

[53] Rule 611 of Regulation NMS, known also as the Order Protection Rule, governs trade-through liability for NMS Stocks. *See* 17 CFR 242.611.

[54] Section 5(b)(i) of the Options Linkage Plan.

[55] Section 5(b)(ii) of the Options Linkage Plan.

[56] Section 5(b)(iii) of the Options Linkage Plan. For the definition of a ''Crossed Market,'' *see infra* note 119 and accompanying text.

[57] Section 5(b)(iv)–(v) of the Options Linkage Plan.

[58] Section 5(b)(vi) of the Options Linkage Plan.

[59] Section 5(b)(vii) of the Options Linkage Plan.

[60] Section 5(b)(viii) of the Options Linkage Plan.

[61] Section 5(b)(ix) of the Options Linkage Plan.

improvement;[62] and benchmark trades.[63]

The Commission believes these exceptions will permit a workable intermarket price protection structure for the options market, and are consistent with the principle of price protection. As discussed below, the Commission finds that each of these exceptions is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[64] and believes each assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[65]

System Issues:[66] This exception, similar to an exception in the Current Plan, permits a Participant to trade through a Protected Quotation if the Eligible Exchange displaying the Protected Quotation that was traded through was experiencing a failure, material delay, or malfunction of its systems or equipment when the Trade-Through occurred. This exception gives Participants a ''self-help'' remedy if another Eligible Exchange repeatedly fails to provide an immediate response to incoming orders attempting to access its quotes. As the Commission stated in approving a parallel exception for stocks under Regulation NMS, the Eligible Exchange receiving an order can only be held responsible for its own turnaround time (*i.e.,* from the time it first received an order to the time it transmits a response to the order). Accordingly, the routing exchange will be required to develop policies and procedures that allow for any potential delays in transmission not attributable to the receiving exchange. This exception also covers any failure or malfunction of an Eligible Exchange's systems or equipment, as well as any material delay.[67]

Participants will need to establish specific objective parameters governing their use of this ''self-help'' exemption as part of their reasonable policies and procedures. The Commission believes, for example, a single failure to respond within one second generally will not justify future bypassing of another Eligible Exchange's quotations. Many failures to respond within one second in a short time period, in contrast, clearly will warrant use of the exception. The Commission believes that a Participant making use of this exception must notify the non-responding Eligible Exchange immediately after (or at the same time as) electing this exception pursuant to reasonable and objective standards contained in its policies and procedures in order to alert the non-responding Eligible Exchange that the Participant intends to make use of this exception with respect to the non-responding Eligible Exchange's quotes.[68]

The Commission believes that a Participant should be entitled to bypass an away market's quotations if that market fails to respond to incoming orders attempting to access a displayed quote. The Commission believes that this exception will provide Participants with the necessary flexibility for dealing with problems that occur on an away market during the trading day. Further, the Commission finds that this exception is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[69] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[70]

Trading Rotations:[71] This exception, which is carried over from the Current Plan[72] and similar to an exception available for NMS stocks under Regulation NMS,[73] permits a Participant to trade through a Protected Quotation disseminated by an Eligible Exchange during a trading rotation. Options exchanges use a trading rotation to open an option for trading or reopen an option after a trading halt.

As noted by the Participants, the trading rotation is effectively a single price auction to price the option,[74] and there are no practical means to include prices on other exchanges in that auction.[75] As such, the Commission emphasizes that the exception will not permit a Participant to declare a trading halt merely to be able to circumvent the operation of the Options Linkage Plan's Trade-Through provisions upon reopening; instead, the Commission believes a Participant must conduct, pursuant to its rules, a formalized and transparent process for executing orders during reopening after a trading halt that involves the queuing and ultimate execution of multiple orders at a single equilibrium price. In addition, a Participant must have formally declared a trading halt pursuant to its rules. Therefore, the Commission finds that it is reasonable to include this as an exception to the general prohibition on Trade-Throughs as it is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[76] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[77]

Crossed Markets:[78] This exception permits a Participant to trade through a Protected Quotation when the market is crossed, and corresponds to an exception for NMS stocks under Regulation NMS.[79] A Crossed Market occurs when a Protected Bid is higher than a Protected Offer in a given options class. The Commission believes that it is appropriate to permit executions without regard to Trade-Throughs in a Crossed Market because allowing such transactions should permit the market to quickly resolve any unintentional crosses. For the foregoing reasons, the Commission finds that this exception is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[80] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[81]

Intermarket Sweep Orders:[82] The Options Linkage Plan includes two exceptions from the prohibition against Trade-Throughs for certain transactions involving ISOs. These two exceptions correspond to the exceptions relating to ISOs for NMS stocks under Regulation NMS.[83] First, the Options Linkage Plan permits a Participant to execute orders marked as ISOs even when the Participant is not at the national best bid or offer (''NBBO''). Second, a Participant is permitted to execute a transaction when such transaction is not at the NBBO, provided it simultaneously ''sweeps'' all better priced Protected Quotations by routing an ISO to execute against the full displayed size of any Protected Quotation that was traded through.

[62] Section 5(b)(x) of the Options Linkage Plan.

[63] Section 5(b)(xi) of the Options Linkage Plan.

[64] 17 CFR 242.608(b)(2).

[65] 15 U.S.C. 78k–1(a)(1)(C).

[66] Section 5(b)(i) of the Options Linkage Plan.

[67] *See* NMS Release at 37535, *supra* note 29.

[68] *Id.*

[69] 17 CFR 242.608(b)(2).

[70] 15 U.S.C. 78k–1(a)(1)(C).

[71] Section 5(b)(ii) of the Options Linkage Plan.

[72] *See* Section 8(c)(iii)(E) of the Current Plan.

[73] *See* Rule 611(b)(3) of Regulation NMS under the Act (17 CFR 242.611(b)(3)).

[74] *See* ISE Letter 2 and NYSE Arca Letter 2, *supra* note 5; *see also* Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, *supra* note 7.

[75] *See* ISE Letter 2 and NYSE Arca Letter 2, *supra* note 5; *see also* Amex Letter 2, BSE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, *supra* note 7.

[76] 17 CFR 242.608(b)(2).

[77] 15 U.S.C. 78k–1(a)(1)(C).

[78] Section 5(b)(iii) of the Options Linkage Plan.

[79] *See* Rule 611(b)(4) of Regulation NMS (17 CFR 242.611(b)(4)).

[80] 17 CFR 242.608(b)(2).

[81] 15 U.S.C. 78k–1(a)(1)(C).

[82] Section 5(b)(iv) and (v) of the Options Linkage Plan.

[83] *See* Rule 611(b)(5) and (6) of Regulation NMS (17 CFR 242.611(b)(5) and (6)).

An ISO is defined as a limit order for an options series that, when routed to an Eligible Exchange, is identified as an Intermarket Sweep Order and, simultaneously with the routing of the order, one or more additional orders, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the order.[84] Any such additional orders would also be marked as ISOs.

The availability of ISOs will allow the Participants to access multiple price levels simultaneously displayed on the same or multiple markets, without violating the prohibition against Trade-Throughs. As the Commission stated with respect to ISOs for stocks under Regulation NMS, the Commission believes that allowing a Participant to immediately execute an order identified as an ISO when that exchange is not at the NBBO is fully consistent with the principle of protecting the best displayed prices because the exception is premised on the condition that the market participant sending the ISO has already attempted to access all better-priced Protected Quotations up to their displayed size. Consequently, there is no reason why a Participant that receives an ISO while displaying an inferior-priced quotation should be required to delay an execution of the order.[85] This exception should help to ensure more efficient and faster executions.

The second ISO Trade-Through exception, under subparagraph (b)(v) of Section 5 of the Options Linkage Plan, should benefit market participants in their ability to handle orders efficiently. For example, market participants should be able to use this exception to more efficiently execute block trades one or more minimum price increments away from the NBBO. So long as ISOs are simultaneously routed to execute against better-priced Protected Quotation on other markets, the block order could be executed contemporaneously with the routing of the ISOs.

The Commission notes that Section 5(c) of the Options Linkage Plan requires Participants to take reasonable steps to establish that ISOs are properly routed in an attempt to execute against all applicable Protected Quotations.

For the reasons stated above, the Commission finds that the exception from Trade-Through liability when an exchange or market participants sends an ISO is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[86] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[87]

Quote Flickering:[88] Subparagraph (b)(vi) of Section 5 of the Options Linkage Plan sets forth an exception for flickering quotations, and corresponds to an exception for NMS stocks under Regulation NMS.[89] It excepts a transaction if the Eligible Exchange displaying the Protected Quotation that was traded through had displayed, within one second prior to execution of the Trade-Through, a Best Bid or Best Offer, as applicable, for the options series with a price that was equal or inferior to the price of the Trade-Through transaction.

As the Commission stated with respect to the similar exception for stocks under Regulation NMS,[90] this exception thereby provides a ''window'' to address false indications of Trade-Throughs that in actuality are attributable to rapidly moving quotations. It should also reduce the number of instances in which a Participant must alter its normal trading procedures and route orders to other trading centers to comply with the Options Linkage Plan. The exception is thereby intended to promote more workable intermarket price protection. The Commission finds it is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[91] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[92]

Non-Firm Quotes:[93] This exception, which is carried over from the Current Plan,[94] permits a Participant to trade through a Protected Quotation that was ''Non-Firm.''[95] ''Non-Firm'' is defined to mean, with respect to Quotations in an Eligible Options Class, that members of a Participant are relieved of their obligations under that Participant's firm quote rule in that Eligible Options Class.[96]

The Commission believes that Participants should not be required to protect the price of an away market when that market identifies its quotes as ''Non-Firm.'' The Commission finds that this exception is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[97] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C).[98]

Complex Trades:[99] This exception carries forward the complex trade exception in Section 8(c)(iii)(G) of the Current Plan[100] and permits a Participant to trade through a Protected Quotation if the transaction was part of a ''complex trade.'' The definition of ''complex trade'' would be implemented through rules adopted by the Participants, which would be subject to notice, comment, and Commission review pursuant to the Section 19(b) rule filing process.

Complex trades, such as those submitted by market participants under the Proposing Exchanges complex order mechanisms,[101] are composed of multiple transactions effected at a net price. As the Proposing Exchanges state,[102] it is not always practical to require each leg to be transacted at a price that does not constitute a Trade-Through, and the Commission believes that permitting an exception for transactions effected as a portion of a complex trade is appropriate. By narrowly crafting the definition of complex trades in each Participants' rules,[103] the Commission believes that this exception will not undercut the general Trade-Through protections of the Options Linkage Plan, and finds it is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[104] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C).[105]

[84] Section 2(9) of the Options Linkage Plan.

[85] *See* NMS Release at 37523, *supra* note 29.

[86] 17 CFR 242.608(b)(2).

[87] 15 U.S.C. 78k–1(a)(1)(C).

[88] Section 5(b)(vi) of the Options Linkage Plan.

[89] *See* Rule 611(b)(8) of Regulation NMS (17 CFR 242.611(b)(8)).

[90] *See* NMS Release at 37536, *supra* note 29.

[91] 17 CFR 242.608(b)(2).

[92] 15 U.S.C. 78k–1(a)(1)(C).

[93] Section 5(b)(vii) of the Options Linkage Plan.

[94] *See* Section 8(c)(iii)(C) of the Current Plan.

[95] *See* Section 2(11) of the Options Linkage Plan.

[96] The Commission notes that, when quotations in an Eligible Options Class are Non-Firm, exchange rules require the exchange to provide notice that its quotations are Non-Firm by appending an indicator to its quotations. *See, e.g.*, CBOE Rule 43.14(b) and NYSE Arca Rule 6.86(d)(1)(C).

[97] 17 CFR 242.608(b)(2).

[98] 15 U.S.C. 78k–1(a)(1)(C).

[99] Section 5(b)(viii) of the Options Linkage Plan.

[100] Section 8(c)(iii)(G) of the Current Plan.

[101] *See, e.g.*, ISE Rule 722.

[102] *See* ISE Letter 2 and NYSE Arca Letter 2, *supra* note 5; *see also* Amex Letter 2, BSE Letter 2, CBOE Letter 2, Nasdaq Letter 2, and Phlx Letter 2, *supra* note 7.

[103] All changes to rules of national securities exchanges are subject to notice, comment and Commission review pursuant to Section 19(b) of the Act. 15 U.S.C. 78s(b).

[104] 17 CFR 242.608(b)(2).

[105] 15 U.S.C. 78k–1(a)(1)(C).

Customer Stopped Orders:[106] This exception permits a Participant to trade through a Protected Quotation if the trade executed a ''stopped order.'' The exception requires that the ''stopped order'' be for the account of a Customer;[107] that the Customer agreed to the specified price on an order-by-order basis; and that the price of the Trade-Through was, for a stopped buy order, lower than the national Best Bid in the options series at the time of execution, or, for a stopped sell order, higher than the national Best Offer in the options series at the time of execution. This exception corresponds to the customer stopped order exception under Regulation NMS.[108]

The Commission recognizes that the use of stopped orders is a valuable tool, particularly for the execution of large orders.[109] The Commission believes that this narrowly-drawn exception would give market participants the ability to execute large Customer 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, without undermining the general principles of price protection under the Options Linkage Plan. For these reasons, the Commission finds that this exception is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[110] and assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[111]

Stopped Orders and Price Improvement:[112] This exception permits a Participant to trade through a Protected Quotation if the transaction that constituted the Trade-Through was the execution by a Participant of an order that is stopped at a price that did not constitute a Trade-Through at the time of the stop. This exception allows a Participant to seek price improvement for an 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. The rules of several of the Proposing Exchanges currently contain provisions relating to price improvement mechanisms.[113]

These price improvement mechanisms offer price improvement to orders received by the exchange during a specified period of time (''auction''). During this auction period, the NBBO could move from where it was when the order was received. However, the exchange is only required to guarantee a price no worse than the NBBO at the time the order was received. Thus, following the auction, an execution could result in a Trade-Through if the NBBO improves from the time the order was received although, had the order been executed at the time of receipt, the execution would not have resulted in a Trade-Through.

This exception would allow a Participant to seek price improvement for an 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. By allowing this exception, the Commission expects that Participants would be able to continue to use price improvement mechanisms, thereby offering market participants potentially better-priced executions. The Commission finds that this exception is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[114] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[115]

Benchmark Trades:[116] This exception permits a Participant to trade through a Protected Quotation if the trade was executed at a price not based directly or indirectly on the quoted price of an options series 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 exception allows a ''benchmark order'' and corresponds to an exception for NMS stocks under Rule 611 of Regulation NMS.[117] A common example of a benchmark order for NMS stocks is a volume-weighted average price, or ''VWAP,'' order. The Commission notes that none of the Proposing Exchanges currently permit these types of options trades, and any Participant seeking to make use of this exception would be required to submit a proposed rule change which would be subject to notice, comment and Commission review under Section 19(b) of the Act. The Commission finds that this exception is in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets, and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C) of the Act.[118]

B. Locked and Crossed Markets

The Options Linkage Plan also addresses Locked and Crossed Markets.[119] The requirements in the Options Linkage Plan relating to Locked and Crossed Markets are virtually identical to those applicable to market centers for NMS stock under Regulation NMS.[120]

Specifically, the Options Linkage Plan requires each Participant to establish, maintain, and enforce written rules that require their members reasonably to avoid displaying Locked and Crossed Markets.[121] Participants would also be required to establish, maintain, and enforce written rules reasonably designed to assure the reconciliation of Locked and Crossed Markets.[122] Finally, the Options Linkage Plan would provide that Participants must establish, maintain, and enforce written rules that prohibit their members from engaging in a pattern or practice of displaying Locked and Crossed Markets, subject to exceptions as may be contained in the Participants' rules, as approved by the Commission.[123]

The Commission recognizes that Section 6 of the Options Linkage Plan, by restricting Locked Markets, can prohibit the display of an order that would otherwise have been displayed and reduced the quoted spread to zero. However, as the Commission stated with respect to locked markets for stocks under Regulation NMS, the

[106] Section 5(b)(ix) of the Options Linkage Plan.

[107] ''Customer'' would be defined to mean an individual or organization that is not a ''Broker/Dealer.'' *See* Section 2(5) of the Options Linkage Plan.

[108] *See* Rule 611(b)(9) of Regulation NMS (17 CFR 242.611(b)(9)).

[109] *See* NMS Release at 37527, *supra* note 29.

[110] 17 CFR 242.608(b)(2).

[111] 15 U.S.C. 78k–1(a)(1)(C).

[112] Section 5(b)(x) of the Options Linkage Plan.

[113] *See*, *e.g.*, Securities Exchange Act Release No. 50819 (December 8, 2004), 69 FR 75093 (December 15, 2004) (SR–ISE–2003–06) (approving rules implementing ISE's Price Improvement Mechanism under ISE Rule 723).

[114] 17 CFR 242.608(b)(2).

[115] 15 U.S.C. 78k–1(a)(1)(C).

[116] Section 5(b)(xi) of the Options Linkage Plan.

[117] *See* Rule 611(b)(7) of Regulation NMS (17 CFR 242.611(b)(7)).

[118] 15 U.S.C. 78k–1(a)(1)(C).

[119] Section 6 of the Options Linkage Plan. A ''Locked Market'' is defined as a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an Eligible Options Class. *See* Section 2(10) of the Options Linkage Plan. A ''Crossed Market'' is defined as a quoted market in which a Protected Bid is higher than a Protected Offer in a series of an Eligible Options Class. *See* Section 2(4) of the Options Linkage Plan.

[120] *See* Rule 610(d) of Regulation NMS (17 CFR 242.610(d)).

[121] Section 6(a) of the Options Linkage Plan.

[122] Section 6(b) of the Options Linkage Plan.

[123] Section 6(c) of the Options Linkage Plan. The Commission notes that the proposed rule changes relating to all necessary implementing rules of the Participants, including those required by Section 6 of the Options Linkage Plan, would be subject to notice, comment, and Commission review pursuant to Section 19(b) of the Act.

Commission believes that Locked Markets may not actually represent two market participants willing to buy and sell at the same price. Instead, a locking market participant may not truly be willing to trade at the displayed locking price, but chooses to lock rather than execute against the already-displayed quotation to receive a liquidity rebate. The Commission believes that giving priority to the first-displayed Protected Bid or Protected Offer, particularly when it includes a public customer's order, will encourage price discovery and contribute to fair and orderly markets.[124]

The Options Linkage Plan is designed to ensure that the display of locked and crossed markets would be restricted, while also recognizing that locked and crossed markets do occur accidentally and cannot always be avoided. Thus, the Options Linkage Plan requires that the Participants have written rules that are reasonably designed to assure the reconciliation of any lock or cross. Further, the Options Linkage Plan expressly prohibits a pattern or practice of locking or crossing away markets.

In addition, the Options Linkage Plan would allow exceptions to its general Locked and Crossed Markets provision as might be contained in a given Participant's rules. As with all proposed rule changes of national securities exchanges, such rule changes would be subject to notice, comment and Commission review under Section 19(b)(1) of the Act.[125] The Commission believes that these provisions are designed to ensure that the display of Locked and Crossed Markets will be limited and that any such display will be promptly reconciled.

For the reasons stated above, the Commission finds that the Options Linkage Plan's provisions relating to Locked and Crossed Markets are in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[126] and believes they assure fair competition among exchange markets, consistent with Section 11A(a)(1)(C).[127]

C. Joining the Proposed Plan

Any national securities exchange would be eligible to become a Participant by executing a copy of the Options Linkage Plan and providing each Participant with a copy of such executed Options Linkage Plan [128] if it is: (1) Registered with the Commission in accordance with Section 6(a) of the Act; (2) a Participant Exchange in OCC; [129] and (3) a party to the OPRA Plan.[130] Further, any such national securities exchange wishing to become a Participant would be required to file an amendment to the Options Linkage Plan by executing a copy of the Options Linkage Plan and filing such executed Options Linkage Plan to the Commission.[131] Such amendment would be effective when the amendment is approved by the Commission or otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 thereunder.[132] The Commission finds that this process for joining the Options Linkage Plan is in the public interest,[133] and believes it is consistent with Section 11A(a)(1)(C) because it is designed to ensure that reasonable procedures are in place to permit additional exchanges to also participate in the Options Linkage Plan.[134]

D. Withdrawal From the Proposed Plan

Any Participant would be able to withdraw from the Options Linkage Plan at any time by providing not less than 30 days' prior written notice to each of the other Participants of such intent to withdraw.[135] To withdraw, such Participant also would be required to effect an amendment to the Options Linkage Plan by submitting such amended Options Linkage Plan to the Commission for approval.[136] In submitting the amended Options Linkage Plan to the Commission, the Participant proposing to withdraw from the Options Linkage Plan would be required to state how the Participant plans to accomplish, by alternate means, the goal of the Options Linkage Plan regarding limiting Trade-Throughs of prices on other exchanges trading the same options classes.[137] Such withdrawal from the Options Linkage Plan would be effective when the amendment is approved by the Commission or otherwise becomes effective pursuant to Section 11A of the Act and Rule 608 thereunder. Upon the effectiveness of such withdrawal, the withdrawing Participant would have no further rights or obligations under the Options Linkage Plan.

The Commission finds that these requirements for withdrawal from the Options Linkage Plan are in the public interest, appropriate for the protection of investors and the maintenance of fair and orderly markets,[138] and believes it assures fair competition among exchange markets, consistent with Section 11A(a)(1)(C).[139]

E. Implementation

The Proposed Plan states that the ''[Participants] shall implement [the plan] * * * no later than February 27, 2009; provided that, unless the [Commission] otherwise authorizes, the [Participants] shall not implement [the plan] until all Eligible Exchanges either (1) have become parties to [the plan] and the [Commission] has approved all necessary implementing rules or (2) have developed the ability to accept and execute incoming Intermarket Sweep Orders.'' [140]

To provide clarity to market participants regarding the implementation date of the plan, the Commission, after consultation with the Proposing Exchanges, has modified the Proposed Plan to change the implementation date in Section 7 from February 27, 2009 to August 31, 2009. In addition, the Commission notes that all seven options exchanges [141] have joined in filing the Proposed Plan with the Commission, and each has submitted proposed rule changes pursuant to Section 19(b) of the Act to modify its rules to comply with the Options Linkage Plan.[142] The Commission believes that the provision that would permit the plan to be implemented if an Eligible Exchange ''developed the ability to accept and execute incoming Intermarket Sweep Orders,'' even if such exchange had not become a party to the plan is no longer necessary because all seven options exchanges have joined the Options

[124] *See* NMS Release at 37547, *supra* note 29.

[125] 15 U.S.C. 78s(b)(1).

[126] 17 CFR 242.608(b)(2).

[127] 15 U.S.C. 78k–1(a)(1)(C).

[128] Section 3(c) of the Options Linkage Plan.

[129] For a definition of a ''Participant Exchange,'' *see* Section VII of the OCC by-laws.

[130] For more information on who is a party to the OPRA Plan, *see* Section I of the OPRA Plan.

[131] Section 4(b) of the Options Linkage Plan.

[132] *Id.* These requirements are identical to those contained in the Current Plan. *See* Sections 4(c)(i) and 5(c) of the Current Plan. The Current Plan also requires that an eligible exchange pay a fee to join the Current Plan. *See* Section 4(c)(i)(iv) of the Current Plan. The Options Linkage Plan does not require an Eligible Exchange to pay a fee to join the Options Linkage Plan.

[133] 17 CFR 242.608(b)(2).

[134] 15 U.S.C. 78k–1(a)(1)(C).

[135] Section 3(d) of the Options Linkage Plan.

[136] Section 4(c) of the Options Linkage Plan.

[137] *Id.* These requirements are identical to those contained in the Current Plan. *See* Sections 4(d) and 5(c)(iii) of the Current Plan.

[138] 17 CFR 242.608(b)(2).

[139] 15 U.S.C. 78k–1(a)(1)(C).

[140] *See* Section 7 of the Proposed Plan.

[141] That is, CBOE, ISE, Nasdaq, BX, Phlx, Amex and NYSE Arca.

[142] *See, e.g.,* Securities Exchange Act Release Nos. 60014 (June 1, 2009); and 74 FR 27224 (June 8, 2009) (SR–ISE–2009–27) and 60015 (June 1, 2009); 74 FR 27375 (June 9, 2009) (SR–NYSEAmex–2009–19) which propose rules such as provisions that contain relevant definitions, an order protection rule, and a locked and crossed market rule, which correspond to the provisions in the Options Linkage Plan.

Linkage Plan and therefore will, upon implementation of the Options Linkage Plan, accept and execute ISOs.

The Commission finds that these modifications to Section 7 of the Proposed Plan are necessary and appropriate and will further the purposes of the Act by providing clarity to market participants regarding the implementation of the plan while providing appropriate time to self-regulatory organizations to prepare for implementation.

With these modifications, unless the Commission otherwise authorizes, the plan may only be implemented by the Proposing Exchanges when all Proposing Exchanges' proposed rule changes containing the necessary implementing rules [143] have been approved by the Commission.

IV. Conclusion

It is hereby ordered, that pursuant to Section 11A(a)(3)(B) of the Act [144] and Rule 608 thereunder,[145] that the Proposed Plan submitted by CBOE, ISE, Nasdaq, BX, Phlx, Amex, and NYSE Arca, as modified herein, is approved and declared effective,[146] and that CBOE, ISE, Nasdaq, BX, Phlx, Amex, and NYSE Arca are authorized to act jointly to implement the Options Order Protection and Locked/Crossed Market Plan as a means of facilitating a national market system.

By the Commission.

Florence E. Harmon,

Deputy Secretary.

Appendix A

Options Order Protection and Locked/Crossed Market Plan

Section 1—Preamble

The Participants submit to the SEC this Plan providing a framework for order protection and addressing Locked and Crossed Markets in Eligible Options Classes. The purpose of the Plan is to enable the Participants to act jointly in establishing a framework for providing order protection and addressing Locked and Crossed Markets in Eligible Options Classes. In addition, the Plan provides for a non-exclusive method for achieving order protection and addressing Locked and Crossed Markets. The Participants will submit to the SEC for approval their respective rules that will implement the framework of the Plan. The Participants request that the SEC issue an order pursuant to Section 11A(a)(3)(B) of the Exchange Act and Rule 608 thereunder evidencing its approval of the Plan.

Section 2—Definitions

(1) ''Best Bid'' and ''Best Offer'' mean the highest priced Bid and the lowest priced Offer.

(2) ''Bid'' or ''Offer'' means the bid price or the offer price communicated by a member of a*n* Eligible Exchange to any Broker/Dealer, or to any customer, at which it is willing to buy or sell, as either principal or agent, but shall not include indications of interest.

(3) ''Broker/Dealer'' means an individual or organization registered with the SEC in accordance with Section 15(b)(1) of the Exchange Act or a foreign broker or dealer exempt from such registration pursuant to Rule 15a–6 under the Exchange Act.

(4) ''Crossed Market'' means a quoted market in which a Protected Bid is higher than a Protected Offer in a series of an Eligible Class.

(5) ''Customer'' means an individual or organization that is not a Broker/Dealer.

(6) ''Eligible Exchange'' means a national securities exchange registered with the SEC in accordance with Section 6(a) of the Exchange Act that: (a) As a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection.

(7) ''Eligible Options Class'' means all option series overlying a security (as that term is defined in Section 3(a)(10) of the Exchange Act) or group of securities, including both put options and call options, which class is available for trading on two or more Eligible Exchanges.

(8) ''Exchange Act'' means the Securities Exchange Act of 1934, as amended.

(9) ''Intermarket Sweep Order (ISO)'' means a limit order for an options series that meets the following requirements:

(a) When routed to an Eligible Exchange, the order is identified as an ISO;

(b) Simultaneously with the routing of the order, one or more additional ISOs, as necessary, are routed to execute against the full displayed size of any Protected Bid, in the case of a limit order to sell, or any Protected Offer, in the case of a limit order to buy, for the options series with a price that is superior to the limit price of the ISO, with such additional orders also marked as ISOs.

(10) ''Locked Market'' means a quoted market in which a Protected Bid is equal to a Protected Offer in a series of an Eligible Options Class.

(11) ''Non-Firm'' means, with respect to Quotations in an Eligible Options Class, that members of a Participant are relieved of their obligations under that Participant's firm quote rule in that Eligible Options Class.

(12) ''OCC'' means The Options Clearing Corporation.

(13) ''OPRA'' means the Options Price Reporting Authority.

(14)''OPRA Plan'' means the plan filed with the SEC pursuant to Section 11Aa(1)(C)(iii) of the Exchange Act, approved by the SEC and declared effective as of January 22, 1976, as from time to time amended.

(15) ''Participant'' means an Eligible Exchange whose participation in the Plan has become effective pursuant to Section 3(c) of the Plan.

(16) ''Plan'' means the plan amended and restated in this instrument as from time to time amended in accordance with its provisions.

(17) ''Protected Bid'' or ''Protected Offer'' means a Bid or Offer in an options series, respectively, that:

a. Is displayed by an Eligible Exchange;

b. Is disseminated pursuant to the OPRA Plan; and

c. Is the Best Bid or Best Offer, respectively, of an Eligible Exchange.

(18) ''Protected Quotation'' means a Protected Bid or Protected Offer.

(19) ''Quotation'' means a Bid or Offer.

(20) ''SEC'' means the United States Securities and Exchange Commission.

(21) ''Trade-Through'' means a transaction in an options series, either as principal or agent, at a price that is lower than a Protected Bid or higher than a Protected Offer.

Section 3—Parties to the Plan

(a) *List of Parties*

The parties to the Plan are as follows:

Boston Stock Exchange, Inc., registered as a national securities exchange under the Exchange Act and having its principal place of business at 100 Franklin Street, Boston, Massachusetts 02110.

Chicago Board Options Exchange, Incorporated, registered as a national securities exchange under the Exchange Act and having its principal place of business at 400 South LaSalle Street, Chicago, Illinois 60605.

International Securities Exchange, LLC, registered as a national securities exchange under the Exchange Act and having its principal place of business at 60 Broad Street, New York, New York 10004.

The NASDAQ Stock Market LLC, registered as a national securities exchange under the Exchange Act and having its principal place of business at One Liberty Plaza, 50th Floor, New York, New York 10006.

NASDAQ OMX PHLX, Inc., registered as a national securities exchange under the Exchange Act and having its principal place of business at 1900 Market Street, Philadelphia, Pennsylvania 19103.

NYSE Alternext US LLC, registered as a national securities exchange under the Exchange Act and having its principal place of business at 11 Wall Street, New York, NY 10005.

NYSE Arca, Inc., registered as a national securities exchange under the Exchange Act and having its principal place of business at 100 South Wacker Drive, Suite 1800, Chicago, IL 60606.

(b) *Compliance Undertaking*

By subscribing to and submitting the Plan for filing with the SEC, each Participant agrees to enforce compliance by its members with the provisions of the Plan.

(c) *Entry of New Participants*

The Participants agree that any other Eligible Exchange may become a Participant by: (i) Executing a copy of the Plan, as then in effect; (ii) providing each then-current

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[143] *See id.*

[144] 15 U.S.C. 78k–1(a)(3)(B).

[145] 17 CFR 242.608.

[146] The approved Plan is attached here as *Appendix A.*

Participant with a copy of such executed Plan; and (iii) effecting an amendment to the Plan as specified in Section 4(b) of the Plan.

(d) *Withdrawal from the Plan*

Any Participant may withdraw from the Plan at any time by: (i) Providing not less than 30 days' prior written notice to each of the other Participants of such intent to withdraw; and (ii) effecting an amendment to the Plan as specified in Section 4(c) of the Plan. Upon the effectiveness of such withdrawal the withdrawing Participant shall have no further rights or obligations whatsoever under the Plan.

Section 4—Amendments to the Plan

(a) General Amendment Authority

Except with respect to:

(i) the addition of new Participants to the Plan; and

(ii) the withdrawal of a Plan Participant,

any proposed change in, addition to, or deletion from the Plan may be effected only by means of a written amendment to the Plan that is unanimously approved by the Participants and that: (A) sets forth the change, addition or deletion; (B) is executed on behalf of each Participant; and (C) is approved by the SEC or otherwise becomes effective pursuant to Section 11A of the Exchange Act and Rule 608 thereunder.

(b) *New Participants*

With respect to new Participants, an amendment to the Plan may be effected by a new Eligible Exchange executing a copy of the Plan, as then in effect (with the only change being the addition of the new Participant's name in Section 3(a) of the Plan), and submitting such executed Plan to the SEC. Such amendment will be effective when the amendment is approved by the SEC or otherwise becomes effective pursuant to Section 11A of the Exchange Act and Rule 608 thereunder.

(c) *Withdrawal from the Plan*

A Participant seeking to withdraw from the Plan shall effect an amendment to the Plan as then in effect (with the only change being the deletion of the Participant's name in Section 3(a) of the Plan) by submitting such amended Plan to the SEC for approval. In submitting the amended Plan to the SEC, the Participant proposing to withdraw from the Plan shall state how the Participant plans to accomplish, by alternate means, the goal of the Plan regarding limiting Trade-Throughs of prices on other exchanges trading the same options classes. Such withdrawal from the Plan shall be effective when the amendment is approved by the SEC or otherwise becomes effective pursuant to Section 11A of the Exchange Act and Rule 608 thereunder.

Section 5—Order Protection

(a) *Order Protection*

(i) *Prevention of Trade-Throughs.* Each Participant agrees that it shall establish, maintain and enforce written policies and procedures as approved by the SEC that are reasonably designed to prevent Trade-Throughs in that Participant's market in Eligible Options Classes that do not fall within an exception set forth in paragraph (b) below, and, if relying on such exception, that are reasonably designed to assure compliance with the terms of the exception.

(ii) *Surveillance.* Each Participant agrees to conduct surveillance of its market on a regular basis to ascertain the effectiveness of the policies and procedures required by paragraph (a)(1) of this section, and to take prompt action to remedy deficiencies in such policies and procedures.

(b) *Exceptions.*

(i) The transaction that constituted the Trade-Through was effected when the Eligible Exchange displaying the Protected Quotation that was traded through was experiencing a failure, material delay, or malfunction it its systems or equipment;

(ii) The transaction traded through a Protected Quotation being disseminated by an Eligible Exchange during a trading rotation;

(iii) The transaction that constituted the Trade-Through occurred when there was a Crossed Market;

(iv) The transaction that constituted the Trade-Through was the execution of an order identified as an Intermarket Sweep Order;

(v) The transaction that constituted the Trade-Through was effected by a Participant that simultaneously routed an Intermarket Sweep Order to execute against the full displayed size of any Protected Quotation that was traded through;

(vi) The Eligible Exchange displaying the Protected Quotation that was traded through had displayed, within one second prior to execution of the Trade-Through, a Best bid or Best offer, as applicable, for the options series with a price that was equal or inferior to the price of the Trade-Through transaction;

(vii) The Protected Quotation traded through was being disseminated from an Eligible Exchange whose Quotations were Non-Firm with respect to such options series;

(viii) The transaction that constituted the Trade-Through was effected as a portion of a ''complex trade,'' as defined in the rules of a Participant;

(ix) The transaction that constituted the Trade-Through was the execution by a Participant of an order for which, at the time of receipt of the order, a member of the Participant had guaranteed an execution at no worse than a specified price (a ''stopped order''), where:

(A) The stopped order was for the account of a Customer;

(B) the Customer agreed to the specified price on an order-by-order basis; and

(C) the price of the Trade-Through was, for a stopped buy order, lower than the national Best Bid in the options series at the time of execution, or, for a stopped sell order, higher than the national Best Offer in the options series at the time of execution;

(x) The transaction that constituted the Trade-Through was the execution by a Participant of an order which was stopped at a price that did not Trade-Through another Eligible Exchange at the time of the stop; or

(xi) The transaction that constituted the Trade-Through was the execution of an order at a price that was not based, directly or indirectly, on the quoted price of the options series at the time of execution and for which the material terms were not reasonably determinable at the time the commitment to execute the order was made.

(c) *Intermarket Sweep Orders.* Participants shall take reasonable steps to establish that Intermarket Sweep Orders meet the requirements of Section 2(9) of the Plan.

Section 6—Locked and Crossed Markets

The Participants agree that they shall establish, maintain and enforce written rules that:

(a) Require their members reasonably to avoid displaying Locked and Crossed Markets;

(b) Are reasonably designed to assure the reconciliation of Locked and Crossed Markets; and

(c) Prohibit its members from engaging in a pattern or practice of displaying Locked and Crossed Markets;

in all cases subject to such exceptions as may be contained in the rules of a Participant approved by the Commission.

Section 7—Implementation

The Parties shall implement this Plan on a date upon which all Parties agree, but no later than August 31, 2009; provided that, unless the SEC otherwise authorizes, the Parties shall not implement this Plan unless all Eligible Exchanges have become parties to this Plan and the SEC has approved all necessary implementing rules.

Section 8—Counterparts and Signatures

The Plan may be executed in any number of counterparts, no one of which need contain all signatures of all Participants, and as many of such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

In Witness Whereof, this Plan has been executed as of the _____ 2009 by each of the parties hereto.

CHICAGO BOARD OPTIONS EXCHANGE, INCORPORATED

By: _____

Date: _____

INTERNATIONAL SECURITIES EXCHANGE, LLC

By: _____

Date: _____

The NASDAQ STOCK MARKET LLC

By: _____

Date: _____

NASDAQ OMX BX, INC.

By: _____

Date: _____

NASDAQ OMX PHLX, Inc.

By: _____

Date: _____

NYSE AMEX LLC

By: _____

Date: _____

NYSE ARCA, INC.

By: _____

Date: _____

[FR Doc. E9–18763 Filed 8–5–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60408; File No. SR–MSRB–2009–11]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of Amendments to Rule A–3, on Membership on the Board, Rule A–4, on Meetings of the Board, Rule A–5, on Officers and Employees of the Board, and Rule A–6, on Committees of the Board

July 30, 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 29, 2009, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board''), 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 substantially prepared by the MSRB. The MSRB has filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Board has been reviewing its Administrative Rules and by-laws to ensure that they are consistent with current good corporate governance practices. Pursuant to this review, the MSRB is filing amendments to Rule A–3, on membership on the Board, Rule A–4, on meetings of the Board, Rule A–5, on officers and employees of the Board, and Rule A–6, on committees of the Board. The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/msrb1/sec.asp*, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB 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 MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Board has been reviewing its Administrative Rules and by-laws to ensure that they are consistent with current good corporate governance practices. Among other things, Rule A–3, on membership on the Board, states that the Board will be composed of 15 members and it describes the types of groups that will be represented on the Board (*i.e.*, public representatives, broker-dealer representatives and bank representatives). The Board considered the possibility of two persons associated with the same firm being seated on the Board due to a merger, consolidation or similar corporate action of Board members' firms or other change in circumstances. The Board decided to add new section (g) to Rule A–3 to prohibit two persons associated with the same firm from serving as members of the Board at the same time. The proposed rule change also revises the language in Rule A–3(c)(iv) to restore language that was inadvertently deleted from the rule in recent amendments.[5] The revised language now reads as was intended in the previous proposed rule change.

Rule A–5, on officers and employees of the Board, among other things, describes the procedure for the election of officers. Rule A–5(b) notes that vacancies in office shall be filled as soon as practicable by vote of the Board members. The proposed rule change adds language to Rule A–5(b) to provide for an election to fill a vacancy if a Board member elected to a Board office becomes unable to take the position (*e.g.*, by resignation) prior to the commencement of the term.

The proposed rule change also revises the language in Rules A–3, A–4, on meetings of the Board, A–5 and A–6, on committees of the Board, to ensure gender neutrality by replacing the word ''Chairman'' with the word ''Chair.''

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the requirements of Section 15B(b)(2)(I) of the Act,[6] which authorizes the MSRB to adopt rules that provide for the operation and administration of the MSRB. The MSRB believes that the proposed rule change is consistent with this provision because it is concerned solely with the operation and administration of the MSRB.

B. Self-Regulatory Organization's Statement on Burden on Competition

The MSRB does not believe the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it only applies to the operation and administration of the MSRB.

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 on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[7] and Rule 19b–4(f)(3) thereunder[8] because it is concerned solely with the operation and administration of the MSRB. 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.[9]

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

[5] *See* Securities Exchange Act Release No. 57500 (March 14, 2008), 73 FR 15244 (March 21, 2008). *See also* File No. SR–MSRB–2008–02.

[6] 15 U.S.C. 78o–4(b)(2)(I).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(3).

[9] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–MSRB–2009–11 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–MSRB–2009–11. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. 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–MSRB–2009–11 and should be submitted on or before August 27, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–18764 Filed 8–5–09; 8:45 am]

BILLING CODE 8010–01–P

[10] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11833 and # 11834]

Florida Disaster # FL–00046

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Florida dated: 07/31/2009.

Incident: Tornado and Severe Storms.

Incident Period: 07/24/2009.

Effective Date: 07/31/2009.

Physical Loan Application Deadline Date: 09/29/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 05/01/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Volusia.

Contiguous Counties:

Florida: Brevard, Flagler, Lake, Marion, Orange, Putnam, Seminole.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.500.
Homeowners Without Credit Available Elsewhere	2.750.
Businesses With Credit Available Elsewhere	6.000.
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000.
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500.
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000.

The number assigned to this disaster for physical damage is 11833 C and for economic injury is 11834 0.

The State which received an EIDL Declaration # is Florida.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 31, 2009.

Karen G. Mills,

Administrator.

[FR Doc. E9–18803 Filed 8–5–09; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11835 and # 11836]

Maine Disaster # ME–00018

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Maine (FEMA–1852–DR), dated 07/30/2009.

Incident: Severe Storms, Flooding, and Landslides.

Incident Period: 06/18/2009 through 07/08/2009.

Effective Date: 07/30/2009.

Physical Loan Application Deadline Date: 09/28/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 04/30/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/30/2009, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Franklin, Hancock, Knox, Lincoln, Oxford, Somerset, Waldo, Washington.

The Interest Rates are:

	Percent
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	4.500.
Businesses and Non-Profit Organizations Without Credit Available Elsewhere	4.000.

The number assigned to this disaster for physical damage is 11835B and for economic injury is 11836B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–18804 Filed 8–5–09; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 6721]

Termination of Ineligible Status and Statutory Debarment Pursuant to Section 38(g)(4) of the Arms Export Control Act and Section 127.7 of the International Traffic in Arms Regulations for Electro-Glass Products, Inc.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of State has terminated the ineligible status and statutory debarment of Electro-Glass Products, Inc., pursuant to section 38(g)(4) of the Arms Export Control Act (AECA) (22 U.S.C. 2778) and section 127.7 of the International Traffic in Arms Regulations (ITAR).

DATES: *Effective Date:* June 9, 2009.

FOR FURTHER INFORMATION CONTACT: Daniel J. Buzby, Acting Director, Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State (202) 663–2812.

SUPPLEMENTARY INFORMATION: Section 38(g)(4) of the AECA and section 127.11 of the ITAR prohibit the issuance of export licenses or other approvals to a person if that person, or any party to the export, has been convicted of violating the AECA and certain other U.S. criminal statutes enumerated at section 38(g)(1) of the AECA and section 120.27 of the ITAR. Such individuals are considered ineligible in accordance with section 120.1 of the ITAR. Also, a person convicted of violating the AECA is subject to statutory debarment under section 127.7 of the ITAR.

In July 2007, Electro-Glass Products, Inc. was convicted of violating the AECA (U.S. District Court, District of Pennsylvania, Case # 06–00117–001). Based on this conviction, Electro-Glass Products, Inc., was ineligible in accordance with section 120.1 of the ITAR and was statutorily debarred pursuant to section 127.7 of the ITAR. Electro-Glass Products, Inc. was thus prohibited from participating directly or indirectly in exports of defense articles and defense services. Notice of debarment was published in the **Federal Register** (72 FR 51885, September 11, 2007).

In accordance with section 38(g)(4) of the AECA and section 127.7 of the ITAR, the ineligible status and statutory debarment may be terminated after consultation with other appropriate U.S. agencies, after a thorough review of the circumstances surrounding the conviction, and a finding that appropriate steps have been taken to mitigate any law enforcement concerns. The Department of State has reviewed the circumstances and consulted with other appropriate U.S. agencies, and has determined that Electro-Glass Products, Inc., has taken appropriate steps to address the causes of the violations and to mitigate any law enforcement concerns. Therefore, in accordance with section 38(g)(4) of the AECA and section 127.7 of the ITAR, Electro-Glass Products, Inc. is no longer ineligible and the statutory debarment is rescinded, effective June 9, 2009.

Dated: July 27, 2009.

Andrew J. Shapiro

Assistant Secretary, Bureau of Political-Military Affairs, Department of State.

[FR Doc. E9–18847 Filed 8–5–09; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF STATE

[Public Notice 6722]

Waiver of Restriction on Assistance to Bolivia, Dominica, the Dominican Republic, Nicaragua, and St. Vincent and the Grenadines

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 Bolivia, Dominica, the Dominican Republic, Nicaragua, and St. Vincent and the Grenadines, 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 J. Lew,

Deputy Secretary of State For Management and Resources, Department of State.

[FR Doc. E9–18844 Filed 8–5–09; 8:45 am]

BILLING CODE 4710–29–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2009–0038]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval to renew the following information collection: 49 CFR Part 611 Major Capital Investment Projects (OMB Number: 2132–0561). The information to be collected for this program is to evaluate proposed New and Small Starts projects. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on April 27, 2009.

DATES: Comments must be submitted before September 8, 2009. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: Sylvia L. Marion, Office of Administration, Office of Management Planning, (202) 366–6680.

SUPPLEMENTARY INFORMATION:

Title: 49 CFR Part 611 Major Capital Investment Projects.

Abstract: On August 10, 2005, the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy for Users (SAFETEA–LU) was enacted. Sections 3011(d)(5) and 3011(e)(6) of SAFETEA–LU require FTA to issue regulations on the manner in which candidate projects for major capital investment grants for new fixed guideway systems, extensions to existing fixed guideway systems, or significant corridor based bus investments (''New Starts,'' ''Small Starts,'' respectively) will be evaluated and rated for purposes of the FTA Capital Investment Grants program for New and Small Starts under 49 USC Section 5309. An Advanced Notice of Proposed Rulemaking (ANPRM) for this regulation was issued on January 30, 2006 (71 FR 22841). A Notice of Proposed Rulemaking (NPRM) was issued on August 3, 2007 (72 FR 43328). The NPRM was withdrawn on February 17, 2009, due to an intervening statutory change resulting from the passage of the SAFETEA–LU Technical Corrections Act in June 2008.

FTA has a longstanding requirement to evaluate proposed projects against a prescribed set of statutory criteria. The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) established in law a set of criteria that proposed projects had to meet in order to be eligible for federal funding. The requirement for summary project ratings has been in place since 1998. Thus, the requirements for project evaluation and data collection for New Starts projects are not new, nor have

they changed extensively since their inception. One addition included in SAFETEA–LU is the Small Starts program. The Small Starts program enables projects with a lesser total capital cost and smaller requested share of New Starts funds to progress through a simplified and streamlined project evaluation and data collection process. In general, though, the information used by FTA for New and Small Starts project evaluation and rating purposes should arise as a part of the normal planning process.

FTA has been collecting project evaluation information from project sponsors under the existing OMB approval for this program (OMB No. 2132–0561). However, due to modifications in project evaluation criteria for the New Starts program and the addition of the Small Starts program, it became apparent that some information required might be beyond the scope of ordinary planning activities.

SAFETEA–LU created additional requirements for before-and-after data collection for purposes of Government Performance and Results Act reporting as a condition of obtaining a Full Funding Grant Agreement (FFGA) or a Project Construction Grant Agreement (PCGA).

Estimated Total Annual Burden: 38,760 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, *Attention:* FTA Desk Officer.

Comments Are Invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued: July 31, 2009.

Ann M. Linnertz.

Associate Administrator for Administration.

[FR Doc. E9–18771 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2009–0037]

Agency Information Collection Activity Under OMB Review

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Federal Transit Administration invites public comment about our intention to request the Office of Management and Budget's (OMB) approval to renew the following information collection: Metropolitan and Statewide Transportation Planning (OMB Number: 2132–0529). The information to be collected for this program is to evaluate proposed New and Small Starts projects. The **Federal Register** Notice with a 60-day comment period soliciting comments was published on April 27, 2009.

DATES: Comments must be submitted before September 8, 2009. A comment to OMB is most effective if OMB receives it within 30 days of publication.

FOR FURTHER INFORMATION CONTACT: LaStar Matthews, Office of Administration, Office of Management Planning, (202) 366–2295.

SUPPLEMENTARY INFORMATION:

Title: Metropolitan and Statewide Transportation Planning.

Abstract: The Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) jointly carry out the federal mandate to improve urban and rural transportation. 49 U.S.C. Sections 5303 and 5304 and 23 U.S.C. 134 and 135 authorize the use of federal funds to assist Metropolitan Planning Organizations (MPOs), States, and local public bodies in developing transportation plans and programs to serve the transportation needs of urbanized areas over 50,000 in population and other areas of States outside of urbanized areas. The information collection activities involved in developing the Unified Planning Work Program (UPWP), the Metropolitan Transportation Plan, the Long Range Statewide Transportation Improvement Plan, the Transportation Improvement Program (TIP), and the Statewide Transportation Improvement Program (STIP) are necessary to identify and evaluate the transportation issues and needs in each urbanized area and throughout every state. These products of the transportation planning process are essential elements in the reasonable planning and programming of federally funded transportation investments.

In addition to serving as management tools for MPOs and State DOTs, the UPWP and State Planning and Research (SP&R) Work Program are used by both FTA and FHWA to monitor the transportation planning activities of those agencies. It is also needed to establish national out year budgets and regional program plans, develop policy on using funds, monitor State and local compliance with national technical emphasis areas, respond to Congressional inquiries, prepare Congressional testimony, and ensure efficiency in the use and expenditure of federal funds by determining that planning proposals are both reasonable and cost-effective. 49 U.S.C. Section 5303 and 23 U.S.C.134(h) require the development of TIPs for urbanized areas; STIPs are mandated by 49 U.S.C. Section 5304 and 23 U.S.C. 235(f) for an entire State. After approval by the Governor and MPO, metropolitan TIPs in attainment areas are to be incorporated directly into the STIP. For nonattainment areas, FTA/FHWA must make a conformity finding on the TIPs before including them into the STIP. The complete STIP is then jointly reviewed and approved or disapproved by FTA and FHWA. These conformity findings and approval actions constitute the determination that Sates are complying with the requirements of 23 U.S.C. 235 and 49 U.S.C. Section 5304 as a condition of eligibility for federal-aid funding. Without these documents, approvals and findings, capital and/or operating assistance cannot be provided.

Estimated Total Annual Burden: 38,760 hours.

ADDRESSES: All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: FTA Desk Officer.

Comments Are Invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued: July 31, 2009.

Ann M. Linnertz,

Associate Administrator for Administration.

[FR Doc. E9–18772 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Office of Analysis, Research, and Technology Forum

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of meeting/forum.

SUMMARY: FMCSA's Office of Analysis, Research, and Technology (ART) invites interested persons to participate in a forum regarding updating it's 5-Year Strategic Plan (2010–2015). FMCSA is seeking input from industry leaders via two public Stakeholder Forums in order to identify and discuss key safety related challenges and opportunities facing the motor carrier industry, and to solicit ideas on research objectives that FMCSA should consider in developing it's strategic plan—as well as on potential projects and programs that would help meet those safety research objectives. As a participant in the forum, attendees will have an opportunity to comment on the proposed mission, vision and strategic objectives (goals) for the 5-Year Strategic Plan, and provide any additional insights they feel will be important to the FMCSA.

Where and When:

Meeting # 1. Hyatt Place Denver Airport, 16250 E. 40th Ave., Aurora, CO 80011, on Thursday August 13, 2009 from 9 a.m. to 4 p.m.

Meeting # 2. Booz Allen Hamilton Conference Center, Hamilton 2011, 8283 Greensboro Dr., McLean, VA 22102, on Tuesday, August 18, 2009, from 9 a.m. to 4 p.m.

Registration: Space will be limited to the first 30 registered participants for each forum. To attend the forum, send an e-mail to: *karen.robin@dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Martin R. Walker, Office of Analysis, Research and Technology, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave, SW., Washington, DC 20590; telephone (202) 385–2364 or e-mail *martin.r.walker@dot.gov* Or, contact Karen Robin in the same office at (202) 385–2373 or e-mail *karen.robin@dot.gov* Office hours are from 8 a.m. to 4:30 p.m., E.S.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: ART is currently in the process of updating its 5-Year Strategic Plan, which was last issued in 2005. The updated plan seeks to articulate the ART's mission to reduce the number and severity of commercial motor vehicle crashes by expanding FMCSA's knowledge portfolio of available technological, behavioral, and operational approaches for addressing safety challenges in the motor carrier industry.

Forum attendees will receive an Information Packet on current programs the Office of Research and Technology is working on. While the forum will be open to the public, it will be limited to the space available. Individuals requiring special needs/accommodations (sign, reader, etc.), please call Karen Robin at (202) 385–2373 or e-mail *karen.robin@dot.gov.*

Issued On: July 28, 2009.

David Anewalt,

Acting Associate Administrator for Research and Information Technology.

[FR Doc. E9–18770 Filed 8–5–09; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 6478

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 6478, Alcohol and Cellulosic Biofuel Fuels Credit.

DATES: Written comments should be received on or before October 5, 2009 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Robert Kennedy at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3403, or through the Internet at *Robert.J.Kennedy@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Alcohol and Cellulosic Biofuel Fuels Credit.

OMB Number: 1545–0231.

Form Number: Form 6478.

Abstract: Use Form 6478 to figure your alcohol and cellulosic biofuel fuels credit. You claim the credit for the tax year in which the sale or use occurs. The credit is determined under IRC section 40 and consists of the alcohol mixture credit, alcohol credit, small ethanol producer credit and cellulosic biofuel producer credit.

Current Actions: We deleted 3 lines in compliance with IRC section 40. We also deleted 8 lines to reflect changes made during the processing cycle of the 2008 Form 6478. This results in a total burden decrease of 8,811.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 3,300.

Estimated Time per Respondent: 6 hours, 48 minutes.

Estimated Total Annual Burden Hours: 22,473.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection

techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: July 29, 2009.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E9–18789 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 4 Taxpayer Advocacy Panel (Including the States of Illinois, Indiana, Kentucky, Michigan, Ohio, Tennessee, and Wisconsin)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 4 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 15, 2009.

FOR FURTHER INFORMATION CONTACT: Ellen Smiley at 1–888–912–1227 or 414–231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 4 Taxpayer Advocacy Panel will be held Tuesday, September 15, 2009 at 1 p.m. Central Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Ellen Smiley. For more information please contact Ms. Smiley at 1–888–912–1227 or 414–231–2360, or write TAP Office Stop 1006MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18774 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 3 Taxpayer Advocacy Panel (Including the States of Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, and the Territory of Puerto Rico)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 3 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Monday, September 14, 2009.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227 or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 3 Taxpayer Advocacy Panel will be held Monday, September 14, 2009, at 12:30 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Sallie Chavez. For more information please contact Ms. Chavez at 1–888–912–1227 or 954–423–7979, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18775 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 2 Taxpayer Advocacy Panel (Including the States of Delaware, North Carolina, South Carolina, New Jersey, Maryland, Pennsylvania, Virginia, West Virginia and the District of Columbia)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 2 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, September 16, 2009.

FOR FURTHER INFORMATION CONTACT: Marianne Ayala at 1–888–912–1227 or 954–423–7978.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 2 Taxpayer Advocacy Panel will be held Wednesday, September 16, 2009, at 2:30 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Marianne Ayala. For more information please contact Mrs. Ayala at 1–888–912–1227 or 954–423–7978, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18776 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 6 Taxpayer Advocacy Panel (Including the States of Arizona, Colorado, Idaho, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 6 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 1, 2009.

FOR FURTHER INFORMATION CONTACT: Dave Coffman at 1–888–912–1227 or 206–220–6095.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 6 Taxpayer Advocacy Panel will be held Tuesday, September 1, 2009, at 1 p.m. Pacific Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Dave Coffman. For more information please contact Mr. Coffman at 1–888–912–1227 or 206–220–6095, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18777 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 7 Taxpayer Advocacy Panel (Including the States of Alaska, California, Hawaii, and Nevada)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 7 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, September 16, 2009.

FOR FURTHER INFORMATION CONTACT: Janice Spinks at 1–888–912–1227 or 206–220–6098.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 7 Taxpayer Advocacy Panel will be held Wednesday, September 16, 2009, at 2 p.m. Pacific Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Janice Spinks. For more information please contact Ms. Spinks at 1–888–912–1227 or 206–220–6098, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18778 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be Friday, September 25, 2009 and Saturday, September 26, 2009.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 or 718–488–2085.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Earned Income Tax Credit Issue Committee will be held Friday, September 25, 2009, 8:30 a.m. to 5 p.m. and Saturday, September 26, 2009, 8 a.m. to 12 p.m. Eastern Time in Brooklyn, NY. The public is invited to make oral comments or submit written statements for consideration. Notification of intent to participate must be made with Audrey Y. Jenkins. For more information please contact Ms. Jenkins at 1–888–912–1227 or 718–488–2085, or write TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201, or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18779 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Multi-Lingual Initiatives Issue Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Multi-Lingual Initiatives Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 10, 2009.

FOR FURTHER INFORMATION CONTACT: Marisa Knispel at 1–888–912–1227 or 718–488–3557.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Multi-Lingual Initiatives Issue Committee will be held Thursday, September 10, 2009, at 2 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Marisa Knispel. For more information please contact Ms. Knispel at 1–888–912–1227 or 718–488–3557, or write TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201, or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS Issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18780 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of Taxpayer Advocacy Panel Notice Improvement Issue Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Notice Improvement Issue Committee will be

conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 10, 2009.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal

Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Notice Improvement Issue Committee will be held Thursday, September 10, 2009, at 2 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Sallie Chavez. For more information please contact Ms. Chavez at 1–888–912–1227 or 954–423–7979, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: *July 30, 2009.*

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18781 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 22, 2009.

FOR FURTHER INFORMATION CONTACT: Ellen Smiley at 1–888–912–1227 or 414–231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Committee will be held Tuesday, September 22, 2009, at 1 p.m. Central Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Ellen Smiley. For more information please contact Ms. Smiley at 1–888–912–1227 or 414–231–2360, or write TAP Office Stop 1006MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18782 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 1 Taxpayer Advocacy Panel (Including the States of New York, Connecticut, Massachusetts, Rhode Island, New Hampshire, Vermont and Maine)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 1 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 15, 2009.

FOR FURTHER INFORMATION CONTACT: Audrey Y. Jenkins at 1–888–912–1227 or 718–488–2085.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 1 Taxpayer Advocacy Panel will be held Tuesday, September 15, 2009, at 10 a.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Audrey Y. Jenkins. For more information please contact Ms. Jenkins at 1–888–912–1227 or 718–488–2085, or write TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201, or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: *July 30, 2009.*

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18783 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 5 Taxpayer Advocacy Panel (Including the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, and Texas)

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Area 5 Taxpayer Advocacy Panel will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 8, 2009.

FOR FURTHER INFORMATION CONTACT: Patricia Robb at 1–888–912–1227 or 414–231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Area 5 Taxpayer Advocacy Panel will be held Tuesday, September 8, 2009, at 9:30 a.m. Central Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Patricia Robb. For more information please contact Ms. Robb at 1–888–912–1227 or 414–231–2360, or write TAP Office Stop 1006MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18784 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Tax Forms and Publications Issue Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Tax Forms and Publications Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, September 2, 2009.

FOR FURTHER INFORMATION CONTACT: Marianne Ayala at 1–888–912–1227 or 954–423–7978.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Tax Forms and Publications Issue Committee will be held Wednesday, September 2, 2009, at Noon, Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Marianne Ayala. For more information please contact Ms. Ayala at 1–888–912–1227 or 954–423–7978, or write TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18785 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Volunteer Income Tax Assistance Issue Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Volunteer Income Tax Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 8, 2009.

FOR FURTHER INFORMATION CONTACT: Marisa Knispel at 1–888–912–1227 or 718–488–3557.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Volunteer Income Tax Issue Committee will be held Tuesday, September 8, at 2 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Marisa Knispel. For more information please contact Ms. Knispel at 1–888–912–1227 or 718–488–3557, or write TAP Office, 10 MetroTech Center, 625 Fulton Street, Brooklyn, NY 11201, or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS Issues.

Dated: July 30, 2009.

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18786 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Joint Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Joint Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, September 23, 2009.

FOR FURTHER INFORMATION CONTACT: Susan Gilbert at 1–888–912–1227 or (515) 564–6638.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Wednesday, September 23, 2009, at 3 p.m. Eastern Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to limited conference lines, notification of intent to participate must be made with Susan Gilbert. For more information please contact Ms. Gilbert at 1–888–912–1227 or (515) 564–6638 or write: TAP Office, 210 Walnut Street, Stop 5115, Des Moines, IA 50309 or contact us at the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: *July 31, 2009.*

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18787 Filed 8–5–09; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Issue Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Issue Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 24, 2009.

FOR FURTHER INFORMATION CONTACT: Janice Spinks at 1–888–912–1227 or 206–220–6098.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Small Business/Self Employed Issue Committee will be held Thursday, September 24, 2009, at 8:30 a.m. Pacific Time via telephone conference. The public is invited to make oral comments or submit written statements for consideration. Due to

limited conference lines, notification of intent to participate must be made with Janice Spinks. For more information please contact Ms. Spinks at 1–888–912–1227 or 206–220–6098, or write TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include various IRS issues.

Dated: July 30, 2009

Shawn F. Collins,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E9–18788 Filed 8–5–09; 8:45 am]

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Federal Register

Thursday,
August 6, 2009

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 418
Medicare Program; Hospice Wage Index for Fiscal Year 2010; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 418

[CMS–1420–F]

RIN 0938–AP45

Medicare Program; Hospice Wage Index for Fiscal Year 2010

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule will set forth the hospice wage index for fiscal year 2010. The final rule adopts a MedPAC recommendation regarding a process for certification and recertification of terminal illness. In addition, this final rule will also revise the phase-out of the wage index budget neutrality adjustment factor (BNAF), with a 10 percent BNAF reduction in FY 2010. The BNAF phase-out will continue with successive 15 percent reductions from FY 2011 through FY 2016.

DATES: *Effective Date:* These regulations are effective on October 1, 2009.

FOR FURTHER INFORMATION CONTACT: Randy Throndset, (410) 786–0131.
Katie Lucas, (410) 786–7723.

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I. Background

A. General

1. Hospice Care

Hospice care is an approach to treatment that recognizes that the impending death of an individual warrants a change in the focus from curative care to palliative care for relief of pain and for symptom management. The goal of hospice care is to help terminally ill individuals continue life with minimal disruption to normal activities while remaining primarily in the home environment. A hospice uses an interdisciplinary approach to deliver medical, nursing, social, psychological, emotional, and spiritual services through use of a broad spectrum of professional and other caregivers, with the goal of making the individual as physically and emotionally comfortable as possible. Counseling services and inpatient respite services are available to the family of the hospice patient. Hospice programs consider both the patient and the family as a unit of care. Section 1861(dd) of the Social Security Act (the Act) provides for coverage of hospice care for terminally ill Medicare beneficiaries who elect to receive care from a participating hospice. Section 1814(i) of the Act provides payment for Medicare participating hospices.

2. Medicare Payment for Hospice Care

Sections 1812(d), 1813(a)(4), 1814(a)(7), 1814(i) and 1861(dd) of the Act, and our regulations at 42 CFR part 418, establish eligibility requirements, payment standards and procedures, define covered services, and delineate the conditions a hospice must meet to be approved for participation in the Medicare program. Part 418, subpart G provides for payment in one of four prospectively-determined rate categories (routine home care, continuous home care, inpatient respite care, and general inpatient care) to hospices based on each day a qualified Medicare beneficiary is under a hospice election.

B. Hospice Wage Index

Our regulations at § 418.306(c) require that the wage index for all labor markets in which Medicare-participating hospices do business be established using the most current hospital wage data available, including any changes by Office of Management and Budget (OMB) to the Metropolitan Statistical Areas (MSAs) definitions. OMB revised the MSA definitions beginning in 2003 with new designations called the Core Based Statistical Areas (CBSAs). For the purposes of the hospice benefit, the term ''MSA-based'' refers to wage index values and designations based on the previous MSA designations before 2003. Conversely, the term ''CBSA-based'' refers to wage index values and designations based on the OMB revised MSA designations in 2003, which now include CBSAs. In the August 11, 2004 IPPS final rule (69 FR 49026), the revised labor market area definitions were adopted at § 412.64(b), which were effective October 1, 2004 for acute care hospitals. We also revised the labor market areas for hospices using the new OMB standards that included CBSAs. In the FY 2006 hospice wage index final rule (70 FR 45130), we finalized a 1-year transition policy using a 50/50 blend of the CBSA-based wage index values and the MSA-based wage index values for FY 2006. The one-year transition policy ended on September 30, 2006. For FY 2007, FY 2008, and FY 2009, we used wage index values based on CBSA designations.

The hospice wage index is used to adjust payment rates for hospice agencies under the Medicare program to reflect local differences in area wage levels. The original hospice wage index was based on the 1981 Bureau of Labor Statistics hospital data and had not been updated since 1983. In 1994, because of disparity in wages from one geographical location to another, a committee was formulated to negotiate a wage index methodology that could be accepted by the industry and the government. This committee, functioning under a process established by the Negotiated Rulemaking Act of 1990, was comprised of national hospice associations; rural, urban, large and small hospices; multi-site hospices; consumer groups; and a government representative. On April 13, 1995, the Hospice Wage Index Negotiated Rulemaking Committee signed an agreement for the methodology to be used for updating the hospice wage index.

In the August 8, 1997 **Federal Register** (62 FR 42860), we published a final rule promulgating a new methodology for calculating the hospice wage index based on the recommendations of the negotiated rulemaking Committee, using a hospital wage index rather than continuing to use the Bureau of Labor Statistics (BLS) data. The committee statement was

included in the appendix of that final rule (62 FR 42883). The reduction in overall Medicare payments if a new wage index were adopted was noted in the November 29, 1995 notice transmitting the recommendations of the negotiated rulemaking committee (60 FR 61264). Therefore, the Committee also decided that for each year in updating the hospice wage index, aggregate Medicare payments to hospices would remain budget neutral to payments as if the 1983 wage index had been used.

As decided upon by the Committee, budget neutrality means that, in a given year, estimated aggregate payments for Medicare hospice services using the updated hospice wage index values will equal estimated payments that would have been made for these services if the 1983 hospice wage index values had remained in effect. Although payments to individual hospice programs may change each year, the total payments each year to hospices would not be affected by using the updated hospice wage index because total payments would be budget neutral as if the 1983 wage index had been used. To implement this policy, a BNAF would be computed and applied annually to the pre-floor, pre-reclassified hospital wage index, when deriving the hospice wage index.

The BNAF is calculated by computing estimated payments using the most recent completed year of hospice claims data. The units (days or hours) from those claims are multiplied by the updated hospice payment rates to calculate estimated payments. For this final rule, that means estimating payments for FY 2010 using FY 2008 hospice claims data, and applying the FY 2010 hospice payment rates (updating the FY 2009 rates by the FY 2010 hospital market basket update factor). The FY 2010 hospice wage index values are then applied to the labor portion of the payment rates only. The procedure is repeated using the same claims data and payment rates, but using the 1983 BLS-based wage index instead of the updated pre-floor, pre-reclassified hospital wage index (note that both wage indices include their respective floor adjustments). The total payments are then compared, and the adjustment required to make total payments equal is computed; that adjustment factor is the BNAF.

The hospice wage index is updated annually. Our most recent update, published in the **Federal Register** (73 FR 46464) on August 8, 2008, set forth updates to the hospice wage index for FY 2009. That update also finalized a provision for a 3-year phase-out of the BNAF, which was applied to the wage index values. As discussed in detail in section I.B.1 below, the update was later revised with the February 17, 2009 passage of the American Recovery and Reinvestment Act (ARRA), which eliminated the BNAF phase-out for FY 2009.

1. Raw Wage Index Values (Pre-floor, Pre-reclassified Hospital Wage Index)

As described in the August 8, 1997 hospice wage index final rule (62 FR 42860), the pre-floor and pre-reclassified hospital wage index is used as the raw wage index for the hospice benefit. These raw wage index values are then subject to either a BNAF or application of the hospice floor calculation to compute the hospice wage index used to determine payments to hospices.

Pre-floor, pre-reclassified hospital wage index values of 0.8 or greater are adjusted by the BNAF. Pre-floor, pre-reclassified hospital wage index values below 0.8 are adjusted by the greater of: (1) The hospice BNAF; or (2) the hospice 15 percent floor adjustment, which is a 15 percent increase subject to a maximum wage index value of 0.8. For example, if County A has a pre-floor, pre-reclassified hospital wage index (raw wage index) value of 0.4000, we would perform the following calculations using the BNAF (which for this example is 0.060988; we added 1 to simplify the calculation) and the hospice floor to determine County A's hospice wage index:

Pre-floor, pre-reclassified hospital wage index value below 0.8 multiplied by the BNAF: ($0.4000 \times 1.060988 = 0.4244$).

Pre-floor, pre-reclassified hospital wage index value below 0.8 multiplied by the hospice 15 percent floor adjustment: ($0.4000 \times 1.15 = 0.4600$).

Based on these calculations, County A's hospice wage index would be 0.4600.

The BNAF has been computed and applied annually to the labor portion of the hospice payment. Currently, the labor portion of the payment rates is as follows: for Routine Home Care, 68.71 percent; for Continuous Home Care, 68.71 percent; for General Inpatient Care, 64.01 percent; and for Respite Care, 54.13 percent. The non-labor portion is equal to 100 percent minus the labor portion for each level of care. Therefore the non-labor portion of the payment rates is as follows: for Routine Home Care, 31.29 percent; for Continuous Home Care, 31.29 percent; for General Inpatient Care, 35.99 percent; and for Respite Care, 45.87 percent.

The August 8, 2008 FY 2009 Hospice Wage Index final rule (73 FR 46464) promulgated a phase-out of the hospice BNAF over 3 years, beginning with a 25 percent reduction in the BNAF in FY 2009, an additional 50 percent reduction for a total of 75 percent in FY 2010, and complete phase-out of the BNAF in FY 2011. However, subsequent to the publication of the FY 2009 rule, the American Recovery and Reinvestment Act of 2009 (P.L. 111–5) (ARRA) eliminated the BNAF reduction for FY 2009. Specifically, division B, section 4301(a) of ARRA prohibited the Secretary from beginning the phasing-out or eliminating of the BNAF in the Medicare hospice wage index before October 1, 2009, and instructed the Secretary to recompute and apply the final Medicare hospice wage index for FY 2009 as if there had been no reduction in the BNAF. We did so in an administrative instruction to our intermediaries, which was issued as Change Request (CR) #6418 (Transmittal #1701, dated 3/13/2009). CR 6418 is available on the Web at *http://www.cms.hhs.gov/Hospice/Transmittals/itemdetail.asp?filterType=none&filterByDID=0&sortByDID=1&sortOrder=descending&itemID=CMS1222448&intNumPerPage=10.*

While ARRA eliminated the BNAF phase-out for FY 2009, it neither changed the 75 percent reduction in the BNAF for FY 2010, nor prohibited the elimination of the BNAF in FY 2011, as set out in the August 8, 2008 Hospice Wage Index final rule. The provision in the ARRA that eliminated the FY 2009 BNAF reduction provided the hospice industry additional time to prepare for the FY 2010 75 percent BNAF reduction and the FY 2011 BNAF elimination. Therefore, in accordance with the August 8, 2008 FY 2009 Hospice Wage Index final rule, the rationale presented in that final rule, and consistent with section 4301(a) of ARRA, in our proposed rule we said we planned to reduce the BNAF by 75 percent in FY 2010 and ultimately eliminate the BNAF in 2011. We accepted comments on the BNAF reductions.

2. Changes to Core Based Statistical Area (CBSA) Designations

The annual update to the hospice wage index is published in the **Federal Register** and is based on the most current available hospital wage data, as well as any changes by OMB to the definitions of MSAs, which now include CBSA designations. The August 4, 2005 hospice wage index final rule (70 FR 45130) set forth the adoption of the changes discussed in the OMB Bulletin No. 03–04 (June 6, 2003),

which announced revised definitions for Micropolitan Statistical Areas and the creation of MSAs and Combined Statistical Areas. In adopting the OMB CBSA geographic designations, we provided for a 1-year transition with a blended hospice wage index for all hospices for FY 2006. Subsequent fiscal years have used the full CBSA-based hospice wage index.

3. Definition of Rural and Urban Areas

Each hospice's labor market is determined based on definitions of MSAs issued by OMB. In general, an urban area is defined as an MSA or New England County Metropolitan Area (NECMA) as defined by OMB. Under § 412.64(b)(1)(ii)(C), a rural area is defined as any area outside of the urban area. The urban and rural area geographic classifications are defined in § 412.64(b)(1)(ii)(A) through (C), and have been used for the Medicare hospice benefit since implementation.

In the August 22, 2007 FY 2008 Inpatient Prospective Payment System (IPPS) final rule with comment period (72 FR 47130), § 412.64(b)(1)(ii)(B) was revised such that the two ''New England deemed Counties'' that had been considered rural under the OMB definitions (Litchfield County, CT and Merrimack County, NH) but deemed urban, were no longer considered urban effective for discharges occurring on or after October 1, 2007. Therefore, these two counties are considered rural in accordance with § 412.64(b)(1)(ii)(C). The recommendations to adjust payments to reflect local differences in wages are codified in § 418.306(c) of our regulations; however there had been no explicit reference to § 412.64 in § 418.306(c) before the promulgation of the August 8, 2008 FY 2009 Hospice Wage Index final rule. Although § 412.64 had not been explicitly referred to, the hospice program has used the definition of urban in § 412.64(b)(1)(ii)(A) and (b)(1)(ii)(B), and the definition of rural as any area outside of an urban area in § 412.64(b)(1)(ii)(C). With the promulgation of the August 8, 2008 FY 2009 Wage Index final rule, we now explicitly refer to those provisions in § 412.64 to make it absolutely clear how we define urban and rural for purposes of the hospice wage index. Litchfield County, CT and Merrimack County, NH are considered rural areas for hospital IPPS purposes in accordance with § 412.64. Effective October 1, 2008, Litchfield County, CT was no longer considered part of urban CBSA 25540 (Hartford-West Hartford-East Hartford, CT), and Merrimack County, NH was no longer considered part of urban CBSA 31700 (Manchester-Nashua, NH). Rather, these counties are now considered to be rural areas within their respective States under the hospice payment system. When the pre-floor, pre-reclassified hospital wage index was adopted for use in deriving the hospice wage index, it was decided not to take into account IPPS geographic reclassifications. This policy of following OMB designations of rural or urban, rather than considering some Counties to be ''deemed'' urban, is consistent with our policy of not taking into account IPPS geographic reclassifications in determining payments under the hospice wage index.

4. Areas Without Hospital Wage Data

When adopting OMB's new labor market designations in FY 2006, we identified some geographic areas where there were no hospitals, and thus, no hospital wage index data on which to base the calculation of the hospice wage index. Beginning in FY 2006, we adopted a policy to use the FY 2005 pre-floor, pre-reclassified hospital wage index value for rural areas when no hospital wage data were available. We also adopted the policy that for urban labor markets without a hospital from which hospital wage index data could be derived, all of the CBSAs within the State would be used to calculate a statewide urban average pre-floor, pre-reclassified hospital wage index value to use as a reasonable proxy for these areas. Consequently, in subsequent fiscal years, we applied the average pre-floor, pre-reclassified hospital wage index data from all urban areas in that state, to urban areas without a hospital. The only affected CBSA is 25980, Hinesville-Fort Stewart, Georgia.

Under the CBSA labor market areas, there are no hospitals in rural locations in Massachusetts and Puerto Rico. Since there was no rural proxy for more recent rural data within those areas, in the FY 2006 hospice wage index proposed rule (70 FR 22394, 22398), we proposed applying the FY 2005 pre-floor, pre-reclassified hospital wage index value to rural areas where no hospital wage data were available. In the FY 2006 final rule and in the FY 2007 update notice, we applied the FY 2005 pre-floor, pre-reclassified hospital wage index data to areas lacking hospital wage data in rural Massachusetts and rural Puerto Rico.

In the FY 2008 hospice wage index final rule (72 FR 50217), we considered alternatives to our methodology to update the pre-floor, pre-reclassified hospital wage index for rural areas without hospital wage data. We indicated that we believed that the best imputed proxy for rural areas would—(1) use pre-floor, pre-reclassified hospital data; (2) use the most local data available to impute a rural pre-floor, pre-reclassified hospital wage index; (3) be easy to evaluate; and (4) be easy to update from year-to-year.

Therefore, in FY 2008, and again in FY 2009, in cases where there was a rural area without rural hospital wage data, we used the average pre-floor, pre-reclassified hospital wage index data from all contiguous CBSAs to represent a reasonable proxy for the rural area. This approach does not use rural data; however, the approach uses pre-floor, pre-reclassified hospital wage data, is easy to evaluate, is easy to update from year-to-year, and uses the most local data available. In the FY 2008 hospice wage index final rule (72 FR 50217), we noted that in determining an imputed rural pre-floor, pre-reclassified hospital wage index, we interpret the term ''contiguous'' to mean sharing a border. For example, in the case of Massachusetts, the entire rural area consists of Dukes and Nantucket Counties. We determined that the borders of Dukes and Nantucket Counties are contiguous with Barnstable and Bristol Counties. Under the adopted methodology, the pre-floor, pre-reclassified hospital wage index values for the Counties of Barnstable (CBSA 12700, Barnstable Town, MA) and Bristol (CBSA 39300, Providence-New Bedford-Fall River, RI–MA) would be averaged resulting in an imputed pre-floor, pre-reclassified rural hospital wage index for FY 2008. We noted in the FY 2008 final hospice wage index rule that while we believe that this policy could be readily applied to other rural areas that lack hospital wage data (possibly due to hospitals converting to a different provider type, such as a Critical Access Hospital, that does not submit the appropriate wage data), if a similar situation arose in the future, we would re-examine this policy.

We also noted that we do not believe that this policy would be appropriate for Puerto Rico, as there are sufficient economic differences between hospitals in the United States and those in Puerto Rico, including the payment of hospitals in Puerto Rico using blended Federal/Commonwealth-specific rates. Therefore, we believe that a separate and distinct policy for Puerto Rico is necessary. Any alternative methodology for imputing a pre-floor, pre-reclassified hospital wage index for rural Puerto Rico would need to take into account the economic differences between hospitals in the United States and those in Puerto Rico. Our policy of imputing a rural pre-floor, pre-reclassified

hospital wage index based on the pre-floor, pre-reclassified hospital wage index(es) of CBSAs contiguous to the rural area in question does not recognize the unique circumstances of Puerto Rico. While we have not yet identified an alternative methodology for imputing a pre-floor, pre-reclassified hospital wage index for rural Puerto Rico, we will continue to evaluate the feasibility of using existing hospital wage data and, possibly, wage data from other sources. For FY 2008 and FY 2009, we used the most recent pre-floor, pre-reclassified hospital wage index available for Puerto Rico, which is 0.4047.

5. CBSA Nomenclature Changes

The Office of Management and Budget (OMB) regularly publishes a bulletin that updates the titles of certain CBSAs. In the FY 2008 hospice wage index final rule (72 FR 50218) we noted that the FY 2008 rule and all subsequent hospice wage index rules and notices would incorporate CBSA changes from the most recent OMB bulletins. The OMB bulletins may be accessed at *http://www.whitehouse.gov/omb/bulletins/index.html.*

6. Wage Data From Multi-Campus Hospitals

Historically, under the Medicare hospice benefit, we have established hospice wage index values calculated from the pre-floor, pre-reclassified hospital wage data (also called the IPPS wage index) without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. The wage adjustment established under the Medicare hospice benefit is based on the location where services are furnished without any reclassification.

For FY 2010, the data collected from cost reports submitted by hospitals for cost reporting periods beginning during FY 2005 were used to compute the 2009 pre-floor, pre-reclassified hospital wage index data without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. This 2009 pre-floor, pre-reclassified hospital wage index was used to derive the applicable wage index values for the hospice wage index because these data (FY 2005) are the most recent complete cost data.

Beginning in FY 2008, the IPPS apportioned the wage data for multi-campus hospitals located in different labor market areas (CBSAs) to each CBSA where the campuses are located (*see* the FY 2008 IPPS final rule with comment period (72 FR 47317 through 47320)). We are continuing to use the pre-floor, pre-reclassified hospital wage data as a basis to determine the hospice wage index values for FY 2010 because hospitals and hospices both compete in the same labor markets, and therefore, experience similar wage-related costs. We note that the use of pre-floor, pre-reclassified hospital (IPPS) wage data, used to derive the FY 2010 hospice wage index values, reflects the application of our policy to use that data to establish the hospice wage index. The FY 2010 hospice wage index values presented in this notice were computed consistent with our pre-floor, pre-reclassified hospital (IPPS) wage index policy (that is, our historical policy of not taking into account IPPS geographic reclassifications in determining payments for hospice). As finalized in the August 8, 2008 FY 2009 Hospice Wage Index final rule, for the FY 2009 Medicare hospice benefit, the hospice wage index was computed from IPPS wage data (submitted by hospitals for cost reporting periods beginning in FY 2004 (as was the FY 2008 IPPS wage index)), which allocated salaries and hours to the campuses of two multi-campus hospitals with campuses that are located in different labor areas, one in Massachusetts and another in Illinois. Thus, the FY 2009 hospice wage index values for the following CBSAs were affected by this policy: Boston-Quincy, MA (CBSA 14484), Providence-New Bedford-Falls River, RI–MA (CBSA 39300), Chicago-Naperville-Joliet, IL (CBSA 16974), and Lake County-Kenosha County, IL–WI (CBSA 29404).

7. Hospice Payment Rates

Section 4441(a) of the Balanced Budget Act of 1997 (BBA) amended section 1814(i)(1)(C)(ii) of the Act to establish updates to hospice rates for FYs 1998 through 2002. Hospice rates were to be updated by a factor equal to the percentage increase in the hospital market basket index, minus 1 percentage point. However, neither the BBA nor subsequent legislation specified alteration to the hospital market basket adjustment to be used to compute hospice payments for fiscal years beyond 2002. Payment rates for FYs since 2002 have been updated according to section 1814(i)(1)(C)(ii)(VII) of the Act, which states that the update to the payment rates for subsequent fiscal years will be the market basket percentage for the fiscal year. It has been longstanding practice to use the inpatient hospital market basket as a proxy for a hospice market basket. In the FY 2010 Inpatient Prospective Payment System/Rate Year (RY) 2010 Long Term Care Hospital Prospective Payment System proposed rule (74 FR 24154), we proposed to rebase and revise the inpatient hospital operating market basket.

Historically, the rate update has been published through a separate administrative instruction issued annually, in the summer, to provide adequate time to implement system change requirements. Hospices determine their payments by applying the hospice wage index in this final rule to the labor portion of the published hospice rates.

II. Provisions of the Proposed Rule and Analysis of and Responses to Public Comments

On April 24, 2009 we published a proposed rule in the **Federal Register** (74 FR 18912) that set forth the proposed hospice wage index for FY 2010. We received 729 timely items of correspondence. In general, those who commented strongly opposed the policy to reduce the BNAF adjustment in hospice and were supportive of modifications to the hospice certification and recertification of the terminal illness process. An in-depth summary of the public comments and our responses to those comments are set forth under the appropriate headings.

A. FY 2010 Hospice Wage Index

1. Background

The hospice final rule published in the **Federal Register** on December 16, 1983 (48 FR 56008) provided for adjustment to hospice payment rates to reflect differences in area wage levels. We apply the appropriate hospice wage index value to the labor portion of the hospice payment rates based on the geographic area where hospice care was furnished. As noted earlier, each hospice's labor market area is based on definitions of MSAs issued by the OMB. For this final rule, we will use the pre-floor, pre-reclassified hospital wage index, based solely on the CBSA designations, as the basis for determining wage index values for the FY 2010 hospice wage index.

As noted above, our hospice payment rules utilize the wage adjustment factors used by the Secretary for purposes of section 1886(d)(3)(E) of the Act for hospital wage adjustments. We will again use the pre-floor and pre-reclassified hospital wage index data as the basis to determine the hospice wage index, which is then used to adjust the labor portion of the hospice payment rates based on the geographic area where the beneficiary receives hospice care. We believe the use of the pre-floor, pre-reclassified hospital wage index data, as a basis for the hospice wage index, results in the appropriate

adjustment to the labor portion of the costs. For the FY 2010 update to the hospice wage index, we will continue to use the most recent pre-floor, pre-reclassified hospital wage index available at the time of publication.

Comment: A commenter noted that the hospital-based wage index has undergone multiple changes over the past 10 years and that providers were not invited to provide comment for CMS to consider when formalizing these changes. This commenter stated that CMS previously cited the BNAF as a mitigating factor that offset some of the adverse impacts on hospice of changes in the hospital wage index. A few commenters wrote that the existence of exceptions to the hospital wage index system in the form of reclassifications demonstrates the unfairness and inadequacy of the hospital-based wage index system, and one suggested it puts hospices at a disadvantage in attracting and retaining employees. One commenter suggested that limits be established on the allowable annual changes in index values from one year to the next to achieve wage index stability. Several commenters mentioned that a 2007 MedPAC report on the hospital wage index suggested that CMS repeal the existing hospital wage index and develop a new one. The commenter stated that MedPAC recommended that CMS evaluate the use of the revised wage index in other Medicare payment systems, which includes hospice.

Response: The pre-floor, pre-reclassified hospital wage index was adopted in 1998 as the wage index from which the hospice wage index is derived. The Negotiated Rulemaking Committee considered several wage index options: (1) Continuing with Bureau of Labor Statistics data; (2) using updated hospital wage data; (3) using hospice-specific data; and (4) using data from the physician payment system. The Committee determined that the pre-floor, pre-reclassified hospital wage index was the best option for hospice. The pre-floor, pre-reclassified hospital wage index is updated annually, and reflects the wages of highly skilled hospital workers.

We agree that the hospital-based wage index has undergone some changes in the past 10 years. Those changes were implemented through rulemaking, which provided the public an opportunity to provide comments. Therefore, we disagree that hospice providers have not had an opportunity to comment on hospital wage index changes.

The reclassification provision provided at section 1886(d)(10) of the Act is specific to hospitals. We believe the use of the most recent available pre-floor and pre-reclassified hospital wage index results in the most appropriate adjustment to the labor portion of hospice costs as required in 42 CFR 418.306(c). Additionally, use of the pre-floor, pre-reclassified hospital wage data avoids further reductions in certain rural statewide wage index values that result from reclassification. We also note that the wage index adjustment is based on the geographic area where the beneficiary is located, and not where the hospice is located.

We continue to believe that the pre-floor, pre-reclassified hospital wage index, which is updated yearly and is used by many other CMS payments systems including home health, appropriately accounts for geographic variances in labor costs for hospices. Home health agencies and hospices are Medicare's only home-based benefits, and home health agencies and hospices share labor pools. Home health agencies experience the same wage index fluctuations, but do not receive an adjustment such as the BNAF. We believe that in the interest of parity, both home-based benefits should use a hospital-based wage index without a BNAF applied. In the future, when looking into reforming the hospice payment system, we will consider wage index alternatives, to include those recommended by MedPAC.

2. Areas Without Hospital Wage Data

In adopting the CBSA designations, we identified some geographic areas where there are no hospitals, and no hospital wage data on which to base the calculation of the hospice wage index. These areas are described in section I.B.4 of this final rule. Beginning in FY 2006, we adopted a policy that, for urban labor markets without an urban hospital from which a pre-floor, pre-reclassified hospital wage index can be derived, all of the urban CBSA pre-floor, pre-reclassified hospital wage index values within the State would be used to calculate a statewide urban average pre-floor, pre-reclassified hospital wage index to use as a reasonable proxy for these areas. Currently, the only CBSA that would be affected by this policy is CBSA 25980, Hinesville, Georgia. We will to continue this policy for FY 2010.

Currently, the only rural areas where there are no hospitals from which to calculate a pre-floor, pre-reclassified hospital wage index are Massachusetts and Puerto Rico. In August 2007 (72 FR 50217) we adopted a methodology for imputing rural pre-floor, pre-reclassified hospital wage index values for areas where no hospital wage data are available as an acceptable proxy; that methodology is also described in section I.B.4 of this final rule. In FY 2010, Dukes and Nantucket Counties are the only areas in rural Massachusetts which are affected. We are again applying this methodology for imputing a rural pre-floor, pre-reclassified hospital wage index for those rural areas without rural hospital wage data in FY 2010.

However, as noted in section I.B.4 of this final rule, we do not believe that this policy is appropriate for Puerto Rico. For FY 2010, we are continuing to use the most recent pre-floor, pre-reclassified hospital wage index value available for Puerto Rico, which is 0.4047. This pre-floor, pre-reclassified hospital wage index value will then be adjusted upward by the hospice 15 percent floor adjustment in the computing of the FY 2010 hospice wage index.

We received no comments on this section of the proposed rule.

3. FY 2010 Wage Index With a Reduced Budget Neutrality Adjustment Factor (BNAF)

The hospice wage index set forth in this final rule will be effective October 1, 2009 through September 30, 2010. We are not incorporating any modifications to the hospice wage index methodology. In accordance with our regulations at 42 CFR 418.306(c) and the agreement signed with other members of the Hospice Wage Index Negotiated Rulemaking Committee, we are using the most current hospital data available. For this final rule, the FY 2009 hospital wage index was the most current hospital wage data available for calculating the FY 2010 hospice wage index values. We used the FY 2009 pre-floor, pre-reclassified hospital wage index data for this calculation.

As noted above, for FY 2010, the hospice wage index values will be based solely on the adoption of the CBSA-based labor market definitions and the hospital wage index. We continue to use the most recent pre-floor and pre-reclassified hospital wage index data available (based on FY 2005 hospital cost report wage data). A detailed description of the methodology used to compute the hospice wage index is contained in the September 4, 1996 hospice wage index proposed rule (61 FR 46579), the August 8, 1997 hospice wage index final rule (62 FR 42860), and the August 8, 2008 FY 2009 Hospice Wage Index final rule (73 FR 46464).

The August 8, 2008 FY 2009 Hospice Wage Index final rule finalized a provision to phase out the BNAF over 3 years, starting with a 25 percent reduction in the BNAF in FY 2009, an

additional 50 percent reduction for a total of a 75 percent reduction in FY 2010, and complete phase out in FY 2011. However, on February 17, 2009, the President signed ARRA (Pub. L. 111–5); Section 4301(a) of ARRA eliminated the BNAF phase-out for FY 2009. Therefore, in an administrative instruction (Change Request 6418, Transmittal 1701, dated 3/13/2009) entitled ''Revision of the Hospice Wage Index and the Hospice Pricer for FY 2009,'' we instructed CMS contractors to use the revised FY 2009 hospice Pricer, which included a revised hospice wage index to reflect a full (unreduced) BNAF rather than the 25 percent reduced BNAF promulgated in the August 8, 2008 FY 2009 Hospice Wage Index final rule.

While ARRA eliminated the BNAF phase-out for FY 2009, it did not change the 75 percent reduction in the BNAF for FY 2010, or the complete phase-out of the BNAF in FY 2011 that was previously promulgated in the August 8, 2008 FY 2009 Hospice Wage Index final rule.

The history of the BNAF and a detailed discussion of the events which led to its application to the hospice wage index were included in the August 8, 2008 FY 2009 Hospice Wage Index final rule. We proposed and finalized the BNAF reduction in that final rule based on the following rationale.

First, the original purpose of the BNAF was to prevent reductions in payments to the majority of hospices whose wage index was based on the original hospice wage index, which was artificially high due to flaws in the 1981 BLS data. Additionally, the BNAF was adopted to ensure that aggregate payments made to the hospice industry would not be decreased or increased as a result of the wage index change. While incorporating a BNAF into hospice wage indices could be rationalized in 1997 as a way to smooth the transition from an old wage index to a new one, since hospices have had plenty of time to adjust to the then new wage index, it is difficult to justify maintaining in perpetuity a BNAF which was in part compensating for artificially high data to begin with.

Second, the new wage index adopted in 1997 resulted in increases in wage index values for hospices in certain areas. The BNAF applies to hospices in all areas. Thus, hospices in areas that would have had increases without the BNAF received an artificial boost in the wage index for the past 11 years. We believe that continuation of this excess payment can no longer be justified.

Third, an adjustment factor that is based on 24-year-old wage index values is not in keeping with our goal of using a hospice wage index that is as accurate, reliable, and equitable as possible in accounting for geographic variation in wages. We believe that those goals can be better achieved by using the pre-floor, pre-reclassified hospital wage index, without the outdated BNAF, which would be consistent with other providers. For instance, Medicare payments to home health agencies, that utilize a similar labor mix, are adjusted by the pre-floor, pre-reclassified hospital wage index without any budget neutrality adjustment. We believe that using the pre-floor, pre-reclassified hospital wage index provides a good measure of area wage differences for both these home-based reimbursement systems.

Fourth, in the 13 years since concerns about the impact of switching from an old to a new wage index were voiced, the hospice industry and hospice payments have grown substantially. Hospice expenditures in 2006 were $9.2 billion, compared to about $2.2 billion in 1998. Aggregate hospice expenditures are increasing at a rate of about $1 billion per year. MedPAC reports that expenditures are expected to grow at a rate of 9 percent per year through 2015, outpacing the growth rate of projected expenditures for hospitals, skilled nursing facilities, and physician and home health services. We believe that this growth in Medicare spending for hospice indicates that the original rationale of the BNAF, to cushion the impact of using the new wage index, is no longer justified. These spending growth figures also indicate that any negative financial impact to the hospice industry as a result of eliminating the BNAF is no longer present, and thus the need for a transitional adjustment has passed.

Fifth, 13 years ago the industry also voiced concerns about the negative financial impact on individual hospices that could occur by adopting a new wage index. In August 1994 there were 1,602 hospices; currently there are 3,328 hospices. Clearly any negative financial impact from adopting a new wage index in 1997 is no longer present, or we would not have seen this growth in the industry. The number of Medicare-certified hospices has continued to increase, with a 26 percent increase in the number of hospice providers from 2001 to 2005. This ongoing growth in the industry also suggests that phasing out the BNAF would not have a negative impact on access to care. Therefore, for these reasons, we believe that continuing to apply a BNAF for the purpose of mitigating any adverse financial impact on hospices or negative impact on access to care is no longer necessary. In the April 24, 2009 proposed rule, we stated that we intended to continue the phase-out of the BNAF with a 75 percent reduction in FY 2010 and complete elimination in FY 2011.

Comment: All but one of those who commented on the BNAF were opposed to the BNAF phase-out. One commenter felt that any reductions in payment, such as the BNAF, need to be in ''sync'' with overall health care reform as it relates to hospice. Others felt that any phase-out should be delayed to see if or how the BNAF fits into future hospice payment reform. Another commenter noted inconsistent levels of per-capita health care spending across states, particularly at the end of life.

One commenter believed that CMS proposed to reduce the BNAF by 75 percent in the FY 2010 hospice wage index proposed rule, and believes that this proposal is contrary to the intent of Congress. This commenter believed that the provision in ARRA which eliminated the FY 2009 25 percent BNAF reduction, showed that Congress intended CMS to delay the first year of the three-year BNAF phase-out to begin the 25 percent reduction of the BNAF in FY 2010 instead of FY 2009. While this commenter strongly recommended that CMS withdraw its proposal to phase out the BNAF, he also suggested that at a minimum we should spread the phase out over a 3-year period, starting in FY 2010 with a 25 percent reduction. A number of commenters also suggested different phase-out options from the current policy that we described in the proposed rule. One suggested a 7-year phase-out, with a 10 percent reduction in FY 2010, and an additional 15 percent reduction over each of the following 6 fiscal years. Another suggested a 4-year phase-out, at 25 percent per year, starting in FY 2010. Another suggested that we phase out the BNAF over 2 years, at 50 percent per year, starting in FY 2010. Another commenter suggested an even phase-out over 3 years starting in FY 2010. Several commenters noted that a more gradual phase-out would minimize the impact on hospices given the economic downturn, and the increased costs that hospices would incur in complying with the new CoPs, which were published on June 5, 2008 (73 FR 32088) and effective December 2, 2008; and with the new data collection requirements.

Response: The FY 2010 hospice wage index proposed rule did not re-*propose* the 75 percent BNAF reduction, though we did accept comments on the BNAF reductions. Instead, we promulgated the

BNAF reductions in the FY 2009 hospice wage index final rule. At that time, we announced a 25 percent reduction in FY 2009, an additional 50 percent reduction for a total of 75 percent in FY 2010, and complete elimination of the BNAF in FY 2011. ARRA eliminated the BNAF reduction in FY 2009, but the bill's language did not address the reduction in FY 2010 and the elimination of the BNAF in FY 2011 that were finalized in the FY 2009 hospice wage index final rule. Though the BNAF phase-out was finalized in the FY 2009 rule, we accepted comments on it in this rule. While we explained in the FY 2010 hospice wage index proposed rule that ARRA's delay allowed additional time to prepare for the BNAF reduction, ARRA's delay was not our rationale for the 75 percent reduction. Our rationale for the BNAF phase-out was presented in the FY 2009 hospice wage index proposed and final rules and was discussed above.

We appreciate the commenters' concerns about how the BNAF phase-out would fit into the larger scenario of health care reform. Health care reform is a major agenda item for the Administration, and may affect the Medicare hospice benefit. We are not clear what the commenter is referring to regarding inconsistent health care spending by state, and believe this comment is outside the scope of our rule. While we cannot speak to the various health care reform measures under discussion in Congress, we continue to believe that the BNAF is an outdated adjustment, for the reasons previously mentioned in this section. However, we concur with the commenter that we should evaluate the impact of the BNAF reduction in the context of how this type of adjustment will fit into our plans for future hospice payment reform.

A more gradual phase-out provides additional opportunity to evaluate the impact of the BNAF reduction in the context of how this type of adjustment will fit into hospice payment reform. As we describe in section IV of this final rule, we are moving forward with our plans to collect additional data from hospices to advance our goals for increasing the accuracy of hospice payments. This longer BNAF phase-out allows us the opportunity to more thoroughly assess the impact of iterative BNAF reductions while we are performing our hospice payment reform analyses. As such, we believe that a more gradual phase-out would be appropriate at this time. Therefore, in response to public comments recommending this course of action, we are finalizing a phase-out of the BNAF over 7 years, with a 10 percent reduction in FY 2010, and additional 15 percent reduction for a total of 25 percent in FY 2011, an additional 15 percent reduction for a total 40 percent in FY 2012, an additional 15 percent reduction for a total of 55 percent in FY 2013, an additional 15 percent reduction for a total of 70 percent in FY 2014, an additional 15 percent reduction for a total of 85 percent in FY 2015, and an additional 15 percent reduction for complete elimination in FY 2016. We will continue to evaluate the impact of the BNAF. To move reform forward, we look to the industry for their participation (for example, in providing technical assistance and/or offering to serve as pilot or demonstration sites in testing a new payment system). We reserve the right to revisit the BNAF phase-out should plans for hospice payment reform be delayed, or for other reasons the Secretary deems appropriate.

Comment: One commenter wrote in support of the BNAF reduction, citing possibly fraudulent behaviors by a specific hospice, and citing what the commenter believed to be inappropriate spending by that hospice, including trips to Las Vegas and dinners at five-star restaurants.

Response: We appreciate the support for the BNAF phase-out, but note that we proposed and finalized the phase-out based on the rationale presented earlier in this section. We cannot comment on the discretionary spending patterns of individual hospices. We have forwarded the comment to our Program Integrity group for review and possible action.

Comment: A commenter believes that the BNAF phase-out was advanced to meet short-term budget goals, without collecting and analyzing data to determine if substantive changes to the hospice payment system were needed, and how any proposed changes would affect hospice programs and beneficiaries. He added that MedPAC had made recommendations related to reform of the hospice payment system, and that MedPAC had suggested that those changes be undertaken in a budget neutral fashion, with a transition period, and that the changes would require Congressional action. The commenter wrote that MedPAC had pointed out the lack of sufficient data to accurately model payment changes, and suggested that those changes could not be implemented before 2013 at the earliest. The commenter felt that the payment reduction resulting from the BNAF reduction would disproportionately impact some segments of the hospice community more than others and that CMS did not have the data to determine whether improvements in the rate structure could be made, and what such changes should look like. The commenter felt that implementing an across-the-board cut is inappropriate and unfounded. Some asked that no reduction in the BNAF occur until a full review of the data related to the cost of providing services is completed. Finally, one commenter suggested we do a full study of the utility and efficacy of hospice.

Response: MedPAC's discussion of payment reform refers to an evaluation of and possible change to the entire hospice payment system. We agree with MedPAC's assessment that we do not have sufficient data yet to reform the entire hospice payment system, which would require legislative authority to do, and we are in the process of collecting the data that MedPAC has recommended. The BNAF phase-out was not included in MedPAC's discussion on reform of the entire hospice payment system. We proposed and finalized the policy to phase out the BNAF to remove an outdated adjustment from the wage index, to increase accuracy of payments, and to bring about parity with the home health wage index, since both home health agencies and hospices compete in the same labor market.

The rationale for the BNAF phase-out in the FY 2009 proposed and final rules is set out in section II.A.3 of this final rule. Discussion of the regulatory and economic impacts of the BNAF phase-out were set out in the FY 2009 proposed and final rules, in the FY 2010 proposed rule, and are in this final rule.

Comment: Several commenters wrote that CMS should use negotiated rulemaking to collaborate fully with hospice stakeholders before reducing or eliminating the BNAF. Some commenters noted that there is no requirement to phase out the BNAF, and that the negotiated rulemaking was not intended to be temporary or transitional. Several suggested that the BNAF should not be phased out without going through a negotiated rulemaking process. One commenter noted that CMS never suggested that the BNAF had ever been calculated inappropriately or that it was not achieving its intended goal of keeping total hospice payments under the new wage index the same as they would have been under the old BLS wage index. This commenter wrote that since the BNAF is achieving its intended purpose, CMS has no legal requirement or policy reason to eliminate it. This commenter also wrote that CMS insists on budget neutrality in all of its payment systems, and therefore

the public expected the BNAF implemented by the Committee to continue.

Other commenters stated that while CMS asserted that the purpose of the BNAF was to smooth the transition from an outdated BLS-based wage index to the hospital-based wage index in 1998, the language in several payment rules suggested that the BNAF was not a time limited adjustment and was to be applied annually, during and after the transition to the hospital-based wage index. A few commenters noted that hospices have adjusted to the BNAF as an integral part of the wage index. A commenter said CMS' rationale for phasing out the BNAF suggested that eliminating the BNAF would restore fairness to the hospice wage index, when in reality no wage index methodology is perfect.

Response: As we stated in the FY 2009 proposed and final rules, we continue to believe that the hospice wage index negotiating committee intended the BNAF to mitigate the negative financial impact of the 1998 hospice wage index change. We continue to believe that because of the growth in the industry and the amount of time that has passed since the wage index change, the rationale for maintaining the BNAF is no longer justified and it is time for a policy change. In addition, from a parity perspective, we believe that a pre-floor, pre-reclassified hospital wage index is appropriate for use in adjusting rates for geographic variances in both of our home-based benefits, hospice and home health. Nothing in our data analysis has shown us that hospice labor costs differ substantially from home health labor costs. Therefore, we believe we cannot justify the 6 percent increase in the hospice wage index and the corresponding approximate 4 percent increase in aggregate payments as a result of the BNAF. We believe that the BNAF was originally put into place protect beneficiary access to hospice care. We believe the Negotiated Rulemaking Committee was primarily concerned about those areas of the country that would see their payments dramatically reduced as a result of the wage index change. The Committee was concerned that the payment reductions might affect the viability of hospices in these areas, thus ultimately risking access to care. The Committee also intended that aggregate payments to hospices not be reduced as a result of the wage index change. While we agree with the commenter that our 1998 regulation describes that the BNAF be applied during and after the transition to the new wage index, we also note that that same regulation describes that in the event that we decide to change this methodology, we would propose to do so in rulemaking. In the beginning of this section of the FY 2010 hospice wage index final rule, we cited our rationale from the FY 2009 hospice wage index final rule as to why we believe a policy change was warranted. However, as noted previously, we are phasing out the BNAF more gradually, over a 7 year period. We are reducing the BNAF in FY 2010 by 10 percent, and then reducing it further by an additional 15 percent for each of the next 6 years, so that it is fully phased-out by FY 2016. We will evaluate the impact of the BNAF reduction in the context of how this type of adjustment will fit into our plans for future hospice payment reform. As such, we believe that a more gradual phase-out is appropriate at this time.

As previously noted, the decision to transition from the BLS-based wage index to the hospital-based wage index was a long process. In the October 14, 1994 proposed rule (59 FR 52130), we noted that both CMS (formally HCFA) and industry projections indicated that most hospices would have their wage indices lowered if a new wage index were based on unadjusted hospital data. The preamble of the final rule stated that, ''During the discussions preliminary to developing a new wage index, the industry voiced concerns over the adverse financial impact of a new wage index on individual hospices and a possible reduction in overall Medicare hospice care payments'' (59 FR 52130). There were also concerns that access to hospice care could be affected. We noted that as a result of the impact of the lower payments to hospices in the aggregate, the new wage index would have to be at least budget neutral (59 FR 52131). The Committee Statement of April 13, 1995, which was published in a notice on November 29, 1995 (60 FR 61265), said that we would apply a factor to achieve budget neutrality, and noted that budget neutrality meant that aggregate Medicare hospice payments using the new hospital-based wage index would have to equal estimated payments that would have been made under the original hospice wage index.

We disagree with the commenter who wrote that Medicare insists on budget neutrality in all of its payment systems, and therefore we should keep the BNAF. The commenter is correct that in many (but not all) of our other payment systems, we apply a budget neutrality adjustment each year when a wage index change occurs to ensure that aggregate payments made using the new wage index are the same as payments made using the prior year's wage index. A wage index is essentially an index of wage weights which are relative to 1, reflecting relative geographic differences in labor costs. Because the hospital wage data are updated each year, and these are the usual data upon which our wage indices are built, the year-to-year change in total Medicare benefit payments is minor. The yearly update enables the relative weight values of the wage indices to reflect current geographic wage fluctuations. The hospice budget neutrality adjustment factor differs from these budget neutrality adjustments in a significant way. Because the original, 1981 Bureau of Labor Statistics based hospice wage index wasn't updated since it was first created, the relative weights of the wage index values became inaccurate over the years, ultimately resulting in inaccurate hospice payments in most areas of the country, and erroneously low payments in other areas of the country. By the mid-1990s the weights were so distorted and inaccurate, that we were paying hospices more in the aggregate than we would have paid had a wage index which was reflective of more current geographic wage variances in labor costs been used, such as the yearly updated hospital wage index. This inaccuracy resulted in an unintended increase in payments. By continuing to apply the BNAF in perpetuity, we are no longer simply adjusting hospice payments for differences in geographic variances in labor costs; rather we are perpetrating artificially-inflated payments associated with inaccurate wage weights.

As we described in the rationale provided at the beginning of this section, we do not believe that the Committee foresaw the tremendous growth in the hospice industry that has occurred in the past 12 years. As a result of this growth, the surge of new entrants into the industry over the past 12 years has benefited from this adjustment. We continue to believe that the Committee adopted the BNAF to help existing hospices transition to the 1998 wage index change. We note that in the late 1990's almost all hospices were not-for-profit. Impact analysis performed by participants in the negotiating process showed pockets of the country where the migration to the new hospital wage index would result in wage index values dramatically decreasing nearly 30 percent during the 3-year transition. The Committee was clearly concerned about hospice viability in those areas of the country, with a corresponding concern about access to care. We continue to believe that the unique BNAF

methodology, coupled with the 3-year transition period, served to address those concerns. It also continues to be our belief that because of the growth in the number of hospices, and the growth in the beneficiaries served that has occurred during the last decade, the Committee's goal to ensure that access to hospice care not be reduced as a result of the wage index change has been achieved. Therefore, we believe that this unique methodology for achieving budget neutrality has served its purpose and is no longer necessary, and we are phasing out this adjustment.

We agree with the commenter that the language in the August 8, 1997 final rule indicated that the BNAF would be applied during and after the transition period (62 FR 42862), which we believe we have done; however, this language did not imply that the BNAF could never be changed or eliminated. That same final rule clearly stated that if it became necessary to change the wage index methodology, we would do so through notice and comment rulemaking (62 FR 42863).

Comment: A commenter wrote that CMS tried to diminish the size of the BNAF reduction by noting that they will be ''mitigated'' by market basket updates. The commenter said that market basket updates are essentially cost of living increases intended to keep providers' payments in line with increased costs. The commenter felt that by doing away with the BNAF through a regulatory process, CMS is essentially eliminating the hospice payment update, and then making a further cut, and making an end-run around the congressionally-established payment system for hospice services. He added that CMS had implemented the BNAF phase-out without seeking input from knowledgeable stakeholders, including Congress, and without relying on a deliberative and inclusive process, over a short three-month timeframe.

Response: The commenter appears to suggest that, because Congress has determined that hospice payment *rates* are to be increased each year by the market basket update factor, it therefore follows that hospice *payments* must increase each year by the same percentage. We disagree, and believe that the commenter is looking at the market basket update alone, when instead Medicare payments to hospices are affected by other things—including the hospice wage index. Calculating the hospice payment rates for the four types of hospice services is merely the first step in determining how much hospices will be paid for services in any particular year. Once those rates are determined (by taking the prior year's rates and adjusting them by the market basket update factor), we apply the hospice wage index to the labor component of the payment rate. The values in that index change from year to year based on data CMS collects regarding hospital wages in different labor markets. Some hospices end up being paid at a rate lower than what they would have received based solely on the market basket update factor, while some end up being paid at a higher rate. These fluctuations occur every year, and they would continue to occur regardless of whether or not we phase out the BNAF. By requiring the hospice payment rates to be adjusted annually using the market basket update factor, Congress was not guaranteeing that hospices, individually or in the aggregate, would always receive an identical adjustment in payments. On the contrary, although Congress imposes a statutory cap on payments and sets the payment rates for the four categories of hospice services (based on the market basket update factor), it otherwise gives the Secretary the exceedingly broad authority to develop (and revise as necessary) the administrative tools used to calculate actual hospice payments under Medicare. *See* Section 1814(i)(1)(A) of the Act (''[T]he amount paid to a hospice program with respect to hospice care for which payment may be made under this part shall be an amount equal to the costs which are reasonable and related to the cost of providing hospice care or which are based on such other tests of reasonableness as the Secretary may prescribe in regulations * * *''). Following the commenter's reasoning, the Secretary would be prohibited from taking any action that would result in hospices receiving less than what they would receive if the adjusted rates (*i.e.,* with the market basket update factor applied) were applied with no further modification. Indeed, we would be prohibited from using the wage index entirely, because using that index necessarily means that some hospices will receive less in payments than they would if the market basket update-adjusted rates were applied without further alteration. While we have on occasion sought industry input before proposing changes, we are not required to seek stakeholder input beyond that of providing a comment period.

Comment: A commenter wrote that CMS justified phasing out the BNAF in part because the combination of increases in the wage index in certain areas with the BNAF led to an artificial boost in the wage index for the past 11 years, which CMS concluded was an excess payment. While this commenter disagrees that some hospices received an ''artificial boost'' in payments due to the BNAF, this commenter suggested that CMS change the methodology for the limited number of hospices that CMS believes benefited unduly from the ''artificial boost'' given by the BNAF. This commenter felt that CMS has failed to analyze the impact of the elimination of the BNAF on hospices and on Medicare beneficiaries in need of hospice services. The analysis should evaluate the current role and impacts of the BNAF phase-out in light of the other elements of the hospice wage index, and how those elements have changed over time, and the effects of those changes. As an example, this commenter noted that hospitals are allowed geographic reclassifications which hospices are not, and CMS has not shown whether and to what extent hospices are disadvantaged by this.

Response: We continue to believe that applying the BNAF to the hospital-based wage index does not accurately, account for geographic variances in hospice labor costs. When the hospice industry changed from the BLS-based wage index to the pre-floor, pre-reclassified hospital wage index, it began using more accurate, more current data which are updated annually. When that transition occurred, there were hospices whose wage index value increased, but many hospices saw their wage index value decrease. This is because the BLS-based wage index values, which were applied to hospice payments, were artificially high in some areas of the country. The Committee itself acknowledged that the BLS data were ''inaccurate and outdated'' in its Committee Statement (62 FR 42883). The hospital-based wage index was considered more accurate by the Committee, even though its wage index values were lower for many hospices. Therefore before the transition to the hospital-based wage index, many hospices were receiving payments that were inflated due to the artificially high BLS-based wage index.

In addition, the BNAF was put into place to mitigate the potential adverse financial impact to hospice providers of changing wage indices, since the change would lead to a reduction in payments, which could threaten access to care. However, as we previously described in the comment above, the BNAF has been applied not only to those hospices that were in existence at the time of the wage index change, but also to those new hospices that were established after 1998. We continue to believe that these new entrants have received an artificial boost to their payments as a result of the

BNAF, which was not the intent of the negotiating committee.

As noted above, because of the inaccurate and outdated nature of the BLS-based wage data, those payments would also be inaccurate, and CMS must do its best to ensure the accuracy of Medicare payments. Therefore we believe that it is appropriate to phase-out the BNAF for all hospices, and not just those who are new entrants, or whose wage index values did not drop with the shift to the hospital-based wage index.

The payment reduction which would occur as a result of a BNAF phase-out applies equally to all hospices except for providers eligible for the hospice floor calculation. That calculation lessens the effect on those providers eligible for the floor, which are typically in rural areas.

There are no statutory provisions that explicitly permit entities other than hospitals to reclassify. We note that sections 1886(d)(8)(B) & 1886 (d)(10) of the Social Security Act explicitly permit hospitals to seek reclassification. By contrast, no language in Section 1814(i)(1)(A) of the Act provides any indication that Congress intended hospices to reclassify. Our regulations at 42 CFR 418.306(c) state only that CMS will issue annually, in the **Federal Register**, a hospice wage index based on the most current available CMS hospital wage data, including changes to the definitions of Metropolitan Statistical Areas.

As noted previously, we are assessing the impact of the BNAF phase-out more slowly, due to the more gradual 7-year phase-out which is being finalized in this rule.

Comment: A few commenters mentioned that CMS had said in 2008 that since hospices and home health agencies use a similar labor pool, and since the home health wage index does not include the BNAF, this further supports phasing out the BNAF. The commenter wrote that there are significant differences between hospice and home health, and said that the issue is the difference in the payment systems. The commenter wrote that it is inappropriate to assume, without any analysis, that the absence of a BNAF in the home health wage index is evidence that the BNAF can and should be eliminated from the hospice wage index, and that do so would result in a more accurate and equitable payment methodology.

Response: There are differences in the home health and hospice payment systems. However, the purpose of a wage index is to account for geographic variances in labor costs, regardless of the system used to reimburse those costs, along with non-labor costs. As we described in our FY 2009 proposed and final rules, we believe that there should be a level playing field for recruiting and retaining staff for home-based benefits such as hospice and home health. Because hospices and home health agencies share labor pools, we believe that there should be consistency in the wage index used by both these home-based benefits. Nothing in our data analysis has shown us that hospice labor costs differ substantially from home health labor costs, making it difficult to justify the BNAF which provides a 6 percent increase in the hospice wage index, which equals about 4 percent more in payments over the payments otherwise applicable. We continue to believe that the pre-floor, pre-reclassified hospital wage index provides a good measure to account for geographic variances in labor costs for both these home-based benefits. Home health agencies also experience annual fluctuations in the hospital wage index values, however, they do not receive a BNAF adjustment. Phasing-out the BNAF enables us to achieve this consistency.

Comment: Several commenters stated that CMS has concluded that the growth in the hospice benefit was due to the BNAF, in order to justify its elimination. The commenters noted a number of factors that have contributed to the hospice industry's growth, including an increased number of beneficiaries using the benefit, longer lengths of stay, increased acceptance of hospices for end-of-life care by the physician and patient/family communities, changes in the mix of patients using hospice, and educational efforts by providers and by CMS to beneficiaries and health care providers. One commenter noted that the number of Medicare certified hospices had decreased from the 3,255 reported by CMS in December 2008 to the 3,206 hospices reported as of January 29, 2009. Another commenter stated that hospice is a small portion of all Medicare spending.

Response: We disagree with the comment that we concluded that the growth in the hospice industry was due to the BNAF or that the BNAF reduction is a reaction to the growth in hospice reimbursements. However, the commenters correctly noted several factors that have contributed to industry growth. In our FY 2009 proposed and final rules, we indicated that the BNAF phase-out was not a reaction to that growth—in the proposed rule, rather we stated that the BNAF was put in place to mitigate any adverse financial impact that then-existing individual hospices might have experienced as a result of transitioning to the new hospital-based wage index in 1998. We note that industries do not typically expand and grow during times of financial adversity; often there is industry contraction instead. We stated that the growth in the industry is an indication that any adverse financial effects of transitioning to a new wage index had ended.

We disagree with the commenter who believes that the numbers of Medicare-certified hospices have decreased, and can explain the differences in the figures which might lead to that conclusion. The report from Data Compendium dated December 2008 showed Medicare-certified hospices; these data are drawn from survey and certification records. The data in the impact tables in our wage index proposed and final rules are also originated from survey and certification data, but those data are limited to those Medicare-certified hospices which have filed claims. Because of the time allowed for claims to be submitted and for the claims files to be finalized, the claims files used in proposed and final rules typically lag. Therefore, the data presented in the impact tables in our proposed and final rules show the numbers of Medicare-certified hospices which have filed claims, and are typically less than the numbers which the survey and certification system reports, which simply show the number of Medicare-certified hospices. That number often increases between the proposed and final rules, since we receive updated claims information which we use for the final rule. Additionally, with respect to newly-certified Medicare hospices, there may be a lag between certification and submission of Medicare claims. Thus, the total number of Medicare-certified hospices may legitimately be greater in number than the number of Medicare-certified hospices that submit Medicare hospice claims in a given year.

To make a proper comparison, one must either compare impact table data for one year to impact table data for another year, or compare survey and certification data without ties to claims filed for one year to survey and certification data without ties to claims filed to another year. For example, the Table 1 of this FY 2010 final rule shows that there are 3,328 hospices. We used January 29, 2009 survey and certification data, but tied it to FY 2008 claims as of March 2009. In the FY 2009 final rule, there were 3,111 hospices; that rule tied February 2008 survey and certification data to FY 2007 claims as of March 2008. Based on these data, the number of hospices increased by 217,

which represents a 7 percent increase from 2008 to 2009.

We agree that hospice spending relative to all Medicare spending is a small portion that will account for an estimated 2.3 percent of Medicare spending overall in FY 2009. The growth in hospice spending has outpaced the rate of growth for other Medicare provider types, and the CMS Office of the Actuary projects that it will continue to do so over the next decade. Furthermore, CMS has a responsibility to safeguard trust fund dollars by paying accurately and appropriately for all Medicare services.

Comment: Several comments suggested other ways that CMS could save Medicare dollars without phasing out the BNAF. Many commenters said that we should encourage more patients to elect hospice care, and cited a Duke University study which found that hospice can save Medicare money at the end of life; one suggested we focus on assisting physicians and hospitals in providing more education about hospice. Several suggested we target fraud and abuse. One commenter suggested we target the for-profit hospices whose practices have inappropriately raised Medicare costs, rather than making a payment reduction which impacts non-profits and for-profits equally. A commenter also suggested we focus payment reductions on hospices with aberrant lengths of stay. Other commenters felt that phasing out the BNAF penalizes hospices that do the right thing with a substantial rate cut because large for-profit hospices have managed to ''game'' the system. Several commenters felt that rather than addressing potential abuses, CMS is choosing to implement across-the-board actions without regard to the impact on the lowest and most efficient end of the provider spectrum, or on access. A commenter wrote that instead of focusing on the root cause of increasing hospice expenditures (an aging population, quality services, increased understanding of the benefit, *etc.*), CMS is simply cutting reimbursement. One wrote that the rationale for payment reduction seems at odds with a careful and thoughtful consideration of changes in the payment approach that will best serve hospice patients, agencies, and the Federal budget.

Response: We encourage eligible Medicare beneficiaries who would like to receive hospice care to consider electing the benefit. We also support educational outreach to all provider types to increase understanding of the benefits associated with hospice care. We believe that hospice provides quality, compassionate care for those at the end of life, and often does so in a cost-effective fashion. We agree that hospice can save Medicare dollars, though it does not always do so.

The BNAF phase-out was not promulgated because of growing hospice expenditures, although those expenditures did suggest a favorable business climate for the hospice industry. We are aware that those rising expenditures also indicated increasing numbers of eligible beneficiaries and increasing understanding and use of the benefit which we have encouraged. The BNAF phase-out was also not promulgated as a means of limiting fraud or abuse or of recovering dollars due to questionable or inappropriate practices by some hospices. Rather, our rationale for promulgating the BNAF phase-out is the same as that described in the FY 2009 proposed and final rules, and is included at the beginning of this section of the FY 2010 hospice wage index final rule. The rationale was carefully considered as part of a thoughtful process. We determined that a special adjustment which was adopted to mitigate the impact of wage index change in 1998, which results in a greater than 4 percent annual aggregate increase in payments over what would have been paid otherwise, could not continue to be justified. We recognize that the BNAF reductions affect providers equally unless the providers are eligible for the hospice floor calculation, in which case the reductions may have less effect. The hospice floor calculation limits the impact that the BNAF reduction can have on some smaller, rural providers. As noted previously, we are phasing out the BNAF more gradually, reducing it in FY 2010 by 10 percent instead of by 75 percent, as promulgated in the FY 2009 final rule and as presented in the FY 2010 hospice wage index proposed rule. We will continue the phase-out over the next 6 years, at an additional 15 percent each year. We will evaluate the impact of the BNAF reduction in the context of how this type of adjustment will fit into our goals for future hospice payment reform. As such, we believe that a more gradual phase-out is appropriate at this time.

The impact of the 10 percent BNAF reduction for FY 2010 is shown in section VII of this final rule.

Regarding the comment about targeting some for-profit hospices for a payment reduction, we typically do not adjust payments based on type of ownership, and do not have the statutory authority to do so, nor do we believe that such an approach is appropriate.

We believe that the vast majority of hospices provide care to their patients in a legal and ethical fashion that is not fraudulent or abusive of Medicare or its requirements. However, we realize that there is a small minority of providers who engage in fraud or abuse, and we remind commenters that they can report suspected fraud or abuse to the Office of the Inspector General at 1–800–HHS–TIPS or to the Medicare Customer Service Center at 1–800–MEDICARE.

After considering the comments received and alternate phase-out scenarios provided by commenters, we are finalizing the FY 2010 hospice wage index final rule with a BNAF which has been reduced by 10 percent, rather than continuing with the 75 percent reduction which was promulgated in the FY 2009 hospice wage index final rule, and planned for FY 2010. We are finalizing a 7-year phase-out, with a 10 percent reduction in FY 2010, an additional 15 percent reduction for a total of 25 percent in FY 2011, an additional 15 percent reduction for a total of 40 percent in FY 2012, an additional 15 percent reduction for a total of 55 percent in FY 2013, an additional 15 percent reduction for a total of 70 percent in FY 2014, an additional 15 percent reduction for a total of 85 percent in FY 2015, and an additional 15 percent reduction for complete phase-out in FY 2016. We will continue to evaluate the impact of the BNAF reduction as we perform our hospice payment reform analyses.

We believe that a more gradual phase-out is appropriate given the hospice payment reform analyses which are underway; however, we reserve the right to change this phase-out timeframe through notice and comment rulemaking should hospice payment reform be delayed or for other reasons that the Secretary deems appropriate.

The unreduced BNAF for FY 2010 is computed to be 0.061775 (or 6.1755 percent). A 10 percent reduced BNAF, which is subsequently applied to the pre-floor, pre-reclassified hospital wage index values greater than or equal to 0.8, is computed to be 0.055598 (or 5.5598 percent). Pre-floor, pre-reclassified hospital wage index values which are less than 0.8 are subject to the hospice floor calculation; that calculation is described in section I.B.1.

The hospice wage index for FY 2010 is shown in Addenda A and B. Specifically, Addendum A reflects the FY 2010 wage index values for urban areas under the CBSA designations. Addendum B reflects the FY 2010 wage index values for rural areas under the CBSA designations.

4. Effects of Phasing Out the BNAF

The full (unreduced) BNAF calculated for FY 2010 is 6.1775 percent. As noted in the previous subsection, we are phasing out the BNAF over a total of 7 years. We are reducing the BNAF by 10 percent for FY 2010, with additional 15 percent reductions for each of the next 6 years. Therefore total phase-out will occur in FY 2016.

For FY 2010, this is mathematically equivalent to taking 90 percent of the full BNAF value, or multiplying 0.061775 by 0.90, which equals 0.055598 (5.5598 percent). The BNAF of 5.5598 percent reflects a 10 percent reduction in the BNAF. The 10 percent reduced BNAF (5.5598 percent) will be applied to the pre-floor, pre-reclassified hospital wage index values of 0.8 or greater in the FY 2010 hospice wage index.

The hospice floor calculation will still apply to any pre-floor, pre-reclassified hospital wage index values less than 0.8. Currently, the hospice floor calculation has 4 steps. First, pre-floor, pre-reclassified hospital wage index values that are less than 0.8 are multiplied by 1.15. Second, the minimum of 0.8 or the pre-floor, pre-reclassified hospital wage index value times 1.15 is chosen as the preliminary hospice wage index value. Steps 1 and 2 are referred to in this final rule as the hospice 15 percent floor adjustment. Third, the pre-floor, pre-reclassified hospital wage index value is multiplied by the BNAF. Finally, the greater result of either step 2 or step 3 is chosen as the final hospice wage index value. The hospice floor calculation is unchanged by the BNAF reduction. We note that steps 3 and 4 will become unnecessary once the BNAF is eliminated.

We examined the effects of a 10 percent reduction in the BNAF versus using the full BNAF of 6.1775 percent on the FY 2010 hospice wage index. The FY 2010 BNAF reduction of 10 percent resulted in approximately a 0.57 to 0.59 percent reduction in most hospice wage index values. The phase-out of the BNAF over the following 6 fiscal years at 15 percent per year will result in an additional estimated annual reduction of the hospice wage index values of approximately 0.9 percent per year.

Those CBSAs whose pre-floor, pre-reclassified hospital wage index values had the hospice 15 percent floor adjustment applied before the BNAF reduction would not be affected by this phase-out of the BNAF. These CBSAs, which typically include rural areas, are protected by the hospice 15 percent floor adjustment. We have estimated that 18 CBSAs are already protected by the hospice 15 percent floor adjustment, and are therefore completely unaffected by the BNAF reduction. There are over 120 hospices in these 18 CBSAs.

Additionally, some CBSAs with pre-floor, pre-reclassified wage index values less than 0.8 will become newly eligible for the hospice 15 percent floor adjustment as a result of the 10 percent reduced BNAF. Areas where the hospice floor calculation would have yielded a wage index value greater than 0.8 if the full BNAF were applied, but which will have a final wage index value less than 0.8 after the 10 percent reduced BNAF is applied, will now be eligible for the hospice 15 percent floor adjustment. These CBSAs will see a smaller reduction in their hospice wage index values since the hospice 15 percent floor adjustment will apply. We have estimated that 3 CBSAs will have their pre-floor, pre-reclassified hospital wage index value become newly protected by the hospice 15 percent floor adjustment due to the 10 percent reduction in the BNAF. This will affect those hospices with lower wage index values, which are typically in rural areas. There are 9 hospices located in these 3 CBSAs.

Finally, the hospice wage index values only apply to the labor portion of the payment rates; the labor portion is described in section I.B.1 of this final rule. Therefore the projected reduction in payments due to the updated wage data and the 10 percent reduction of the BNAF will be less than the projected reduction in the wage index value itself. We estimated a projected reduction in payments of −0.7 percent, as described in column 4 of Table 1 in section VII of this final rule. In addition, the estimated effects of the phase-out of the BNAF will be lessened by any hospital market basket updates to payments. The hospital market basket update for FY 2010 is 2.1 percent and will be officially communicated through an administrative instruction. The combined effects of the updated wage data, the 10 percent reduction of the BNAF and a hospital market basket update of 2.1 percent for FY 2010 is an overall estimated increase in payments to hospices in FY 2010 of 1.4 percent (column 5 of Table 1 in section VII of this final rule).

Comment: Many commenters wrote that they had already pared back expenses, and that they could not absorb any cuts, particularly with the present economic downturn; smaller providers and rural providers in particular said that they may not be able to survive the payment reduction. A number of commenters indicated that because of the economy, their hospices had already implemented a variety of spending reductions, including hiring or wage freezes, and a few said that they had already laid off some personnel. Some indicated that they would postpone hiring for vacant positions. Many also wrote that hiring and wage freezes, layoffs, and wage reductions would lead to higher caseloads, and likely lower the quality or quantity of services provided, as well as reduce morale. Some were concerned that they would lose nursing staff to hospitals if they could not pay nurses competitively. One wrote that when the upswing finally comes, it will be difficult to hire and train quality employees in a timely manner, adding to staffing costs overall.

Many commenters, particularly in rural areas, said that a payment reduction would force them to reduce their service area, leaving some rural beneficiaries without access to any hospice care. One commenter noted that smaller hospices generally provide better, more personal care, but if they cannot survive, only large hospices will remain in business; this commenter felt that patients and families will have lower quality care as a result. Others noted that they would cut back services provided, and mentioned that bereavement programs, outreach programs, proven alternative therapies, staff training, and volunteer training would be targeted. A number of commenters felt that the BNAF reduction would ultimately increase Medicare costs, as patients in a crisis would go to the hospital if hospice staffing was too low to respond quickly, or if patients lost access to care and were forced into other post-acute settings or into hospitals at the end of life.

One commenter reported that hospices had also postponed a planned expansion of services or of facilities. This commenter mentioned the closure of an inpatient unit or consolidation of offices as other cost cutting measures taken due to the economic climate. Multiple commenters wrote that a payment cut would force them to lay off workers, which is contrary to the Obama Administration's stated goal of preserving jobs and stimulating growth. A few stated that ARRA's delay of the FY 2009 BNAF reduction saved 3,000 jobs, and that these jobs will be at risk if the BNAF reduction is implemented for FY 2010.

Several commenters also indicated that donations usually help them to meet their expenses, but that with the recession and stock market decline, their donors had less to give; they wrote that donations were greatly reduced and fundraising was more difficult. As a

result, some said they were already operating with negative margins. Several commenters said that small or medium hospices would be more affected than larger hospices, and that their margins could not absorb greater expenses or a payment reduction. Some cited MedPAC's margin analysis, which showed average hospice margins at 3.4 percent, stating that they could not survive the 3.2 percent payment reduction reported in the FY 2010 proposed rule. A few noted that for some, the payment reduction is far greater than 3.2 percent, citing 5 percent or 9 percent reductions overall for their CBSA.

Additionally, several commenters said that a payment reduction would force them to reduce or eliminate care to indigent patients and to the uninsured. They noted that they had previously accepted all patients without regard to ability to pay, and that their revenues from Medicare and from donations enabled them to absorb the costs of providing care to the uninsured; one commenter wrote that her hospice is ''mandated'' to accept all eligible patients, regardless of ability to pay. Given the economic climate, particularly the current unemployment rate, many felt that this was the wrong time to be reducing payments.

Response: While we are sensitive to the issues raised by commenters, and to the possible effects of the BNAF reduction, we continue to believe that we cannot justify an adjustment factor which was adopted to mitigate the impact of a 1998 wage index change, and which results in what we believe to be an inappropriate increase in overall hospice payments of approximately 4 percent annually over what would have been paid in absence of the BNAF. Therefore, for the reasons described in this FY 2010 hospice wage index final rule and in the FY 2009 hospice wage index final rule, we will phase out the BNAF. However, as noted in the previous section, given the efforts to reform the hospice payment system, we are finalizing a more gradual phase-out of the BNAF over 7 years. We believe it would be prudent to take additional time to evaluate the BNAF phase-out in the context of these reforms, in order to allow for further consideration of any consequences that might result from the phase-out.

Regarding MedPAC's margin analysis, we refer commenters to MedPAC's 2008 report entitled ''Report to the Congress: Reforming the Payment System'' [*http://www.medpac.gov/documents/Jun08_EntireReport.pdf*], which lists limitations of the analysis which could lead to an underestimation of hospice margins. In response to the commenters who believed that the impact of the BNAF reduction is greater in some areas, we note that the reductions in payments which exceed the 3.2 percent reported in our FY 2010 proposed rule impact summary are not due to the BNAF phase-out, but are due to the normal fluctuations in the pre-floor, pre-reclassified hospital wage index. The BNAF affects all hospices equally, except for those eligible for the hospice floor calculation (*i.e.,* hospices with pre-floor, pre-reclassified hospital wage index values less than 0.8). Those hospices which are eligible for the hospice floor calculation are either completely protected from the effects of the BNAF reduction, or will experience lessened effects. Most of these hospices are in rural areas.

We applaud hospices which provide care to the uninsured and to indigent patients. We note that Medicare hospice patients have nearly all of their hospice care paid for by Medicare; the co-payments for prescription drugs and for respite care are very small. This benefits all hospice patients, but particularly low income patients, as the out-of-pocket costs are minimal. We also note that hospices develop their own policies about taking eligible patients without insurance or the means to pay; Medicare does not ''mandate'' that hospices take all eligible patients regardless of ability to pay or insurance status.

Finally, the costs of complying with the new CoPs and with the data collection requirements are normal costs of doing business, for which hospices have had ample time to prepare.

Comment: One commenter wrote that the Negotiated Rulemaking Committee was familiar with the serious disruptions that could occur in the delivery of healthcare services through a change in the payment distribution methodology. The commenter felt that stability in delivery of hospice care is dependent on payment stability, which is lost if CMS phases out the BNAF. A few commenters wrote that we did not have enough data or data analysis to justify the elimination of the decade old BNAF, and felt that our eliminating the BNAF was arbitrary and capricious. One said that without a careful analysis of all the effects of the phase-out, phasing out the BNAF would be arbitrary and capricious and a violation of the Administrative Procedures Act. Some wrote that we had not carefully analyzed the impact of this action. One commenter wrote that historically, Congress has rejected the Administration's requests to reduce hospice reimbursement rates, understanding that any reduction in rate must necessarily reduce quality of care or access to care. This commenter felt that the 2009 NPRM is inconsistent with the legislative intent to maintain and ensure adequate hospice funding levels.

Response: We presented our rationale for the BNAF phase-out in the FY 2009 proposed and final rules and in section II.A.3 of this final rule. Commenters have argued that we have not considered the effects of reducing the BNAF on hospices; we disagree, and refer the commenters to the impact section of our rule, which set out detailed information on the effects of reducing the BNAF.

More than adequate access to hospice care was reported by MedPAC [*see* ''Report to the Congress: Reforming the Payment System'', chapter 8, available at *http://www.medpac.gov/documents/Jun08_EntireReport.pdf*], and suggests that a BNAF phase-out will not impede access to hospice care. Given this information, we continue to believe that a BNAF phase-out will not impede access to hospice care. Congress mandated the payment rates and the market basket updates. Congress did not mandate that we apply in perpetuity a special adjustment to the hospice wage index that has the effect of raising aggregate hospice payments by about 4 percent annually over what CMS would have paid absent the BNAF.

We appreciate the commenters' concerns regarding possible effects of a payment reduction. The BNAF affects all hospices equally, except for those eligible for the hospice floor calculation (*i.e.,* hospices with a pre-floor, pre-reclassified hospital wage index values less than 0.8). Those hospices which are eligible for the hospice floor calculation are either completely protected from the effects of a BNAF reduction, or experienced lessened effects. Most of these hospices are in rural areas.

We also do not believe that our actions in phasing-out the BNAF were arbitrary or capricious. We believe that the rationale and impacts provided in the FY 2009 and FY 2010 proposed and final rules are clear, and that we met all the requirements of the Administrative Procedures Act.

Comment: Many commenters wrote that this is the wrong time for a payment reduction due to rising costs, particularly gasoline. Rural providers in particular cited the rising cost of gasoline combined with service areas that cover thousands of square miles and generate significant mileage costs. Additionally, others wrote that the 1983 per diems were not designed to cover the costs of technology and of expensive palliative treatments, and said hospices couldn't afford a payment reduction on

top of that. Another wrote that hospices had had to spend more to implement the new Conditions of Participation and data collection requirements, but received no additional reimbursement to cover the cost of these changes. They felt that if the BNAF were phased out as described in the proposed rule, hospices would be subjected to multiple significant changes over a short period of time, and that too many reforms at once could have a negative impact on access to quality hospice services and relations operations. Others cited rising wages, benefit costs, and insurance costs.

Many commenters also felt that this was the wrong time to reduce reimbursement given the nation's demographics. Some expressed concern that access to hospice would be reduced if hospices could not survive the BNAF reductions or if they had to reduce their service areas, at a time when there are more baby boomers eligible for hospice. They noted that the demand for hospice would be increasing as the geriatric population increases, and one said she was disconcerted to hear of CMS' concern over the growing utilization of hospice. One wrote that demographers in his state projected more persons without caregivers in the home; less money for hospices erodes hospices' capacity to provide care, and may lead to an increase in costly nursing home stays.

A few noted that a payment reduction was inconsistent with the health care reform being discussed in Washington, as hospice saves Medicare money and should be supported and expanded. Many commenters noted that a study done at Duke University has shown that hospice is cost-effective, and saves Medicare dollars overall while providing quality end-of-life care. A commenter also referred to the Dartmouth Atlas Report (2008) which found that hospices were the only post-acute provider to significantly reduce hospitalizations. Another commenter wrote that if patients could not access hospice and end up in hospitals, it would burden an already strained hospital healthcare delivery system. Two commenters suggested we also consider the ''secondary savings'' that hospice brings by positively affecting conditions unrelated to the patient's terminal diagnosis, by benefitting the physical and emotional health of the caregivers, and of the children of hospice patients.

Response: We appreciate the commenters' concerns about rising costs and about access to hospice care. We understand that costs are rising and that it is vital to preserve access to hospice care for Medicare beneficiaries. The hospital market basket update which is used to update payment rates for all hospices includes an energy component that is sensitive to petroleum costs among other costs. It is reasonable to expect that future market basket updates will continue to account for any continuation of rising fuel costs.

In addition, we believe that the requirements associated with the CoPs and data collection are part of the cost of doing business, and that the industry has had ample time to plan and budget for these changes. We do not believe that these requirements will have adverse affects on admissions or services, but instead expect that the emphasis on quality and the increased awareness of visits provided could enhance services.

We believe that in a time of economic pressures, all businesses, including hospices, will seek to operate more efficiently. However, we plan to monitor the effect of the BNAF reduction to assess whether unanticipated effects occur.

We agree that the Medicare hospice benefit has been of tremendous benefit to those at the end of life and to their families, and applaud those who serve the dying as hospice staff and volunteers. We also agree that the hospice benefit often saves Medicare money, and appreciate the studies which have highlighted the areas where it provides costs savings to the Medicare program. However, hospice care does not save money in every instance. In their June 2008 report, MedPAC noted that ''hospice's net reduction in Medicare spending decreases the longer the patient is enrolled and beneficiaries with very long hospice stays may incur higher Medicare spending than those who do not elect hospice.'' (MedPAC, Report to the Congress: Reforming the Delivery System, chapter 8, ''Evaluating Medicare's Hospice Benefit'', MedPAC: Washington, DC, p. 209).

We agree that we should evaluate the impact of the BNAF reduction in the context of how this type of adjustment will fit into our goals for future hospice payment reform that could affect payment to hospices. As such, we believe that a more gradual phase-out would be appropriate at this time. For the reasons described above, we do not believe that hospice access will be impeded due to a 10 percent BNAF reduction, and therefore, do not believe that Medicare costs would be shifted from hospice to more expensive forms of care.

The hospice industry is growing and the demand for hospice services is likely to grow in the future, particularly with an aging population. CMS has encouraged hospice usage, and we expect the hospice benefit to continue to grow. We will monitor the impact of the BNAF phase-out for any unintended impact.

Comment: A few commenters wrote that any reductions in Medicare reimbursement will trickle down to the private sector and to Medicaid, affecting funding for care for all patients, not just those on Medicare. One wrote that CMS had not considered the effects of the BNAF reduction on Medicaid.

Response: Our Medicare payments are intended to be accurate and to adequately pay for resource use in providing care to Medicare patients. We do not develop Medicare payment policy to enable providers to offset the costs of non-Medicare patients. Indeed, the Act at section 1861(v)(1) prohibits providers subject to reasonable-cost payment from using Medicare funds to subsidize care for non-Medicare patients.

We received several comments which were outside the scope of this rule, and which we are set out below.

Comment: A commenter wrote that in addition to payment reductions that would result from the elimination of the BNAF, hospices may also be faced with cuts imposed through the productivity adjustment factor proposed in the draft health reform bill being circulated by the House of Representatives.

Response: Because this comment concerns potential future legislative changes, this comment is outside the scope of this rule. Therefore we are unable to respond.

We received several other comments which were outside the scope of this rule, and which are set out below. However because they are related to hospice payments, we will briefly address them.

Comment: A few commenters requested that CMS conduct a study to determine the appropriate hospice per diem for services to rural areas.

Response: This comment is outside the scope of this rule, however we will address it briefly. Medicare pays one of four daily rates to hospice providers, based on the intensity level of care the patient requires. These per diem payment rates are the same, regardless of whether the services are provided in an urban area or a rural area. The hospice wage index, which includes a floor calculation which benefits many rural providers, is the vehicle we use to adjust for geographic variances in labor costs. In a time of high gasoline costs, we are sensitive to concerns from rural hospices that the additional time and distance required to visit a rural patient

adds significantly to their costs, and their assertion that payments are not adequate. However, an additional payment for rural providers, which is sometimes called a rural add-on payment, would have to be legislated. We will consider the situation of rural providers once we begin the process of hospice payment system reform.

Comment: One person suggested we rate all end-of-life care and fund only those hospices which provide excellent services.

Response: While outside the scope of this rule, we will consider this as we move forward hospice payment reform.

Comment: As alternative cost-cutting measures, a commenter suggested we regulate the standards of care, and ensure that providers follow the Conditions of Participation; another suggested more frequent surveys. Another suggested that unnecessary medical tests and procedures performed to avoid litigation and paid for by Medicare should be the target of funding cuts. One commenter suggested we eliminate the tax credit for not-for-profit nursing homes and hospices that don't embody that not-for-profit spirit, and make them pay taxes on their income. One suggested we focus on nursing home chains that create hospice chains solely for additional billing opportunities. Another suggested we go after providers who exploit the dying with false hope that curative measures will lengthen their lives or improve their quality of life. Two commenters felt that if the BNAF phase-out occurs, politicians would have excellent health insurance and hospice care, but that the average American would have bare-bones hospice coverage. A commenter wrote that we should require all hospices to be non-profits, so that more money goes to patient care.

Response: We appreciate these comments, but they are outside the scope of this rule.

B. Change to the Physician Certification and Recertification Process, § 418.22

The Medicare Payment Advisory Commission (MedPAC) has noted an increasing proportion of hospice patients with stays exceeding 180 days, and significant variation in hospice length of stay. MedPAC has questioned whether there is sufficient accountability and enforcement related to certification and recertification of Medicare hospice patients. Currently, our policy requires the hospice medical director or physician member of the interdisciplinary group and the patient's attending physician (if any) to certify the patient as having a terminal illness for the initial 90-day period of hospice care. Subsequent benefit periods only require recertification by the hospice medical director or by the physician member of the hospice interdisciplinary group. These certifications must indicate that the patient's life expectancy is 6 months or less if the illness runs its normal course, and must be signed by the physician. The medical record must include documentation that supports the terminal prognosis.

At their November 6, 2008 public meeting, MedPAC presented the findings of an expert panel of hospice providers convened in October 2008; that panel noted that while many hospices comply with the Medicare eligibility criteria, some are enrolling and recertifying patients who are not eligible.

The expert panel noted that there were several reasons for the variation in compliance. First, they noted that in some cases there was limited medical director engagement in the certification or recertification process. Physicians had delegated this responsibility to the staff involved with patients' day-to-day care, and simply signed off on the paperwork. Second, inadequate charting of the patient's condition or a lack of staff training had led some physicians to certify patients who were not truly eligible for Medicare's hospice benefit. Finally, some panelists cited financial incentives associated with long-stay patients. The panelists mentioned anecdotal reports of hospices using questionable marketing strategies to recruit patients without mentioning the terminal illness requirement, and of hospices failing to discharge patients who had improved or enrolling patients who had already been discharged or turned away from other hospices. Consensus emerged among the panelists that more accountability and oversight of certification and recertification are needed. MedPAC used the panel's input in making recommendations related to the certification process, which can be found in chapter 6 (''Reforming Medicare's Hospice Benefit'') of MedPAC's March 2009 report entitled ''Report to the Congress: Medicare Payment Policy'' which is available at *http://www.medpac.gov/chapters/Mar09_Ch06.pdf*.

We believe that those physicians that are certifying a hospice patient's eligibility can reasonably be expected to synthesize in a few sentences the clinical aspects of the patient's condition that support the prognosis. We believe that such a requirement, as suggested by the expert panel and by MedPAC, would encourage greater physician engagement in the certification and recertification process by focusing attention on the physician's responsibility to set out the clinical basis for the terminal prognosis indicated in the patient's medical record.

To increase accountability related to the physician certification and recertification process, we are making a change to § 418.22. Specifically, we are adding a new paragraph (b)(3) to § 418.22, to require that physicians that certify or recertify hospice patients as being terminally ill include a brief narrative explanation of the clinical findings that support a life expectancy of 6 months or less. We originally proposed that the narrative should be written or typed on the certification form itself.

In our proposed rule, we wrote that we do not believe that an attachment should be permissible because an attachment could easily be prepared by someone other than the physician. We solicited comments on whether this requirement would increase physician engagement in the certification and recertification process.

Comment: Many commenters stated that this requirement would be a burden to hospices. Commenters referred to our regulations at § 418.22 which require that the clinical information and other documentation supporting the terminal prognosis must be included in the medical record, stating that the narrative would duplicate information in the medical record. Several commenters further stated that many hospice doctors have no clinical contact with the hospice patients, and that doctors currently base the certification of terminal illness on the medical record information alone. Therefore, they believe that this requirement would result in physicians simply rephrasing what was already in the medical record. Several commenters suggested CMS determine whether this requirement is feasible for small hospices with only a part-time medical director. Other commenters suggested that CMS require the narrative only on recertifications, stating that MedPAC's suggestion was intended to ensure that long-stay hospice patients continue to be hospice-eligible. Additionally, they said given that two physicians determine initial eligibility, a narrative at initial certification is unnecessary and burdensome. One commenter suggested an alternative to the narrative, suggesting that an attestation statement be included on the certification and recertification form stating that the pertinent medical record information has been reviewed by the physician.

Many commenters supported this requirement as a way to ensure more

physician involvement with the patient and increase engagement in the certification of terminal illness. Some cautioned CMS to not allow a typed narrative, fearing that the hospice nurse would type it, and the physician would simply sign off without performing the sort of physician review and involvement that CMS intended.

Some commenters supported the requirement, but encouraged CMS to reconsider that the narrative must be present on the certification and recertification form, asking CMS to consider accepting an attachment. A few commenters believed that hospices which have electronic medical records may incur costly software modifications if the narrative must be included on the certification and recertification. The commenters believed that as long as the physician's written or electronic signature was included on the narrative, it would make no difference if the narrative was an addendum.

Several commenters stated that CMS should provide illustrative examples to help hospices and physicians understand the scope of acceptable responses.

Many commenters were supportive of the proposal, but cautioned CMS that not all patients show measurable indications of decline at the time of every recertification. These commenters cautioned CMS to not regulate the process such that hospices will be encouraged to discharge patients inappropriately.

Another commenter encouraged that CMS be clear that neither check boxes nor standard language should be permitted to satisfy the requirement, that we clarify that this narrative must be composed by the physician performing the certification or recertification, and that the certification and recertification forms containing the narrative should include under the physician's signature a statement indicating that by signing, the physician confirms that he/she composed the narrative based on his/her review.

Response: We thank the writers for their comments. We concur with the commenter who states that 42 CFR 418.22(b) requires clinical information and other documentation supporting the terminal prognosis to be included in the medical record. However, we disagree that the inclusion of the clinical narrative duplicates the medical record information, or that the narrative should be completed only at the time of recertification. Rather, as we stated in the proposed rule, we believe that the physician must synthesize the patient's comprehensive medical information in order to compose this brief clinical justification narrative, which we believe will increase physician accountability associated with the terminal prognosis. This synthesis should not be a simple restatement of the medical record facts, but instead sets out the physician's rationale as to how the facts justify the prognosis. We also disagree that a statement on the certification and recertification form that the physician attests he has reviewed the medical record accomplishes the increased physician accountability goal. Our intent is for the physician to justify his prognosis, rather than simply sign a form. While our regulations have always required the physician to perform this sort of review, we believe often the physician relies too heavily on the hospice staff for the prognosis determination in both the certification and recertification of terminal illness.

Because the physician has always been required to perform the review needed to make a terminal illness prognosis, we disagree that the corresponding short narrative which describes the physician's clinical justification associated with the prognosis is overly burdensome. However, we do understand that many physicians prefer to dictate rather than hand-write their clinical findings. And we agree with commenters who stated that some electronic health record systems may more easily produce an addendum containing the clinical justification. Therefore, we have decided that a typed addendum containing the narrative which is electronically or hand signed by the physician will be acceptable. We also agree with the commenters who suggested that the narrative include an attestation, and that we clarify some criteria associated with the narrative requirement. Therefore, we clarify that: (1) The narrative must be composed by the physician performing the certification or recertification and not by other hospice personnel; (2) the narrative should include, under the physician signature, a statement indicating that by signing, the physician confirms that he/she composed the narrative based on his/her review of the patient's medical record or, if applicable, examination of the patient; (3) the narrative reflects the patient's individual clinical circumstances, and should not contain checked boxes or standard language used for all patients; and (4) in the case of the initial certification, we require either the attending physician or the hospice medical director to compose and sign the clinical narrative.

We believe that the narrative will curtail the practice described by one commenter who stated that the physician relies solely on hospice staff and hospice staff entries in the medical record for the prognosis determination, and has little interaction with the patient.

While we agree with the commenter who stated that this requirement helps address MedPAC concerns associated with long stays in hospice, we also believe that this requirement on the initial certification helps ensure that only hospice- eligible patients are admitted to hospice. We disagree with the commenter who suggested CMS include an illustrative example of narrative language, since the intent of the narrative is to capture the physician's synthesis of each patient's unique conditions.

In response to the commenter who cautioned CMS that not all patients show measurable indications of decline at the time of every recertification, we believe this commenter was concerned that CMS may regulate the process such that hospices will be encouraged to discharge patients inappropriately. This comment appears to suggest that the physician narrative may risk patients being discharged inappropriately at recertification time. We disagree that this is a risk. CMS regulations at 42 CFR 418.22, certification of terminal illness, describe in detail the requirements that are necessary to certify and recertify patients that are terminally ill. We also acknowledge that at recertification, not all patients may show measurable decline. We believe that the physician may choose to include facts such as that as part of his narrative, if he or she believes it to be pertinent in his or her justification.

We are finalizing our proposal to require that physicians who certify or recertify hospice patients as terminally ill include a brief narrative explanation of the clinical findings that support a life expectancy of six months or less. We are modifying our original proposal in that we will allow the narrative to either be part of the certification and recertification forms, or it may be on an addendum to the certification and recertification forms which is electronically or hand signed by the physician. If the narrative is part of the certification or recertification form, then the narrative must be located immediately prior to the physician's signature. If the narrative exists as an addendum to the certification or recertification form, in addition to the physician's signature on the certification or recertification form, the physician must also sign immediately following the narrative in the addendum. The narrative must reflect

the patient's individual clinical circumstances. The narrative must not contain check boxes or standard language used for all patients. In the case of the initial certification, we require either the attending physician or the hospice medical director to compose and sign the narrative. We also require that the narrative include under the physician signature, a statement indicating that by signing, the physician confirms that he/she composed the narrative based on his/her review of the patient's medical record or, if applicable, examination of the patient.

C. Update of Covered Services, § 418.202

In Part 418, subpart F, we describe covered hospice services. In § 418.200, Requirements for Coverage, we note that covered services must be reasonable and necessary for the palliation or management of the terminal illness as well as related conditions. We also note that services provided must be consistent with the plan of care. The language at § 418.202, ''Covered services'', describes specific types of hospices services that are covered. Section 418.202(f) describes the coverage of medical appliances and supplies, including drugs and biologicals. The last sentence of § 418.202(f) states that covered medical supplies ''include those that are part of the written plan of care.''

The updated CoPs, which were effective as of December 2008, now require that hospices include all comorbidities in the plan of care, even if those comorbidities are not related to the terminal diagnosis. In § 418.54(c)(2) we refer to assessing the patient for complications and risk factors that affect care planning. Comorbidities that are unrelated to the terminal illness need to be addressed in the comprehensive assessment and should be on the plan of care, clearly marked as comorbidities unrelated to the terminal illness. However, the hospice is not responsible for providing care for the unrelated comorbidities. Because the hospice is not responsible for providing the care for these unrelated comorbidities, we are revising § 418.202(f) to state that medical supplies covered by the Medicare hospice benefit include only those that are part of the plan of care and that are for the palliation or management of the terminal illness or related conditions.

Comment: Commenters supported the proposed clarification in § 418.202 which currently states that medical supplies covered by the hospice benefit include those that are part of the plan of care and that are related to the palliation and management of the terminal illness or related conditions. One commenter stated that because it is difficult for hospices to determine which conditions are related to the terminal illness, that CMS should also require hospices to have written policies describing their processes for determining whether care is related to the terminal illness or related conditions. One commenter wrote that in the absence of companion rules in SNFs, this rule as written has the potential to cause confusion and conflict within the facilities as the facility providers seek resolution on the integration of the care plan and the related cost and responsible party.

Response: We appreciate the support received for the clarification at 42 CFR section 418.202. The comments regarding written policies describing the processes for determining what is related to the terminal illness, and about companion rules in SNFs, are outside the scope of this payment rule, and therefore we are unable to respond. However, we have forwarded these comments to the group within CMS which handles facility Conditions of Participation, for their consideration in future rulemaking.

We are finalizing the change to § 418.202 as proposed.

D. Clarification of Payment Procedures for Hospice Care, § 418.302

Section 1861(dd) of the Act limits coverage of and payment for inpatient days for hospice patients. There are sometimes situations when a hospice patient receives inpatient care but is unable to return home, even though the medical situation no longer warrants general inpatient care (GIP), or even though 5 days of respite have ended. In computing the inpatient cap, the hospice can only count inpatient days in which GIP or respite care is provided and billed as GIP or respite days. For example, assume a patient received 5 days of respite care while a caregiver was out of town, but the caregiver's return was delayed for a day due to circumstances beyond her control. The patient had to remain as an inpatient for a 6th day, but was no longer eligible for respite care. According to § 418.302(e)(5), the hospice should switch from billing for respite care to billing for routine home care on the 6th day. The hospice should only count 5 days toward the inpatient cap, not 6 days, since only 5 inpatient days were provided and billed to Medicare as respite days.

Because we have received several inquiries about how to count inpatient days that are provided and billed as routine home care, we are revising § 418.302(f)(2) to clarify that only inpatient days in which GIP or respite care is provided and billed are counted as inpatient days when computing the inpatient cap.

Comment: Commenters supported the proposal to clarify that inpatient care provided and billed as GIP or respite should be the only inpatient care included in the inpatient cap calculation. However one commenter wrote that her hospice does not agree that inpatient respite services should be charged against the inpatient cap, given the changes in the CoP regulations with respect to 24-hour RN coverage.

Response: We appreciate commenters' support for this proposal. The Social Security Act requires the inclusion of respite services in the inpatient cap calculation (*see* section 1861(dd)(2)(A)(iii) of the Act). Therefore, we cannot make a change to this requirement. We are finalizing the change to 42 CFR § 418.302 as proposed.

E. Clarification of Intermediary Determination and Notice of Amount of Program Reimbursement, § 405.1803

Currently, hospices that exceed either the inpatient cap or the aggregate cap are sent a letter by their contractor (regional home health and hospice intermediary (RHHI) or fiscal intermediary (FI)), detailing the cap results, along with a demand for repayment. As described in an administrative instruction (CR 6400, Transmittal 1708, issued April 3, 2009) effective July 1, 2009, this letter of determination of program reimbursement will be sent to every hospice provider, regardless of whether or not the hospice has exceeded the cap. A demand for repayment will be included for those hospices which have exceeded either cap. If a hospice disagrees with the contractor's cap calculations, the hospice has appeal rights which are set out at 42 CFR § 418.311 and Part 405, subpart R. The letter of determination of program reimbursement shall include language describing the hospice's appeal rights. We proposed clarifying the language at § 405.1803 to note that for the purposes of hospice, the determination of program reimbursement letter sent by the contractors serves as the written notice reflecting the intermediary's determination of the total amount of reimbursement due the hospice, which is commonly called a Notice of Program Reimbursement or NPR. Additionally, we proposed clarifying § 405.1803(a)(1)(i) to note that in the case of hospice, the reporting period covered by the determination of

program reimbursement letter is the hospice cap year and the bases for the letter are the cap calculations rather than reasonable cost from cost report data.

Comment: Commenters supported the proposed clarification, but asked that CMS also clarify that the time period for filing cap appeals does not begin until the hospice receives the letter of determination of program reimbursement. Additionally, they asked CMS to clarify that hospices should not be required to wait until they receive these letters to appeal issues unrelated to the caps. Many commenters also were dissatisfied with the amount of time between the end of a cap year and the hospice receiving the determination letter.

Response: We thank commenters for their support of this clarification, and for their questions, which point out an addition to regulatory text which would be helpful. Several commenters had questions related to the timing of appeals because of the location of the proposed changes to the regulatory text. To avoid confusion, we have established a separate subsection at § 405.1803(a)(3) entitled ''Hospice Caps''. This section includes the language originally proposed for § 405.1803(a) and § 405.1803(a)(1)(i). Additionally, we are adding a sentence to the regulatory text at § 405.1803(a)(3) which notes that the timeframe for hospice cap appeals begins with receipt of the determination of program reimbursement letter.

Commenters also asked about the timing when appealing issues unrelated to the caps. The timing of all other claims appeals is unrelated to the determination of program reimbursement letters, and those appeals are governed under 42 CFR 418.311. When appealing claims decisions, providers should continue to follow the procedures and timeframes outlined in the CMS Claims Processing Manual (IOM 100–04), Chapter 29 (''Appeals of Claims Decisions''), which can be accessed through the CMS Hospice Center Web page at *http://www.cms.hhs.gov/center/hospice.asp.*

Finally, we have taken note of the long timeframe some commenters currently report in receiving the results of their cap calculations, and will consider this information in any changes to the cap calculation methodology that might be made in the future.

For this final rule, we are revising the proposed changes to § 405.1803. Specifically, we are creating a separate section at § 405.1803(a)(3) subtitled ''Hospice Caps'', providing the same information that we had proposed be in § 405.1803(a) and § 405.1803(a)(1)(i). The regulatory text at § 405.1803(a) and § 405.1803(a)(1)(i)is to be unchanged. Additionally, we will add a sentence to the new section at § 405.1803(a)(3) to note that the timeframe for appeals of cap calculation results begins with receipt of the determination of program reimbursement letter.

F. Technical and Clarifying Changes

We are incorporating the following technical changes to clarify existing regulations text, correct errors that we have identified in the regulations, remove obsolete cross references, or to ensure consistent use of terminology in our regulations.

1. Clarification of the Statutory Basis for Hospice Regulation, § 418.1

Currently, the statutory basis for the hospice regulations is described at § 418.1, and notes that Part 418 implements section 1861(dd) of the Act. The regulation describes section 1861(dd) of the Act as specifying covered hospice services and the conditions that a hospice program must meet to participate in the Medicare program. While that is correct, section 1861(dd) of the Act also specifies some limitations on coverage and payment for inpatient hospice care. In the proposed rule we proposed clarifying § 418.1 by adding a sentence noting that section 1861(dd) of the Act limits coverage and payment for inpatient hospice care.

We received no comments on this proposal, and are finalizing the changes as proposed.

2. Update of the Scope of Part, § 418.2

The current regulations at § 418.2 (''Scope of part.'') describe each of the subparts in Part 418. Some of these subparts have been revised or removed due to the update of the hospice conditions of participation (CoPs) in 2008 (73 FR 32088). Specifically, subpart B specifies the eligibility and election requirements, along with the duration of benefits. Subparts C and D specify the Conditions of Participation, with subpart C now entitled ''Patient Care'' rather than ''General Provisions and Administration'', and subpart D now entitled ''Organizational Environment'' rather than ''Core Services''. Subpart E, which was previously described as specifying reimbursement methods and procedures, was removed and reserved for future use with the update of the CoPs. Subparts F and G now relate to payment policy, to include covered services and hospice payment; currently subpart F is incorrectly described in § 418.2 as specifying coinsurance amounts. Finally, subpart H should be referred to as specifying coinsurance amounts applicable to hospice care, rather than subpart F as the regulation currently reads. Accordingly, we proposed to update section § 418.2 to reflect the current organization and scope of Part 418.

We received no comments on this proposal, and are finalizing the changes as proposed.

3. Revision of Hospice Aide and Homemaker Services, § 418.76

In the proposed rule, we proposed to incorporate a technical correction at § 418.76(f)(1) to clarify that home health agencies that have been found out of compliance with paragraphs (a) or (b) of § 484.36, regarding home health aide qualifications, are prohibited from providing hospice aide training. The word ''out'' was inadvertently omitted from the regulation text in the June 5, 2008 hospice final rule.

We received no comments on this proposal, and are finalizing the changes as proposed.

4. Clarification of Hospice Multiple Location, § 418.100

For the sake of clarity, in the proposed rule we proposed to delete the word ''that'' from § 418.100(f)(1)(iii), regarding multiple locations. The revised element would require that the lines of authority and professional and administrative control must be clearly delineated in the hospice's organizational structure and in practice, and must be traced to the location which was issued the certification number.

We received no comments on this proposal, and are finalizing the changes as proposed.

5. Revision to Short Term Inpatient Care, § 418.108

In the proposed rule, we proposed to correct in § 418.108(b)(1)(ii) an erroneous reference to § 418.110(f), ''Patient rooms''. This section, which addresses facilities that are considered acceptable for the provision of respite care to hospice patients, was intended to reference the standard at § 418.110(e), ''Patient areas''. The published reference to standard (f) was a typographic error, and we are correcting it by changing the reference to standard (e).

We received no comments on this proposal, and are finalizing the changes as proposed.

6. Clarification of the Requirements for Coverage, § 418.200

Section 418.200 describes the requirements for coverage for Medicare

hospice services, and references § 418.58 (''Conditions of Participation—Plan of care''). This cross reference is no longer accurate; section § 418.58 was updated with the publication of the new CoPs in 2008, and is now § 418.56. In the proposed rule we proposed to detail the requirements for coverage related to the plan of care rather than cross refer to the CoPs regulations. This revision would make clearer that the statute requires review of the plan of care as a condition for coverage of hospice services. However, we are continuing to include a reference to the updated CoP section (418.56) for a comprehensive description of our expectations associated with the plan of care.

The statute specifies requirements for hospice coverage in section 1814(a)(7)(A) through (C) of the Act. The Act requires that the hospice medical director and the patient's attending physician certify the terminal illness for the initial period of hospice care and that the medical director recertify the terminal illness for each subsequent benefit period. Additionally, the Act requires that a plan of care exist before care is provided; that the plan of care be reviewed periodically by the attending physician, the medical director, and the interdisciplinary group; and that care be provided in accordance with the plan of care. In the proposed rule, we proposed to clarify § 418.200 to incorporate each of these requirements for coverage, rather than cross referencing other CoPs.

We received no comments on this proposal, and are finalizing the changes as proposed, except that we are continuing to include the CoP cross-reference.

7. Incorporation of the Term ''Hospice Aide,'' § 418.202, § 418.204, and § 418.302

Over the last several years, we have worked with the industry to update the hospice CoPs. These efforts culminated in publication of a final rule in 2008, which was effective December 2, 2008. The revised CoPs redesignated the ''home health aide'' who works in hospice as a ''hospice aide''. We are revising § 418.202(g), § 418.204(a), and § 418.302 to include the new terminology.

Comment: One commenter suggested we remove the language ''home health aide'' and just use the term ''hospice aide''.

Response: We appreciate this comment. However, we are keeping the reference to a ''home health aide'' in the regulations, because that is how the Social Security Act refers to aides in hospice. Consequently, we are finalizing the change as proposed.

8. Clarification of Administrative Appeals § 418.311

A hospice that does not believe its payments have been properly determined may request a review from the intermediary or from the Provider Reimbursement Review Board (PRRB), depending on the amount in controversy. Section 418.311 details the procedures for appealing a payment decision and also refers to Part 405, Subpart R.

In the proposed rule, we proposed to clarify the last sentence of this section, which currently notes that ''the methods and standards for the calculation of the payment rates by CMS are not subject to appeal.'' The payment rates referred to are the national rates which are set by statute, and updated according to the statute using the hospital market basket (unless Congress instructs us to update the rates differently). To ensure better understanding of what is not subject to appeal, we proposed to revise § 418.311 to provide that methods and standards for the calculation of the statutorily defined payment rates by CMS are not subject to appeal.

We received no comments on this proposal, and are finalizing the changes as proposed.

III. Comments on Other Policy Issues

A. Recertification Visits, § 418.22

As noted earlier, MedPAC convened an expert panel from the hospice industry in late 2008. That panel noted that some hospices were enrolling and recertifying patients who they determined were not eligible for hospice care under the Medicare benefit, and a consensus emerged that greater accountability and oversight were needed in the certification and recertification process. To further increase accountability in the recertification process, several of the panelists suggested to MedPAC that an additional policy change be made to the recertification process. Several panelists supported a requirement that a hospice physician or advanced practice nurse visit the patient at the time of the 180-day recertification to assess continued eligibility, and at every recertification thereafter to assess the patient's continued eligibility. MedPAC recommended that the physician or advanced practice nurse be required to attest that the visit took place. MedPAC used the panel's input in making recommendations related to the certification process, which can be found in chapter 6 (''Reforming Medicare's Hospice Benefit'') of MedPAC's March 2009 report entitled ''Report to the Congress: Medicare Payment Policy'' which is available at *http://www.medpac.gov/chapters/Mar09_Ch06.pdf.*

At this time, we are not making any policy change to require visits by physicians or advanced practice nurses in order to recertify patients. We note that the statute requires a physician to certify and recertify terminal illness for hospice patients, and specifically precludes nurse practitioners from doing so at 1814(a)(7)(A) of the Act. A recertification visit to a hospice patient by a nurse practitioner would not relieve the physician of his or her legal responsibility to recertify the terminal illness of such hospice patient. The physician is ultimately responsible for the recertification determination. However, the visit, if performed by a nurse practitioner, could potentially serve as an additional, objective source of information for the physician in the recertification of terminal illness decision. We are also considering other options related to a nurse practitioner making recertification visits. For example, a nurse practitioner who is involved in a patient's day-to-day care may not be as objective in assessing eligibility for recertification as a nurse practitioner who is not caring for that patient regularly. One option to better ensure that a nurse practitioner visit results in additional, objective clinical assessment of the patient's condition might be to require that such nurse practitioner not be involved in the hospice patient's day-to-day care. Also, there are different possible approaches regarding the timeframe for making visits. Visits by a physician or nurse practitioner could be made within a timeframe close to the recertification deadline, such as the 2 week period centered around the recertification date, thereby allowing a window of time surrounding the recertification timeframe for a visit to occur.

While we are not making a policy change regarding recertification visits at this time, we did solicit comments on the suggestion to require physician or nurse practitioner visits for hospice recertifications at or around 180 days and for every benefit period thereafter. We solicited comments on all aspects of this suggestion, including practical issues of implementation. We will analyze and consider the comments received in possible future policy development.

Comment: Many commenters supported this requirement, but only if the visits were adequately reimbursed, stating that current payments are not sufficient to cover the costs of these visits, especially where patients reside in remote areas. Some commenters

urged the visits be performed by a physician experienced in end-of-life care. Others stated that the visit be thorough and comprehensive, and include patient and family counseling about alternate care arrangements if appropriate. Many commenters stated that advanced practice nurses should not perform the visits, stating that the goal of increased physician accountability would be achieved with a physician visit. Other commenters suggested that the visits occur only at the 180 day recertification. Similarly, many commenters suggested that the visits occur at 180 days and at every other recertification after that. Many commenters suggested the visit could occur within two or three week window around the recertification timeframe. One commenter suggested an alternative process to review non-cancer patients at 90 and 180 days. Commenters encouraged CMS to work with the industry to identify all issues which may be associated with such a requirement.

In the April 24, 2009 hospice wage index proposed rule, we suggested that if it were determined appropriate for a nurse practitioner to render such a visit, that an option to better ensure that an objective clinical assessment of the patient's condition occurred might be to require that the nurse practitioner not be involved in the day-to-day care for that hospice patient. One commenter suggested that, due to shortages in nurse practitioners, we consider allowing the nurse practitioner who was involved in the patient's day-to-day care to perform some but not all of the recertification visits. The commenter further suggested that the nurse practitioner who was involved in the patient's day-to-day care not be allowed to render the first recertification visit and not be allowed to render such visits for consecutive recertifications. Additionally, this same commenter stated that the recertification visits should occur over a reasonable timeframe before the recertification date. This commenter believes that if the ''visit were to occur after the recertification date, it could create a disincentive for hospices to discharge a patient since it would result in a lack of payment for days of care already provided beyond the recertification date.'' One commenter suggested that nurse training be developed to certify nurses in hospice eligibility evaluations. Another commenter stated that the visit must be performed by someone familiar with the patient so that changes in the patient's condition are identified.

Many commenters opposed this requirement. Commenters were concerned that this recertification requirement would be burdensome to providers and would result in decreased access to care. These same commenters were concerned that the lack of physician resources in small and rural hospices that only have a part-time medical director would make it impossible to perform these visits. Some commenters indicated that nurse practitioners are just as scarce in rural areas as physicians. Some commenters stated that there would be no increased quality associated with these visits, and that visits should be used to improve care, not monitor eligibility. Similarly, other commenters suggested we target for contractor review hospices with long-stay patients rather than penalize all hospices with this costly requirement. A commenter stated that these visits would upset the families, and are not an efficient use of resources. One commenter stated that it would be difficult for hospices to hire medical directors if this requirement were adopted.

Response: We appreciate the comments received from the public concerning this matter and will continue to analyze and consider those comments and suggestions in future rulemaking.

B. Hospice Aggregate Cap Calculation

As described in section 1814(i)(2)(A) through (C) of the Act, when the Medicare hospice benefit was implemented, the Congress included an aggregate cap on hospice payments. The hospice aggregate cap limits the total aggregate payment any individual hospice can receive in a year. The Congress stipulated that a ''cap amount'' be computed each year. The cap amount was set at $6,500 per beneficiary when first enacted in 1983 and is adjusted annually by the change in the medical care expenditure category of the consumer price index for urban consumers from March 1984 to March of the cap year. The cap year is defined as the period from November 1st to October 31st, and was set in place in the December 16, 1983 hospice final rule (48 FR 56022). This timeframe was chosen as the cap year since the Medicare hospice program began on November 1, 1983 (48 FR 56022). For the 2008 cap year, the cap amount was $22,386.15 per beneficiary. This cap amount is multiplied by the number of Medicare beneficiaries who received hospice care in a particular hospice during the year, resulting in its hospice aggregate cap, which is the allowable amount of total Medicare payments that hospice can receive for that cap year. A hospice's total reimbursement for the cap year cannot exceed the hospice aggregate cap. If its aggregate cap is exceeded, then the hospice must repay the excess back to Medicare.

Using the most recent (2008) payment rates before wage adjustment, the 2008 cap amount ($22,386.15) is roughly equal to the cost of providing routine home care for 166 days. Because the hospice aggregate cap is computed in the aggregate for the entire hospice, rather than on a per beneficiary basis, hospices that admit a mix of short-stay and long stay Medicare beneficiaries will rarely exceed the cap. On average, lower expenditures made on behalf of Medicare beneficiaries with shorter hospice stays offset the expenditures made on behalf of Medicare beneficiaries with longer stays such that in the aggregate, the majority of hospices do not exceed the calculated aggregate cap.

Until recently, very few hospices ever exceeded the aggregate cap. The Government Accountability Office (GAO) found that between 1999 and 2002, less than 2 percent of hospices exceeded the aggregate cap (United States Government Accountability Office, ''Medicare Hospice Care. Modifications to Payment Methodology May Be Warranted''. October 2004, Washington, DC. p. 18). MedPAC reported that the number of hospices that exceeded the aggregate cap has grown steadily between 2002 and 2005, but remains just under 8 percent as of 2005 (Medicare Payment Advisory Commission, ''Report to the Congress: Reforming the Delivery System''. June 2008. Washington, DC. p. 212). We do not believe that hospices are exceeding the aggregate cap due to our intermediaries' method of calculating the aggregate cap. Rather, MedPAC's analyses suggest that certain hospices exceed the aggregate cap due to ''significantly longer lengths of stay'' than hospices that do not exceed the cap [MedPAC, p. 214–15]. MedPAC suggests that longer average lengths of stay at certain hospices could be due, in part, to a change in their patient case-mix that has brought in more patients with less predictable disease trajectories [MedPAC, p. 213–14]. However, patient case-mix was not found to account for all of the discrepancy in length of stay [MedPAC, p. 214–15]. MedPAC also found that for-profit ownership, smaller patient loads, and being a freestanding facility were correlated with longer lengths of stay and the consequent likelihood of exceeding the aggregate cap [MedPAC, p. 212–215].

As stated above, in our current hospice aggregate cap calculation methodology, the intermediary calculates each hospice's aggregate cap

amount by multiplying the per-beneficiary cap amount by the number of Medicare beneficiaries counted in each cap year. Patients who receive hospice care in more than one cap year are counted so that, in the aggregate, the ''number of Medicare beneficiaries'' for each year is reduced to reflect the proportion of time patients receive in other years. Hospices are currently required to submit a report of their Medicare beneficiary unduplicated census to their intermediary within 30 days of the end of the cap year. Our current methodology also apportions the beneficiary across multiple hospices if the beneficiary receives care from more than one hospice during the cap year, with the proportional shares summing to 1. The intermediary reduces each hospice's Medicare beneficiary count by that fraction which represents proportional days of care the beneficiary received in another hospice during the year, with all the proportional shares summing to 1.

In counting the Medicare beneficiaries for the unduplicated census report, we instruct hospices to use a slightly different timeframe from the cap year used to count payments. When determining a hospice's expenditures during a cap year, the intermediary sums all claims submitted by the hospice for services performed during the cap year, which begins on November 1st of each year and ends on the October 31st of the following year. However, we instruct hospices to include those beneficiaries who elect the benefit between September 28th of each year and September 27th of the following year, rather than following the November 1st to October 31st cap year. CMS (then HCFA) used mean length of stay from demonstration project data to determine the point at which to include a beneficiary in calculating the hospice cap. Using half of the mean length of stay, or 70 days/2 = 35 days, CMS implemented a timeframe for counting beneficiaries that began less than 35 days from the end of the cap year. Therefore, the timeframe for counting beneficiaries was set as September 28th through September 27th (48 FR 56022). This method of reducing the number of Medicare beneficiaries counted in a cap year to reflect time spent in other years was implemented because it allows for counting the beneficiary in the reporting period where he or she used most of the days of covered hospice care (48 FR 38158). We believe that the regulation complies with the statutory requirements without being unduly burdensome. This approach has the major advantage of allowing each hospice to estimate its aggregate cap calculation within a short period of time after the close of a cap year. While we believe that the current hospice aggregate cap methodology equitably meets the statutory requirements for calculating the hospice aggregate cap set out at section 1814(i)(2) of the Act, the availability of more sophisticated databases and data systems provides us with an opportunity to incorporate efficiencies in the cap calculation process. The lack of sophisticated data systems in place in the 1980's limited our options for how to efficiently compute the hospice aggregate cap. In the 1980's access to claims data was very slow, and searchable claims databases were virtually non-existent. While the current system still has limitations, the advancement of technology has brought with it provider access to benefit period information in the Common Working File (CWF), which was created in the 1990's, and faster processing speeds, which allow contractors and hospices easier access to claims information for hospice aggregate cap calculation purposes. Therefore, we are now able to consider more efficient approaches to calculating the aggregate cap.

The time required for intermediaries to compute each hospice's aggregate cap and send demand letters when overpayments exist delays our recovery of those overpayments and may also contribute to some hospices exceeding the cap in subsequent years. Hospices have described receiving demands for cap overpayments more than a year after the end of the cap year, and have expressed concern that they are not timely notified about their cap overpayments. Hospices which don't closely monitor compliance with their aggregate cap may not have anticipated an overpayment, and the lag in notification may contribute to the risk of a hospice exceeding its aggregate cap in the subsequent year. More timely notification of overpayments would enable hospices to more quickly review their admissions practices, and make necessary changes to ensure that all their patients meet the eligibility requirements for hospice care.

We are exploring a number of different hospice aggregate cap implementation methodology changes to address these issues, and to take advantage of the technological efficiencies available. Specifically, we are exploring enhancements to our current methodology which will improve the timeliness of hospices' notification of cap overpayments, will enable such overpayments to be collected more quickly, and which will encourage hospices to be more proactively involved in managing their admissions practices such that they do not exceed their hospice aggregate cap. We are considering several changes to the annual hospice aggregate cap calculation implementation methodology which could help hospices avoid exceeding the aggregate cap.

If a beneficiary receives hospice care for an extended period of time, or elects hospice toward the end of a cap year, he or she is more likely to cross into more than 1 cap year, or to receive care from more than 1 hospice. If we made a mathematically precise determination of the proportion of time each patient spent in each cap year at each hospice from which they received care, in order for a given cap year report to be final, adjustments to that cap year report would have to continue until the beneficiary actually died. Only then could a final determination of the aggregate cap be made for a given year for each hospice that had treated the beneficiary. Such an approach could be viewed as particularly burdensome to the hospice as a hospice's financial system would likely need to be able to continually react to subsequent hospice aggregate cap calculations, readjusting payments to Medicare to account for an overpayment amount that is ever-changing, that is, until the beneficiary dies.

A variation of this approach would allow apportioning of beneficiaries who receive care in more than 1 cap period over 2 consecutive years. This approach would minimize, but not completely eliminate, the adjustments required to prior year cap calculations. This method still has the effect of delaying the final cap determination. However, it raises questions about scenarios where a beneficiary received hospice care in his first and second cap year, either revoked or was discharged from the benefit, and returned to a different hospice at a much later date, such as in the third cap year. We would like public input from hospices, patient groups, other provider types, academics, and members of the general public on how to best handle this or similar scenarios.

Besides considering different approaches to counting beneficiaries, another option is to require hospices to compute their own hospice aggregate cap and submit a certified cap report to their contractors, along with any overpayment, 7 months after the end of the cap year. The information used for the hospice aggregate cap calculation originates with hospices, and is available to them through the CWF or through their own accounting records. Requiring hospices to compute and

report their own hospice aggregate cap would result in hospices being proactive in managing their cap calculations. In this approach, contractors would still verify the reported cap.

We solicited comments on these and other policy options in an effort to gather more information on this issue, and any other possible underlying issues that may exist.

Comment: Most commenters encouraged CMS to more timely notify providers of their cap overpayments, stating that the current delay in notification is burdensome, results in overpayments generated for prior years, and does not allow providers to make timely corrections. Many commenters suggested CMS apportion the cap over consecutive years if the patient received service over more than 1 year. Some hospices were agreeable to CMS' suggestion that hospices should calculate and report their own certified cap report, with the caveat that patients' full utilization history be made available to hospices in order for them to accurately compute the report. Others expressed concern that there should be penalties imposed for erroneous reporting. Other commenters opposed submission of a cap report, for burden reasons, and because patients' full utilization is not currently available to them. Several commenters suggested that cap amount be adjusted for geographic variances in costs. Commenters also requested that CMS allow a new cap amount for readmitted beneficiaries who experience a break in hospice utilization. Some commenters suggested we consider common ownership as a factor in the cap calculation. Many commenters stated that the cap needs to be modernized. Others stated that the suggestions CMS described in the solicitation for comments will only exacerbate the cap problems, suggesting CMS instead should consider methods that will ensure admissions and discharge decisions are not based on fears of financial liability associated with a cap. One commenter expressed concerns about how we would transition to a new calculation methodology. Another commenter stated that all hospices should receive cap feedback from the fiscal intermediary to enable them to monitor their cap better.

Many submitted comments that were beyond the scope of the solicitation for suggestions associated with cap calculation methodology improvements. Some stated that the cap currently encourages hospice providers to focus on their financial bottom line instead of patient needs, and incentivizes hospices to inappropriately discharge patients, and not admit patients with less predictable trajectories. Others suggested that CMS suspend the aggregate cap until hospice payment reform occurs, and suggesting CMS improve national coverage determination processes. One commenter stated that the cap doesn't account for geographic factors that may affect a hospice's patient population, which may increase their risk of exceeding the cap. Many commenters expressed support for the aggregate cap, with one stating that CMS should generate alerts to physicians and hospice medical directors with a high percentage of long-stay patients, and ultimately revoke their billing privileges.

Response: We appreciate the comments received from the public concerning this matter and will continue to analyze and consider those comments and suggestions in future rulemaking.

C. Hospice Payment Reform

Since the inception of the hospice benefit in 1983, the amount that the Medicare program has spent on this benefit has grown considerably. The number of unduplicated hospice Medicare beneficiaries has increased from 401,140 in FY 1998 to 986,435 in FY 2007, which represents a 146 percent increase. Additionally, at the inception of the benefit, most hospice patients elected hospice care due to terminal cancer. The profile of the hospice patient has changed in recent years such that hospices now provide care to beneficiaries with a wide range of terminal conditions. In calendar year (CY) 1998, 54 percent of hospice patients had terminal cancer diagnoses. In CY 2007, only 28 percent of hospice patients had terminal cancer diagnoses. With the diversity of diagnoses, hospice stays began to increase. The national average length of stay for patients in hospice has risen from 48 days per patient in CY 1998 to 73 days per patient in CY 2006. Additionally, long hospice stays have grown even longer by about 50 percent. Between 2000 and 2005, hospices in the 90th percentile for average length of stay increased their average length of stay from 144 to 212 days.

MedPAC has performed extensive analysis of the hospice benefit over the past few years, and has recommended that CMS reform the hospice payment structure to ensure greater accountability in the hospice benefit. MedPAC believes that the current hospice payment system contains incentives that make long hospice stays more profitable, which may result in misuse of the benefit.

Medicare spending for hospice is rapidly growing, more than tripling between 2000 and 2007. In fiscal year (FY) 1998, expenditures for the Medicare hospice benefit were $2.2 billion, while in FY 2007, expenditures for the Medicare hospice benefit were $10.6 billion, more than the Medicare program spends on inpatient rehabilitation hospitals, critical access hospitals, long term care hospitals, or psychiatric hospitals. Medicare hospice spending is expected to continue to grow, and will account for roughly 2.3 percent of overall Medicare spending in FY 2009.

The number of hospice agencies has also grown by over 80 percent since 1997. The growth is overwhelmingly in the for-profit category. In 1997, there were 1,834 hospices, about 20 percent of which were for-profit and 80 percent were non-profit. In 2009, there were 3,328 hospices, and 51 percent of these are for-profit entities. Since 2000, nearly all hospices newly participating in Medicare are for-profit entities. MedPAC reports that the newly participating hospices have margins five to six times higher than more established hospices. MedPAC estimates that, on average, hospice Medicare margins were approximately 3.4 percent in 2005. However, the for-profit hospices are estimated to have margins ranging from 15.9 percent in 2003 to 11.8 percent in 2005.

In their analyses of the hospice benefit in their June 2008 ''Report to the Congress,'' MedPAC found that hospice care is more costly at the beginning and end of an episode of hospice care, because of the intensity of services provided during those times. Hospices provide more visits to a patient right after a patient elects hospice and in the time shortly before death, than they provide during the middle of the episode. In its March, 2009 report entitled ''Report to the Congress: Medicare Payment Policy'', MedPAC suggested that payments to hospices should decline as the beneficiary's length of stay increases, thus better reflecting intensity and frequency of the hospice services provided over the course of treatment. MedPAC also suggested that payment to hospices should increase during the period just prior to the patient's death to reflect the higher resource usage during this time [*see,* chapter 6 (''Reforming Medicare's Hospice Benefit'') of MedPAC's March 2009 report entitled ''Report to the Congress: Medicare Payment Policy'' which is available at *http://*

www.medpac.gov/chapters/Mar09_Ch06.pdf].

MedPAC believes this payment structure would better reflect hospice patient resource usage and hospice costs, and would encourage hospices to admit patients at the time in their illness which provides the most benefit to the patient.

We solicited comments regarding MedPAC's suggestions on reforming the hospice payment system, as well as broader comments and suggestions regarding hospice payment reform. We note that MedPAC's suggested payment reforms would require Congressional action to change the statute.

Comment: Many commenters supported MedPAC's payment model. Some made specific recommendations regarding which time periods in the stay should warrant a higher payment. Some commenters suggested that a hospice payment system that is a case-mix adjusted would be appropriate. One commenter suggested a site of care adjustment, to reflect more adequate compensation for hospices in rural versus urban areas, and for care provided to patients in congregate living arrangements. The commenter suggested that CMS also require Medicaid to pay room and board charges directly to the nursing home in the case of dually eligible routine home care patients who reside in nursing homes. This commenter also suggested CMS analyze the appropriateness of payments for respite and continuous home care. Commenters feared that the MedPAC payment model would result in decreased access to hospice care, especially for patients with non-cancer diagnoses, with one commenter suggesting that CMS shouldn't change the payment structure simply because a small number of providers are abusing the system. Rather, this commenter suggested that CMS deal with inappropriate use of hospice via increased surveying.

Other commenters feared that MedPAC's suggestion would create incentives for inappropriate hospice provider behavior such as incentivizing admission late in a patient's disease trajectory. One commenter suggested instead of reforming hospice payments, CMS should consider the role of hospice and costs in the total health care picture. Other commenters encouraged CMS to consider the impact payment changes would have on quality of care. Some commenters expressed concern about the administrative burden associated with a payment system change, with one suggesting that CMS consider an approach that would blend rates. One commenter encouraged CMS to consider other possible payment models. Commenters urged CMS to carefully analyze all data including cost data before reforming the hospice payment structure, to avoid unintended consequences. A few commenters suggested that CMS consider a pilot or demonstration to test a revised payment model prior to national implementation. Commenters also suggested that CMS involve the industry by holding technical expert panel (TEP) sessions in order to more fully identify, address, and consider the issues surrounding hospice payment reform. Many commenters urged CMS to ensure that payment reform would be effectuated in a budget neutral way.

Response: We appreciate the comments received from the public concerning possible hospice payment reform. We will continue to review and consider those comments received as we analyze hospice data (to include recent expansions of the hospice data collected on the claim) in our work towards ensuring the accuracy and appropriateness of payments to hospices.

IV. Update on Additional Hospice Data Collection

Over the past several years MedPAC, the GAO, and the Office of the Inspector General have all recommended that CMS collect more comprehensive data in order to better evaluate trends in utilization of the Medicare hospice benefit. We have been phasing in this process to collect more comprehensive data on hospice claims. We also began collecting additional data on hospice claims beginning in January 2007 through an administrative instruction (CR 5245, Transmittal 1011, issued July 28, 2006), when we started required reporting of a HCPCS code on the claim to describe the location where services were provided (Phase 1). In addition, we issued an administrative instruction (CR 5567, Transmittal 1494, issued April 29, 2008) requiring Medicare hospices to provide detail on their claims about the number of physician, nurse, aide, and social worker visits provided to beneficiaries. The start date of this mandatory CR 5567 reporting requirement was July 2008 (Phase 2). On several occasions, industry representatives have communicated to CMS that the newly required claims information was not comprehensive enough to accurately reflect hospice care. A major concern was that CMS was not requiring reporting of the visit intensity. As a result of these concerns, we committed to working with the industry to expand the data collection requirements. In October 2008, we solicited comments via a posting on CMS' hospice center Web site *(http://www.cms.hhs.gov/center/hospice.asp)* on an approach to collecting additional data about hospice resource use. We asked about data collection using hospice claims, along with data collection using hospice cost reports. This final rule provides an update on the additional data collection.

Based on the feedback received from our October 2008 Web posting, we revised our plans for Phase 3 of the claims data collection. Those plans were described in CR 6440 (Transmittal 1738), which was issued on May 15, 2009, and will have a mandatory effective date of January 1, 2010.

Phase 3 will involve collecting new data on hospice claims. In addition to the existing visit reporting requirement, we are requiring visit time reporting in 15 minute increments for nurses, social workers, and aides. We are requiring visit and visit time reporting in 15 minute increments from physical therapists, occupational therapists, and speech language therapists. We are also requiring reporting of some social worker phone calls and their associated time, within certain limits. Specifically, we are requiring the reporting of social worker calls that are necessary for the palliation and management of the terminal illness and related conditions as described in the patient's plan of care (for example, counseling, speaking with a patient's family, or arranging for a placement). Furthermore, only social worker phone calls related to providing and or coordinating care to the patient and family, and documented as such in the clinical records, are to be reported. Visit and time data collection for respite and general inpatient care provided by non-hospice staff in contract facilities would be exempt from the reporting requirement. Finally, travel time, documentation time, and interdisciplinary group time are not to be included in the time reporting. These changes necessitate line-item billing on hospice claims.

While other Medicare provider types (for example, home health agencies) have had to provide similar information on their claims, hospices have historically not been required to provide this information. This additional data collection will bring the requirements for hospice claims more in line with the claim requirements of other Medicare benefits, and provide valuable information about services provided to Medicare beneficiaries.

We also note that this additional data collection uses existing revenue codes and existing UB–04 and 837I claim forms. Those claims forms were

previously approved by the OMB under control number #0938–0997. As stated above, these changes were issued through an administrative instruction (CR 6440, Transmittal 1738) issued on May 15, 2009.

Additionally, we are developing plans to revise the hospice cost reports to include additional sources of revenue, and to gather more detailed data on services provided by volunteers, by chaplains, by counselors, and by pharmacists. We will continue to work with the industry to seek out the best approach to these and any other changes we may make in order to collect useful information on hospice services.

V. Provisions of the Final Regulations

This final rule incorporates many of the provisions of the proposed rule. Those provisions of this final rule that differ from the proposed rule are as follows:

In section II.A.3, instead of reducing the BNAF by 75 percent in FY 2010 and eliminating it in FY 2011, we are finalizing the BNAF phase-out over 7 years, with a 10 percent BNAF reduction in FY 2010, an additional 15 percent reduction for a total of 25 percent in FY 2011, an additional 15 percent reduction for a total of 40 percent in FY 2012, an additional 15 percent reduction for a total of 55 percent in FY 2013, an additional 15 percent reduction for a total of 70 percent in FY 2014, an additional 15 percent reduction for a total of 85 percent in FY 2015, and an additional 15 percent reduction for complete phase-out in FY 2016.

In section II.B, we are finalizing our proposal to require that physicians who certify or recertify hospice patients as terminally ill include a brief narrative explanation of the clinical findings that support a life expectancy of six months or less. We are revising our original proposal to allow the narrative to either be part of the certification and recertification forms, or an addendum to the certification and recertification forms which is electronically or hand signed by the physician. If the narrative is part of the certification or recertification form, then the narrative must be located immediately prior to the physician's signature. If the narrative exists as an addendum to the certification or recertification form, in addition to the physician's signature on the certification or recertification form, the physician must also sign immediately following the narrative in the addendum. The narrative must reflect the patient's individual clinical circumstances. The narrative must not contain checked boxes or standard language used for all patients. In the case of the initial certification, we require either the attending physician or the hospice medical director compose and sign the narrative. We also require that the narrative include under the physician signature, a statement indicating that by signing, the physician confirms that he/she composed the narrative based on his/her review of the patient's medical record or, if applicable, examination of the patient.

In section II.E, we are modifying our proposal to change regulatory text in 42 CFR 405.1803. We are creating a separate section at § 405.1803(a)(3) which will be subtitled ''Hospice Caps'' and which will provide the same information that we had proposed be in § 405.1803(a) and § 405.1803(a)(1)(i). We are leaving the regulatory text at § 405.1803(a) and § 405.1803(a)(1)(i) unchanged. Additionally, we are adding a sentence to the new section at § 405.1803(a)(3) to note that the timeframe for appeals of cap calculation results begins with receipt of the determination of program reimbursement letter.

In section II.F, we are modifying our proposal to change the regulatory text in 42 CFR § 418.200. We are continuing to include a reference to the updated CoP section (418.56) for a comprehensive description of our expectations associated with the plan of care, rather than the removing the reference as proposed.

VI. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on the issue for the following section of this document that contains information collection requirements (ICRs):

Section 418.22 Certification of terminal illness.

Section 418.22 requires the physician to include on or with the certification or recertification a brief narrative explanation of the clinical findings that support a life expectancy of 6 months or less.

The burden associated with this requirement is the time and effort put forth by the physician to include a brief narrative explanation of the clinical findings that supports a life expectancy of 6 months or less. We received the following comment during the 60-day comment period for the proposed stage of this rule:

Comment: One commenter felt that the burden on hospices would be more than 5 minutes, suggesting that it would take physicians 30 minutes per certification to comply with the narrative requirements.

Response: We disagree that requiring a narrative on the certification would take 30 minutes of the physician's time. As we stated in the proposed rule, physicians are already supposed to be reviewing the patient's clinical record when certifying or recertifying a patient. If hospices are complying with the current certification requirements, then the additional time to add a narrative would only be the time to synthesize the medical information. After reviewing the data, we still believe that composing the narrative should take a physician approximately 5 minutes. However, in re-examining the data and our previous assumptions and estimates from the proposed rule, we have re-estimated our burden estimate, which is now consistent with those assumptions used in the associated PRA package.

We estimate that a narrative would be provided on 1,138,653 certifications and recertifications annually. At 5 minutes per narrative, the total annual burden associated with this requirement is 5 minutes × 1,138,653/60 minutes per hour = 94,888 hours. The current requirements for § 418.22 are approved under OMB# 0938–0302 with an expiration date of 8/31/2009. We will revise the PRA package to reflect this change in burden.

If you would like to comment on this information collection and recordkeeping requirement, please submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget,

Attention: CMS Desk Officer, [1420–F]

Fax: (202) 395 6974; or *E-mail: OIRA_submission@omb.eop.gov.*

VII. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)). We estimated the impact on hospices, as a result of the changes to the FY 2010 hospice wage index and of reducing the BNAF by 10 percent.

As discussed previously, the methodology for computing the hospice wage index was determined through a negotiated rulemaking committee and promulgated in the August 8, 1997 hospice wage index final rule (62 FR 42860). The BNAF, which was promulgated in the August 8, 1997 rule, is being phased out. This rule updates the hospice wage index in accordance with the August 8, 2008 FY 2009 Hospice Wage Index final rule (73 FR 46464), which originally finalized a 75 percent reduced BNAF for FY 2010 as the second year of a 3-year phase-out of the BNAF. However, as noted previously, we believe that a more gradual phase-out provides additional opportunity to evaluate the impact of the BNAF reduction in the context of how this type of adjustment will fit into our goals for hospice payment reform. We are finalizing a 10 percent BNAF reduction in FY 2010 as the first year of a 7-year phase-out, with an additional 15 percent BNAF reduction to occur in each of the next 6 years. Total phase-out will be complete by FY 2016.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits including potential economic, environmental, public health and safety effects, distributive impacts, and equity. A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). We have determined that this final rule is not an economically significant rule under this Executive Order.

Column 4 of Table 1 shows the combined effects of the updated wage data (the 2009 pre-floor, pre-reclassified hospital wage index) and of the 10 percent reduction in the BNAF, comparing estimated payments for FY 2010 to estimated payments for FY 2009. In keeping with the American Recovery and Reinvestment Act (ARRA) mentioned earlier in this final rule, the FY 2009 payments used for comparison have a full (unreduced) BNAF applied. We estimate that the total hospice payments for FY 2010 will decrease by $90 million as a result of the application of the updated wage data (−$40 million) and the 10 percent reduction in the BNAF (−$50 million). This estimate does not take into account any hospital market basket update, which is 2.1 percent for FY 2010. The final hospital market basket update and associated payment rates will be communicated through an administrative instruction. The effect of a 2.1 percent hospital market basket update on payments to hospices is approximately $260 million. Taking into account a 2.1 percent hospital market basket update (+$260 million), in addition to the updated wage data (−$40 million) and the 10 percent reduction in the BNAF (−$50 million), it is estimated that hospice payments would increase by $170 million in FY 2010 ($260 million −$90 million = $170 million). The percent change in payments to hospices due to the combined effects of the updated wage data, the 10 percent reduction in the BNAF, and the hospital market basket update of 2.1 percent is reflected in column 5 of the impact table (Table 1).

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The majority of hospices and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7 million to $34.5 million in any 1 year (for details, *see http://www.sba.gov/contractingopportunities/officials/size/index.html*). While the Small Business Administration (SBA) does not define a size threshold in terms of annual revenues for hospices, they do define one for home health agencies ($13.5 million; *see http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf*). For the purposes of this final rule, because the hospice benefit is a home-based benefit, we are applying the SBA definition of ''small'' for home health agencies to hospices; we will use this definition of ''small'' in determining if this final rule has a significant impact on a substantial number of small entities (for example, hospices). Using 2007 Medicare hospice claims data, we estimate that 96 percent of hospices have Medicare revenues below $13.5 million. Additionally, using available 2007 Medicare cost report data, we estimate that roughly 94 percent of hospices have total patient revenues below $13.5 million.

As indicated in Table 1 below, there are 3,328 hospices as of January 29, 2009. Approximately 48.5 percent of Medicare certified hospices are identified as voluntary or government agencies and, therefore, are considered small entities. Most of these and most of the remainder are also small hospice entities because, as noted above, their revenues fall below the SBA size thresholds.

We note that the hospice wage index methodology was previously guided by consensus, through a negotiated rulemaking committee that included representatives of national hospice associations, rural, urban, large and small hospices, multi-site hospices, and consumer groups. Based on all of the options considered, the committee agreed on the methodology described in the committee statement, and after notice and comment, it was adopted into regulation in the August 8, 1997 final rule. In developing the process for updating the hospice wage index in the 1997 final rule, we considered the impact of this methodology on small hospice entities and attempted to mitigate any potential negative effects. Small hospice entities are more likely to be in rural areas, which are less affected by the BNAF reduction than entities in urban areas. Generally, hospices in rural areas are protected by the hospice floor adjustment, which lessens the effect of the BNAF reduction.

The effects of this rule on hospices are shown in Table 1. Overall, Medicare payments to all hospices will decrease by an estimated 0.7 percent, reflecting the combined effects of the updated wage data and the 10 percent reduction in the BNAF. The combined effects of the updated wage data and the 10 percent reduction to the BNAF on small or medium sized hospices (as defined by routine home care days rather than by the SBA definition), is −0.6 or −0.7 percent, respectively. Furthermore, when including the hospital market basket update of 2.1 percent into these estimates, the combined effects on Medicare payment to all hospices would result in an estimated increase of approximately 1.4 percent. For small and medium hospices (as defined by routine home care days), the estimated effects on revenue when accounting for the updated wage data, the 10 percent BNAF reduction, and the hospital market basket update are increases in payments of 1.5 percent and 1.4 percent, respectively. Overall average hospice revenue effects will be slightly less than these estimates since according the

National Hospice and Palliative Care Organization, about 16 percent of hospice patients are non-Medicare. HHS' practice in interpreting the RFA is to consider effects economically ''significant'' only if they reach a threshold of 3 to 5 percent or more of total revenue or total costs. As noted above, the combined effect of only the updated wage data and the 10 percent reduced BNAF for all hospices is −0.7 percent. Since, by SBA's definition of ''small'' (when applied to hospices), nearly all hospices are considered to be small entities, the combined effect of only the updated wage data and the 10 percent reduced BNAF (−0.7 percent) does not exceed HHS' 3.0 percent minimum threshold. However, HHS' practice in determining ''significant economic impact'' has considered either *total* revenue or *total* costs. Total hospice revenues include the effect of the market basket update. When we consider the combined effect of the updated wage data, the 10 percent BNAF reduction, and the 2.1 percent 2009 market basket update, the overall impact is an increase in hospice payments of 1.4 percent for FY 2010. Therefore, the Secretary has determined that this final rule does not create a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside a metropolitan statistical area and has fewer than 100 beds. Therefore, the Secretary has determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of about $100 million or more in 1995 dollars, updated for inflation. That threshold is currently approximately $133 million in 2009. This final rule is not anticipated to have an effect on State, local, or Tribal governments or on the private sector of $133 million or more.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this final rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it will not have an impact on the rights, roles, and responsibilities of State, local, or Tribal governments.

B. Anticipated Effects

This section discusses the impact of the projected effects of the hospice wage index, including the effects of a 2.1 percent hospital market basket update that will be communicated separately through an administrative instruction. This final rule continues to use the CBSA-based pre-floor, pre-reclassified hospital wage index as a basis for the hospice wage index and continues to use the same policies for treatment of areas (rural and urban) without hospital wage data. The final FY 2010 hospice wage index is based upon the 2009 pre-floor, pre-reclassified hospital wage index and the most complete claims data available (FY 2008) with a 10 percent reduction in the BNAF.

For the purposes of our impacts, our baseline is estimated FY 2009 payments (without any BNAF reduction) using the 2008 pre-floor, pre-reclassified hospital wage index. Our first comparison (column 3, Table 1) compares our baseline to estimated FY 2010 payments (holding payment rates constant) using the updated wage data (2009 pre-floor, pre-reclassified hospital wage index). Consequently, the estimated effects illustrated in column 3 of Table 1 show the distributional effects of the updated wage data only. The effects of using the updated wage data combined with the 10 percent reduction in the BNAF are illustrated in column 4 of Table 1.

We have included a comparison of the combined effects of the 10 percent BNAF reduction, the updated wage data, and a 2.1 percent hospital market basket increase for FY 2010 (Table 1, column 5). Presenting these data gives the hospice industry a more complete picture of the effects on their total revenue of the hospice wage index discussed in this rule, the BNAF phase-out, and the FY 2010 hospital market basket update. Certain events may limit the scope or accuracy of our impact analysis, because such an analysis is susceptible to forecasting errors due to other changes in the forecasted impact time period. The nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon hospices.

TABLE 1—ANTICIPATED IMPACT ON MEDICARE HOSPICE PAYMENTS OF UPDATING THE PRE-FLOOR, PRE-RECLASSIFIED HOSPITAL WAGE INDEX DATA, REDUCING THE BNAF BY 10 PERCENT AND APPLYING A 2.1 PERCENT HOSPITAL MARKET BASKET UPDATE FOR THE FY 2010 HOSPICE WAGE INDEX, COMPARED TO THE FY 2009 HOSPICE WAGE INDEX WITH NO BNAF REDUCTION

	Number of hospices*	Number of routine home care days in thousands	Percent change in hospice payments due to FY2010 wage index change	Percent change in hospice payments due to wage index change and 10% reduction in BNAF	Percent change in hospice payments due to wage index change, 10% reduction in BNAF and market basket update
	(1)	(2)	(3)	(4)	(5)
ALL HOSPICES	3,328	71,440	−0.3	−0.7	1.4
URBAN HOSPICES	2,291	61,856	−0.3	−0.7	1.4
RURAL HOSPICES	1,037	9,584	−0.3	−0.6	1.4
BY REGION—URBAN:					
NEW ENGLAND	128	2,286	−0.3	−0.8	1.3
MIDDLE ATLANTIC	226	6,479	−0.5	−0.9	1.2

TABLE 1—ANTICIPATED IMPACT ON MEDICARE HOSPICE PAYMENTS OF UPDATING THE PRE-FLOOR, PRE-RECLASSIFIED HOSPITAL WAGE INDEX DATA, REDUCING THE BNAF BY 10 PERCENT AND APPLYING A 2.1 PERCENT HOSPITAL MARKET BASKET UPDATE FOR THE FY 2010 HOSPICE WAGE INDEX, COMPARED TO THE FY 2009 HOSPICE WAGE INDEX WITH NO BNAF REDUCTION—Continued

	Number of hospices* (1)	Number of routine home care days in thousands (2)	Percent change in hospice payments due to FY2010 wage index change (3)	Percent change in hospice payments due to wage index change and 10% reduction in BNAF (4)	Percent change in hospice payments due to wage index change, 10% reduction in BNAF and market basket update (5)
SOUTH ATLANTIC	331	13,701	−0.7	−1.1	1.0
EAST NORTH CENTRAL	318	8,796	−0.8	−1.2	0.8
EAST SOUTH CENTRAL	176	4,459	−0.5	−0.9	1.2
WEST NORTH CENTRAL	178	4,098	0.0	−0.4	1.7
WEST SOUTH CENTRAL	431	8,181	−0.3	−0.7	1.4
MOUNTAIN	214	5,372	−0.3	−0.7	1.4
PACIFIC	253	7,315	1.1	0.7	2.8
OUTLYING	36	1,170	−1.2	−1.2	0.9
BY REGION—RURAL:					
NEW ENGLAND	26	184	0.1	−0.3	1.8
MIDDLE ATLANTIC	45	496	−0.8	−1.2	0.9
SOUTH ATLANTIC	131	1,893	−0.5	−0.9	1.2
EAST NORTH CENTRAL	146	1,592	−1.0	−1.4	0.7
EAST SOUTH CENTRAL	152	1,957	−0.5	−0.9	1.2
WEST NORTH CENTRAL	192	1,029	0.3	−0.1	2.0
WEST SOUTH CENTRAL	184	1,386	0.5	0.2	2.3
MOUNTAIN	108	610	−0.8	−1.1	0.9
PACIFIC	52	426	1.3	0.9	3.0
OUTLYING	1	11	0.0	0.0	2.1
ROUTINE HOME CARE DAYS:					
0–3499 DAYS (small)	647	1,128	−0.2	−0.6	1.5
3500–19,999 DAYS (medium)	1,616	16,297	−0.3	−0.7	1.4
20,000+ DAYS (large)	1,065	54,016	−0.3	−0.7	1.4
TYPE OF OWNERSHIP:**					
VOLUNTARY	1,190	30,071	−0.3	−0.7	1.4
PROPRIETARY	1,713	35,548	−0.3	−0.7	1.4
GOVERNMENT	425	5,822	−0.6	−0.9	1.1
HOSPICE BASE:					
FREESTANDING	2,156	54,293	−0.3	−0.7	1.4
HOME HEALTH AGENCY	595	10,195	−0.2	−0.6	1.5
HOSPITAL	559	6,714	−0.2	−0.6	1.5
SKILLED NURSING FACILITY	18	238	−0.5	−1.0	1.1

BNAF = Budget Neutrality Adjustment Factor

*OSCAR data as of January 29, 2009, for hospices with claims filed in FY 2008

**In previous years, there was also a category labeled ''Other''; these were Other Government hospices, and have been combined with the ''Government'' category.

Note: Comparison is to FY 2009 estimated payments from the August 8, 2008 FY 2009 Hospice Wage Index final rule (73 FR 46464), but with no BNAF reduction.

REGION KEY: New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; Middle Atlantic = Pennsylvania, New Jersey, New York; South Atlantic = Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; East North Central = Illinois, Indiana, Michigan, Ohio, Wisconsin; East South Central = Alabama, Kentucky, Mississippi, Tennessee; West North Central = Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; West South Central = Arkansas, Louisiana, Oklahoma, Texas; Mountain = Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; Pacific = Alaska, California, Hawaii, Oregon, Washington; Outlying = Guam, Puerto Rico, Virgin Islands.

Table 1 shows the results of our analysis. In column 1, we indicate the number of hospices included in our analysis as of January 29, 2009 which had also filed claims in FY 2008. In column 2, we indicate the number of routine home care days that were included in our analysis, although the analysis was performed on all types of hospice care. Columns 3, 4, and 5 compare FY 2010 estimated payments with those estimated for FY 2009. The estimated FY 2009 payments incorporate a BNAF which has not been reduced. Column 3 shows the percentage change in estimated Medicare payments from FY 2009 to FY 2010 due to the effects of the updated wage data only, with estimated FY 2009 payments. Column 4 shows the percentage change in estimated hospice payments from FY 2009 to FY 2010 due to the combined effects of using the updated wage data and reducing the BNAF by 10 percent. Column 5 shows the percentage change in estimated hospice payments from FY 2009 to FY 2010 due to the combined effects of using updated wage data, a 10 percent

BNAF reduction, and a 2.1 percent hospital market basket update.

Table 1 also categorizes hospices by various geographic and hospice characteristics. The first row of data displays the aggregate result of the impact for all Medicare-certified hospices. The second and third rows of the table categorize hospices according to their geographic location (urban and rural). Our analysis indicated that there are 2,291 hospices located in urban areas and 1,037 hospices located in rural areas. The next two row groupings in the table indicate the number of hospices by census region, also broken down by urban and rural hospices. The next grouping shows the impact on hospices based on the size of the hospice's program. We determined that the majority of hospice payments are made at the routine home care rate. Therefore, we based the size of each individual hospice's program on the number of routine home care days provided in FY 2008. The next grouping shows the impact on hospices by type of ownership. The final grouping shows the impact on hospices defined by whether they are provider-based or freestanding.

As indicated in Table 1, there are 3,328 hospices. Approximately 48.5 percent of Medicare-certified hospices are identified as voluntary (non-profit) or government agencies. Because the National Hospice and Palliative Care Organization estimates that approximately 83.6 percent of hospice patients in 2007 were Medicare beneficiaries, we have not considered other sources of revenue in this analysis.

As stated previously, the following discussions are limited to demonstrating trends rather than projected dollars. We used the pre-floor, pre-reclassified hospital wage indexes as well as the most complete claims data available (FY 2008) in developing the impact analysis. The FY 2010 payment rates will be adjusted to reflect the full hospital market basket, as required by section 1814(i)(1)(C)(ii)(VII) of the Act. As previously noted, we publish these rates through administrative instructions rather than in a proposed rule. The FY 2010 hospital market basket update is 2.1 percent. Since the inclusion of the effect of a hospital market basket increase provides a more complete picture of projected total hospice payments for FY 2010, the last column of Table 1 shows the combined impacts of the updated wage data, the 10 percent BNAF reduction, and the 2.1 percent hospital market basket update. As discussed in the FY 2006 hospice wage index final rule (70 FR 45129), hospice agencies may use multiple hospice wage index values to compute their payments based on potentially different geographic locations. Before January 1, 2008, the location of the beneficiary was used to determine the CBSA for routine and continuous home care and the location of the hospice agency was used to determine the CBSA for respite and general inpatient care. Beginning January 1, 2008, the hospice wage index utilized is based on the location of the site of service. As the location of the beneficiary's home and the location of the facility may vary, there will still be variability in geographic location for an individual hospice. We anticipate that the location of the various sites will usually correspond with the geographic location of the hospice, and thus we will continue to use the location of the hospice for our analyses of the impact of the changes to the hospice wage index in this rule. For this analysis, we use payments to the hospice in the aggregate based on the location of the hospice.

The impact of hospice wage index changes has been analyzed according to the type of hospice, geographic location, type of ownership, hospice base, and size. Our analysis shows that most hospices are in urban areas and provide the vast majority of routine home care days. Most hospices are medium-sized followed by large hospices. Hospices are almost equal in numbers by ownership with 1,615 designated as non-profit or government hospices and 1,713 as proprietary. The vast majority of hospices are freestanding.

1. Hospice Size

Under the Medicare hospice benefit, hospices can provide four different levels of care days. The majority of the days provided by a hospice are routine home care (RHC) days, representing about 97 percent of the services provided by a hospice. Therefore, the number of RHC days can be used as a proxy for the size of the hospice, that is, the more days of care provided, the larger the hospice. As discussed in the August 4, 2005 final rule, we currently use three size designations to present the impact analyses. The three categories are: (1) Small agencies having 0 to 3,499 RHC days; (2) medium agencies having 3,500 to 19,999 RHC days; and (3) large agencies having 20,000 or more RHC days. The FY 2010 updated wage data without any BNAF reduction are anticipated to decrease payments to small hospices by 0.2 percent, and to decrease payments to medium and large hospices by 0.3 percent (column 3); the updated wage data and the 10 percent BNAF reduction are anticipated to decrease estimated payments to small hospices by 0.6 percent, and to medium and large hospices by 0.7 percent (column 4); and finally, the updated wage data, the 10 percent BNAF reduction, and the 2.1 percent hospital market basket update are projected to increase estimated payments by 1.5 percent for small hospices, and by 1.4 percent for medium and large hospices (column 5).

2. Geographic Location

Column 3 of Table 1 shows that the updated wage data without the BNAF reduction would result in a small reduction in estimated payments. Urban and rural hospices are both anticipated to experience a decrease of 0.3 percent. For urban hospices, an increase of 1.1 percent is anticipated to be experienced in the Pacific regions. No change in payments is anticipated for hospices in the West North Central region. The remaining urban regions are anticipated to experience a decrease ranging from 0.3 percent in the New England, West South Central, and Mountain regions to a 1.2 percent decrease in Outlying regions.

Column 3 shows that for rural hospices, Outlying regions are anticipated to experience no change. Five regions are anticipated to experience a decrease ranging from 0.5 percent in the South Atlantic and East South Central regions, to 1.0 percent in the East North Central region. The remaining regions are anticipated to experience an increase ranging from 0.1 percent in the New England region to 1.3 percent in the Pacific region.

Column 4 shows the combined effect of the updated wage data and the 10 percent BNAF reduction on estimated payments, as compared to the FY 2009 estimated payments using a BNAF with no reduction. Overall urban hospices are anticipated to experience a 0.7 percent decrease in payments, while rural hospices expect a 0.6 percent decrease. Pacific urban hospices are anticipated to see a payment increase of 0.7 percent. All other urban hospices are anticipated to experience a decrease in payment ranging from −0.4 percent in the West North Central region to 1.2 percent in the East North Central and Outlying regions.

Rural hospices are estimated to experience an increase in payments of 0.2 percent in the West South Central region and 0.9 percent in the Pacific region, while Outlying regions are estimated to experience no change in payments. The remaining rural hospices are anticipated to experience estimated decreases in payment ranging from 0.1 percent in the West North Central region

to 1.4 percent in the East North Central region.

Column 5 shows the combined effects of the updated wage data, the 10 percent BNAF reduction, and the 2.1 percent hospital market basket update on estimated payments as compared to the estimated FY 2009 payments. Note that the FY 2009 payments had no BNAF reduction applied to them. Overall, urban and rural hospices are anticipated to experience a 1.4 percent increase in payments. Urban hospices are anticipated to experience an increase in estimated payments in every region, ranging from a 0.8 percent increase in the East North Central region to a 2.8 percent increase in the Pacific region. Rural hospices in every region are estimated to see an increase in payments ranging from 0.7 percent in the East North Central region to 3.0 percent in the Pacific region.

3. Type of Ownership

Column 3 demonstrates the effect of the updated wage data on FY 2010 estimated payments versus FY 2009 estimated payments with no BNAF reduction applied to them. We anticipate that using the updated wage data would decrease estimated payments to voluntary (non-profit) and proprietary (for-profit) hospices by 0.3 percent. We estimate a decrease in payments for government hospices of 0.6 percent.

Column 4 demonstrates the combined effects of the updated wage data and of the 10 percent BNAF reduction. Estimated payments to voluntary (non-profit) and proprietary (for-profit) hospices are anticipated to decrease by 0.7 percent, while government hospices are anticipated to experience decreases of 0.9 percent.

Column 5 shows the combined effects of the updated wage data, the 10 percent BNAF reduction, and the 2.1 percent hospital market basket update on estimated payments, comparing FY 2010 to FY 2009 (using a BNAF with no reduction). Estimated FY 2010 payments are anticipated to increase by 1.4 percent for voluntary (non-profit) and proprietary (for-profit) hospices, and by 1.1 percent for government hospices.

4. Hospice Base

Column 3 demonstrates the effect of using the updated wage data, comparing estimated payments for FY 2010 to FY 2009 (using a BNAF with no reduction). Estimated payments are anticipated to decrease by 0.3 percent for freestanding facilities. Home health and hospital based facilities are anticipated to experience a 0.2 percent decrease in estimated payments. Hospices based out of skilled nursing facilities are anticipated to experience a decrease in estimated payments of 0.5 percent.

Column 4 shows the combined effects of the updated wage data and reducing the BNAF by 10 percent, comparing FY 2010 to FY 2009 (using a BNAF with no reduction) estimated payments. Skilled nursing facility based hospices are estimated to see a 1.0 percent decrease, freestanding hospices are estimated to see a 0.7 percent decrease, and hospital and home health agency based hospices are each anticipated to experience a 0.6 percent decrease in payments.

Column 5 shows the combined effects of the updated wage data, the 10 percent BNAF reduction, and the 2.1 percent hospital market basket update on estimated payments, comparing FY 2010 to FY 2009 (using a BNAF with no reduction). Estimated payments are anticipated to increase by 1.1 percent for skilled nursing based facilities, to increase by 1.4 percent for freestanding facilities, and to increase by 1.5 percent for home health agency and hospital based facilities.

C. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 2 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this rule. This table provides our best estimate of the decrease in Medicare payments under the hospice benefit as a result of the changes presented in this final rule on data for 3,328 hospices in our database. All expenditures are classified as transfers to Medicare providers (that is, hospices).

TABLE 2— ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM FY 2009 TO FY 2010

[in millions]

Category	Transfers
Annualized Monetized Transfers.	$ − 90
From Whom to Whom ..	Federal Government to Hospices.

*The $90 million reduction in transfers includes the 10 percent reduction in the BNAF and the updated wage data. It does not include the hospital market basket update, which is 2.1 percent.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 405

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medical devices, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 418

Health Facilities, Hospice care, Medicare, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

■ 1. The authority citation for part 405 subpart R continues to read as follows:

Authority: Secs. 205, 1102, 1814(b), 1815(a), 1833, 1861(v), 1871, 1872, 1878, and 1886 of the Social Security Act (42 U.S.C. 405, 1302, 1395f(b), 1395g(a), 1395l, 1395x(v), 1395hh, 1395ii, 1395oo, and 1395ww).

Subpart R—Provider Reimbursement Determinations and Appeals

■ 2. Section 405.1803 is amended by adding paragraph (a)(3) as follows:

§ 405.1803 Intermediary determination and notice of amount of program reimbursement.

* * * * *

(a) * * *

(3) *Hospice caps.* With respect to a hospice, the reporting period for the cap calculation is the cap year; and the intermediaries' determination of program reimbursement letter, which provides the results of the inpatient and aggregate cap calculations, shall serve as a notice of program reimbursement. The time period for filing cap appeals begins with receipt of the determination of program reimbursement letter.

* * * * *

PART 418—HOSPICE CARE

■ 3. The authority citation for part 418 continues to read as follows:

Authority: Secs 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart A—General Provision and Definitions

■ 4. Section 418.1 is amended by revising the introductory text to read as follows:

§ 418.1 Statutory basis.

This part implements section 1861(dd) of the Social Security Act (the Act). Section 1861(dd) of the Act specifies services covered as hospice care and the conditions that a hospice program must meet in order to participate in the Medicare program. Section 1861(dd) also specifies limitations on coverage of, and payment for, inpatient hospice care. The following sections of the Act are also pertinent:

* * * * *

■ 5. Section 418.2 is revised to read as follows:

§ 418.2 Scope of part.

Subpart A of this part sets forth the statutory basis and scope and defines terms used in this Part. Subpart B specifies the eligibility and election requirements and the benefit periods. Subparts C and D specify the conditions of participation for hospices. Subpart E is reserved for future use. Subparts F and G specify coverage and payment policy. Subpart H specifies coinsurance amounts applicable to hospice care.

Subpart B—Eligibility, Election and Duration of Benefits

■ 6. Section 418.22 is amended by adding a new paragraph (b)(3) to read as follows:

§ 418.22 Certification of terminal illness.

* * * * *

(b) * * *

(3) The physician must include a brief narrative explanation of the clinical findings that supports a life expectancy of 6 months or less as part of the certification and recertification forms, or as an addendum to the certification and recertification forms.

(i) If the narrative is part of the certification or recertification form, then the narrative must be located immediately prior to the physician's signature.

(ii) If the narrative exists as an addendum to the certification or recertification form, in addition to the physician's signature on the certification or recertification form, the physician must also sign immediately following the narrative in the addendum.

(iii) The narrative shall include a statement under the physician signature attesting that by signing, the physician confirms that he/she composed the narrative based on his/her review of the patient's medical record or, if applicable, his or her examination of the patient.

(iv) The narrative must reflect the patient's individual clinical circumstances and cannot contain check boxes or standard language used for all patients.

* * * * *

Subpart C—Conditions of Participation: Patient Care Non-Core Services

■ 7. Section 418.76 is amended by revising paragraph (f)(1) to read as follows:

§ 418.76 Condition of participation: Hospice aide and homemaker services.

(f) *Standard: Eligible competency organizations.*

* * * * *

(1) Had been out of compliance with the requirements of § 484.36(a) and § 484.36 (b) of this chapter.

* * * * *

Subpart D—Conditions of Participation: Organizational Environment

■ 8. Section 418.100 is amended by revising paragraph (f)(1)(iii) to read as follows:

§ 418.100 Condition of participation: Organization and administration of service.

* * * * *

(f) * * *

(1) * * *

(iii) The lines of authority and professional and administrative control must be clearly delineated in the hospice's organizational structure and in practice, and must be traced to the location which was issued the certification number.

* * * * *

§ 418.108 [Amended]

■ 9. In paragraph (b)(1)(ii), the cross reference to ''§ 418.110(f)'' is revised to read ''§ 418.110(e)''.

Subpart F—Covered Services

■ 10. Section 418.200 is revised to read as follows:

§ 418.200 Requirements for coverage.

To be covered, hospice services must meet the following requirements. They must be reasonable and necessary for the palliation and management of the terminal illness as well as related conditions. The individual must elect hospice care in accordance with § 418.24. A plan of care must be established and periodically reviewed by the attending physician, the medical director, and the interdisciplinary group of the hospice program as set forth in § 418.56. That plan of care must be established before hospice care is provided. The services provided must be consistent with the plan of care. A certification that the individual is terminally ill must be completed as set forth in section § 418.22.

■ 11. Section § 418.202 is amended by revising paragraphs (f) and (g) to read as follows:

§ 418.202 Covered services.

* * * * *

(f) *Medical appliances and supplies, including drugs and biologicals.* Only drugs as defined in section 1861(t) of the Act and which are used primarily for the relief of pain and symptom control related to the individual's terminal illness are covered. Appliances may include covered durable medical equipment as described in § 410.38 of this chapter as well as other self-help and personal comfort items related to the palliation or management of the patient's terminal illness. Equipment is provided by the hospice for use in the patient's home while he or she is under hospice care. Medical supplies include those that are part of the written plan of care and that are for palliation and management of the terminal or related conditions.

(g) *Home health or hospice aide services furnished by qualified aides as designated in § 418.94 and homemaker services.* Home health aides (also known as hospice aides) may provide personal care services as defined in § 409.45(b) of this chapter. Aides may perform household services to maintain a safe and sanitary environment in areas of the home used by the patients, such as changing bed linens or light cleaning and laundering essential to the comfort and cleanliness of the patient. Aide services may include assistance in maintenance of a safe and healthy environment and services to enable the individual to carry out the treatment plan.

* * * * *

■ 12. Section § 418.204 is amended by revising paragraph (a) to read as follows:

§ 418.204 Special coverage requirements.

(a) *Periods of crisis.* Nursing care may be covered on a continuous basis for as much as 24 hours a day during periods of crisis as necessary to maintain an individual at home. Either homemaker or home health aide (also known as

hospice aide) services or both may be covered on a 24-hour continuous basis during periods of crisis but care during these periods must be predominantly nursing care. A period of crisis is a period in which the individual requires continuous care to achieve palliation and management of acute medical symptoms.

* * * * *

Subpart G—Payment for Hospice Care

■ 13. Section 418.302 is amended by revising paragraphs (b)(2) and (f)(2) to read as follows:

§ 418.302 Payment procedures for hospice care.

* * * * *

(b) * * *

(2) Continuous home care day. A continuous home care day is a day on which an individual who has elected to receive hospice care is not in an inpatient facility and receives hospice care consisting predominantly of nursing care on a continuous basis at home. Home health aide (also known as a hospice aide) or homemaker services or both may also be provided on a continuous basis. Continuous home care is only furnished during brief periods of crisis as described in § 418.204(a) and only as necessary to maintain the terminally ill patient at home.

* * * * *

(f) * * *

(2) At the end of a cap period, the intermediary calculates a limitation on payment for inpatient care to ensure that Medicare payment is not made for days of inpatient care in excess of 20 percent of the total number of days of hospice care furnished to Medicare patients. Only inpatient days that were provided and billed as general inpatient or respite days are counted as inpatient days when computing the inpatient cap.

* * * * *

■ 14. Section 418.311 is revised to read as follows:

§ 418.311 Administrative appeals.

A hospice that believes its payments have not been properly determined in accordance with these regulations may request a review from the intermediary or the Provider Reimbursement Review Board (PRRB) if the amount in controversy is at least $1,000 or $10,000, respectively. In such a case, the procedure in 42 CFR part 405, subpart R, will be followed to the extent that it is applicable. The PRRB, subject to review by the Secretary under § 405.1874 of this chapter, shall have the authority to determine the issues raised. The methods and standards for the calculation of the statutorily defined payment rates by CMS are not subject to appeal.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 20, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: July 29, 2009.

Kathleen Sebelius,

Secretary.

Editor's note: The following addenda will not appear in the Code of Federal Regulations.

BILLING CODE 4120–01–P

Addendum A. Final Hospice Wage Index for Urban Areas by CBSA- FY 2010

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8547
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3909
10420	Akron, OH Portage County, OH Summit County, OH	0.9413
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.9187
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.9191
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9722
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8582
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	1.0027
11020	Altoona, PA Blair County, PA	0.8995
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.9423
11180	Ames, IA Story County, IA	1.0014
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.2594
11300	Anderson, IN Madison County, IN	0.9247
11340	Anderson, SC Anderson County, SC	1.0102
11460	Ann Arbor, MI Washtenaw County, MI	1.1026
11500	Anniston-Oxford, AL Calhoun County, AL	0.8368
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9965
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9650
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	1.0124

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
12060	Atlanta-Sandy Springs-Marietta, GA	1.0296
	Barrow County, GA	
	Bartow County, GA	
	Butts County, GA	
	Carroll County, GA	
	Cherokee County, GA	
	Clayton County, GA	
	Cobb County, GA	
	Coweta County, GA	
	Dawson County, GA	
	DeKalb County, GA	
	Douglas County, GA	
	Fayette County, GA	
	Forsyth County, GA	
	Fulton County, GA	
	Gwinnett County, GA	
	Haralson County, GA	
	Heard County, GA	
	Henry County, GA	
	Jasper County, GA	
	Lamar County, GA	
	Meriwether County, GA	
	Newton County, GA	
	Paulding County, GA	
	Pickens County, GA	
	Pike County, GA	
	Rockdale County, GA	
	Spalding County, GA	
	Walton County, GA	
12100	Atlantic City-Hammonton, NJ	1.2639
	Atlantic County, NJ	
12220	Auburn-Opelika, AL	0.8000
	Lee County, AL	
12260	Augusta-Richmond County, GA-SC	1.0150
	Burke County, GA	
	Columbia County, GA	
	McDuffie County, GA	
	Richmond County, GA	
	Aiken County, SC	
	Edgefield County, SC	
12420	Austin-Round Rock, TX	1.0066
	Bastrop County, TX	
	Caldwell County, TX	
	Hays County, TX	
	Travis County, TX	
	Williamson County, TX	
12540	Bakersfield, CA	1.1811
	Kern County, CA	
12580	Baltimore-Towson, MD	1.0614
	Anne Arundel County, MD	
	Baltimore County, MD	
	Carroll County, MD	
	Harford County, MD	
	Howard County, MD	
	Queen Anne's County, MD	
	Baltimore City, MD	
12620	Bangor, ME	1.0740
	Penobscot County, ME	
12700	Barnstable Town, MA	1.3346
	Barnstable County, MA	
12940	Baton Rouge, LA	0.8617
	Ascension Parish, LA	
	East Baton Rouge Parish, LA	
	East Feliciana Parish, LA	
	Iberville Parish, LA	
	Livingston Parish, LA	
	Pointe Coupee Parish, LA	
	St. Helena Parish, LA	
	West Baton Rouge Parish, LA	
	West Feliciana Parish, LA	
12980	Battle Creek, MI	1.0683
	Calhoun County, MI	
13020	Bay City, MI	0.9762
	Bay County, MI	
13140	Beaumont-Port Arthur, TX	0.8950
	Hardin County, TX	
	Jefferson County, TX	
	Orange County, TX	
13380	Bellingham, WA	1.2287
	Whatcom County, WA	
13460	Bend, OR	1.2007
	Deschutes County, OR	
13644	Bethesda-Frederick-Gaithersburg, MD	1.1134
	Frederick County, MD	
	Montgomery County, MD	
13740	Billings, MT	0.9295
	Carbon County, MT	
	Yellowstone County, MT	
13780	Binghamton, NY	0.9051
	Broome County, NY	
	Tioga County, NY	

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.9281
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.8000
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8608
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.9478
14060	Bloomington-Normal, IL McLean County, IL	0.9841
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9783
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.2558
14500	Boulder, CO Boulder County, CO	1.0875
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8854
14600	Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	1.0450
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.1369
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.3583
15180	Brownsville-Harlingen, TX Cameron County, TX	0.9412
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	1.0099
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	1.0067
15500	Burlington, NC Alamance County, NC	0.9222
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9769
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1702
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0921
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.9333
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9918
16180	Carson City, NV Carson City, NV	1.0691
16220	Casper, WY Natrona County, WY	1.0112
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.9415
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	0.9987
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8735
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9721

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
16740	Charlotte-Gastonia-Concord, NC-SC	1.0128
	Anson County, NC	
	Cabarrus County, NC	
	Gaston County, NC	
	Mecklenburg County, NC	
	Union County, NC	
	York County, SC	
16820	Charlottesville, VA	1.0362
	Albemarle County, VA	
	Fluvanna County, VA	
	Greene County, VA	
	Nelson County, VA	
	Charlottesville City, VA	
16860	Chattanooga, TN-GA	0.9372
	Catoosa County, GA	
	Dade County, GA	
	Walker County, GA	
	Hamilton County, TN	
	Marion County, TN	
	Sequatchie County, TN	
16940	Cheyenne, WY	0.9792
	Laramie County, WY	
16974	Chicago-Naperville-Joliet, IL	1.0977
	Cook County, IL	
	DeKalb County, IL	
	DuPage County, IL	
	Grundy County, IL	
	Kane County, IL	
	Kendall County, IL	
	McHenry County, IL	
	Will County, IL	
17020	Chico, CA	1.1503
	Butte County, CA	
17140	Cincinnati-Middletown, OH-KY-IN	1.0226
	Dearborn County, IN	
	Franklin County, IN	
	Ohio County, IN	
	Boone County, KY	
	Bracken County, KY	
	Campbell County, KY	
	Gallatin County, KY	
	Grant County, KY	
	Kenton County, KY	
	Pendleton County, KY	
	Brown County, OH	
	Butler County, OH	
	Clermont County, OH	
	Hamilton County, OH	
	Warren County, OH	

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
17300	Clarksville, TN-KY	0.8759
	Christian County, KY	
	Trigg County, KY	
	Montgomery County, TN	
	Stewart County, TN	
17420	Cleveland, TN	0.8455
	Bradley County, TN	
	Polk County, TN	
17460	Cleveland-Elyria-Mentor, OH	0.9755
	Cuyahoga County, OH	
	Geauga County, OH	
	Lake County, OH	
	Lorain County, OH	
	Medina County, OH	
17660	Coeur d'Alene, ID	0.9840
	Kootenai County, ID	
17780	College Station-Bryan, TX	0.9866
	Brazos County, TX	
	Burleson County, TX	
	Robertson County, TX	
17820	Colorado Springs, CO	1.0532
	El Paso County, CO	
	Teller County, CO	
17860	Columbia, MO	0.9015
	Boone County, MO	
	Howard County, MO	
17900	Columbia, SC	0.9430
	Calhoun County, SC	
	Fairfield County, SC	
	Kershaw County, SC	
	Lexington County, SC	
	Richland County, SC	
	Saluda County, SC	
17980	Columbus, GA-AL	0.9225
	Russell County, AL	
	Chattahoochee County, GA	
	Harris County, GA	
	Marion County, GA	
	Muscogee County, GA	
18020	Columbus, IN	1.0280
	Bartholomew County, IN	

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	1.0496
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.9076
18700	Corvallis, OR Benton County, OR	1.1932
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.8251
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	1.0498
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.9189
19180	Danville, IL Vermilion County, IL	0.9895
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8862
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8904
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9715
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.8237
19500	Decatur, IL Macon County, IL	0.8598
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.9384
19740	Denver-Aurora, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.1419
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	1.0065
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	1.0512
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.8036
20100	Dover, DE Kent County, DE	1.0899
20220	Dubuque, IA Dubuque County, IA	0.8846
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0939
20500	Durham, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	1.0273
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	1.0206
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1910
20940	El Centro, CA Imperial County, CA	0.9232

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8999
21140	Elkhart-Goshen, IN Elkhart County, IN	1.0100
21300	Elmira, NY Chemung County, NY	0.8706
21340	El Paso, TX El Paso County, TX	0.9177
21500	Erie, PA Erie County, PA	0.9197
21660	Eugene-Springfield, OR Lane County, OR	1.1676
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.9173
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1925
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.4670
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8620
22140	Farmington, NM San Juan County, NM	0.8499
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9859
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.9469
22380	Flagstaff, AZ Coconino County, AZ	1.2396
22420	Flint, MI Genesee County, MI	1.2060
22500	Florence, SC Darlington County, SC Florence County, SC	0.8582
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.8309
22540	Fond du Lac, WI Fond du Lac County, WI	0.9810
22660	Fort Collins-Loveland, CO Larimer County, CO	1.0416
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	1.0499
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.8125
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.9257
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9686
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	1.0249
23420	Fresno, CA Fresno County, CA	1.1621
23460	Gadsden, AL Etowah County, AL	0.8427
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9830
23580	Gainesville, GA Hall County, GA	0.9615
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9764
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8944
24140	Goldsboro, NC Wayne County, NC	0.9651
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.8000
24300	Grand Junction, CO Mesa County, CO	1.0358

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9695
24500	Great Falls, MT Cascade County, MT	0.9272
24540	Greeley, CO Weld County, CO	1.0222
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	1.0249
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9512
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9973
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	1.0515
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3736
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.9531
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.9497
25260	Hanford-Corcoran, CA Kings County, CA	1.1474
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9662
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.9388
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1684
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.8000
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.9475
25980	Hinesville-Fort Stewart, GA[7] Liberty County, GA Long County, GA	0.9616
26100	Holland-Grand Haven, MI Ottawa County, MI	0.9509
26180	Honolulu, HI Honolulu County, HI	1.2468
26300	Hot Springs, AR Garland County, AR	0.9620
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.8189
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	1.0385
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9769
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9587
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9585

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
26900	Indianapolis-Carmel, IN	1.0459
	Boone County, IN	
	Brown County, IN	
	Hamilton County, IN	
	Hancock County, IN	
	Hendricks County, IN	
	Johnson County, IN	
	Marion County, IN	
	Morgan County, IN	
	Putnam County, IN	
	Shelby County, IN	
26980	Iowa City, IA	1.0010
	Johnson County, IA	
	Washington County, IA	
27060	Ithaca, NY	1.0149
	Tompkins County, NY	
27100	Jackson, MI	0.9827
	Jackson County, MI	
27140	Jackson, MS	0.8516
	Copiah County, MS	
	Hinds County, MS	
	Madison County, MS	
	Rankin County, MS	
	Simpson County, MS	
27180	Jackson, TN	0.8997
	Chester County, TN	
	Madison County, TN	
27260	Jacksonville, FL	0.9499
	Baker County, FL	
	Clay County, FL	
	Duval County, FL	
	Nassau County, FL	
	St. Johns County, FL	
27340	Jacksonville, NC	0.8632
	Onslow County, NC	
27500	Janesville, WI	1.0199
	Rock County, WI	
27620	Jefferson City, MO	0.9263
	Callaway County, MO	
	Cole County, MO	
	Moniteau County, MO	
	Osage County, MO	
27740	Johnson City, TN	0.8414
	Carter County, TN	
	Unicoi County, TN	
	Washington County, TN	
27780	Johnstown, PA	0.8360
	Cambria County, PA	
27860	Jonesboro, AR	0.8356
	Craighead County, AR	
	Poinsett County, AR	
27900	Joplin, MO	0.9929
	Jasper County, MO	
	Newton County, MO	
28020	Kalamazoo-Portage, MI	1.1402
	Kalamazoo County, MI	
	Van Buren County, MI	
28100	Kankakee-Bradley, IL	1.1068
	Kankakee County, IL	
28140	Kansas City, MO-KS	1.0144
	Franklin County, KS	
	Johnson County, KS	
	Leavenworth County, KS	
	Linn County, KS	
	Miami County, KS	
	Wyandotte County, KS	
	Bates County, MO	
	Caldwell County, MO	
	Cass County, MO	
	Clay County, MO	
	Clinton County, MO	
	Jackson County, MO	
	Lafayette County, MO	
	Platte County, MO	
	Ray County, MO	
28420	Kennewick-Pasco-Richland, WA	1.0462
	Benton County, WA	
	Franklin County, WA	
28660	Killeen-Temple-Fort Hood, TX	0.9252
	Bell County, TX	
	Coryell County, TX	
	Lampasas County, TX	
28700	Kingsport-Bristol-Bristol, TN-VA	0.8173
	Hawkins County, TN	
	Sullivan County, TN	
	Bristol City, VA	
	Scott County, VA	
	Washington County, VA	
28740	Kingston, NY	0.9896
	Ulster County, NY	
28940	Knoxville, TN	0.8319
	Anderson County, TN	
	Blount County, TN	
	Knox County, TN	
	Loudon County, TN	
	Union County, TN	
29020	Kokomo, IN	0.9869

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
	Howard County, IN	
	Tipton County, IN	
29100	La Crosse, WI-MN	1.0301
	Houston County, MN	
	La Crosse County, WI	
29140	Lafayette, IN	0.9734
	Benton County, IN	
	Carroll County, IN	
	Tippecanoe County, IN	
29180	Lafayette, LA	0.8840
	Lafayette Parish, LA	
	St. Martin Parish, LA	
29340	Lake Charles, LA	0.8000
	Calcasieu Parish, LA	
	Cameron Parish, LA	
29404	Lake County-Kenosha County, IL-WI	1.0967
	Lake County, IL	
	Kenosha County, WI	
29420	Lake Havasu City - Kingman, AZ	1.0342
	Mohave County, AZ	
29460	Lakeland-Winter Haven, FL	0.9004
	Polk County, FL	
29540	Lancaster, PA	0.9884
	Lancaster County, PA	
29620	Lansing-East Lansing, MI	1.0483
	Clinton County, MI	
	Eaton County, MI	
	Ingham County, MI	
29700	Laredo, TX	0.8831
	Webb County, TX	
29740	Las Cruces, NM	0.9425
	Dona Ana County, NM	
29820	Las Vegas-Paradise, NV	1.2637
	Clark County, NV	
29940	Lawrence, KS	0.8807
	Douglas County, KS	
30020	Lawton, OK	0.8668
	Comanche County, OK	
30140	Lebanon, PA	0.9452
	Lebanon County, PA	
30300	Lewiston, ID-WA	0.9991
	Nez Perce County, ID	
	Asotin County, WA	
30340	Lewiston-Auburn, ME	0.9712
	Androscoggin County, ME	
30460	Lexington-Fayette, KY	0.9616
	Bourbon County, KY	
	Clark County, KY	
	Fayette County, KY	
	Jessamine County, KY	
	Scott County, KY	
	Woodford County, KY	
30620	Lima, OH	0.9951
	Allen County, OH	
30700	Lincoln, NE	1.0302
	Lancaster County, NE	
	Seward County, NE	
30780	Little Rock-North Little Rock-Conway AR	0.9154
	Faulkner County, AR	
	Grant County, AR	
	Lonoke County, AR	
	Perry County, AR	
	Pulaski County, AR	
	Saline County, AR	
30860	Logan, UT-ID	0.9252
	Franklin County, ID	
	Cache County, UT	
30980	Longview, TX	0.8835
	Gregg County, TX	
	Rusk County, TX	
	Upshur County, TX	
31020	Longview, WA	1.1830
	Cowlitz County, WA	
31084	Los Angeles-Long Beach-Santa Ana, CA	1.2887
	Los Angeles County, CA	
31140	Louisville-Jefferson County, KY-IN	0.9763
	Clark County, IN	
	Floyd County, IN	
	Harrison County, IN	
	Washington County, IN	
	Bullitt County, KY	
	Henry County, KY	
	Meade County, KY	
	Nelson County, KY	
	Oldham County, KY	
	Shelby County, KY	
	Spencer County, KY	
	Trimble County, KY	
31180	Lubbock, TX	0.9216
	Crosby County, TX	
	Lubbock County, TX	

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.9262
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	1.0102
31460	Madera, CA Madera County, CA	0.8380
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.1577
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0935
31900	Mansfield, OH Richland County, OH	0.9849
32420	Mayaguez, PR Hormigueros Municipio, PR Mayaguez Municipio, PR	0.4531
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.9510
32780	Medford, OR Jackson County, OR	1.0814
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9745
32900	Merced, CA Merced County, CA	1.2924
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	1.0377
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9668
33260	Midland, TX Midland County, TX	1.0373
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0640
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1770
33540	Missoula, MT Missoula County, MT	0.9472
33660	Mobile, AL Mobile County, AL	0.8348
33700	Modesto, CA Stanislaus County, CA	1.2872
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.8339
33780	Monroe, MI Monroe County, MI	0.9438
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8744
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.9002
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.8000
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0864
34620	Muncie, IN Delaware County, IN	0.8961
34740	Muskegon-Norton Shores, MI Muskegon County, MI	1.0614
34820	Myrtle Beach-North Myrtle Beach-Conway, SC	0.9133

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
	Horry County, SC	
34900	Napa, CA	1.5327
	Napa County, CA	
34940	Naples-Marco Island, FL	1.0210
	Collier County, FL	
34980	Nashville-Davidson--Murfreesboro-Franklin, TN	1.0032
	Cannon County, TN	
	Cheatham County, TN	
	Davidson County, TN	
	Dickson County, TN	
	Hickman County, TN	
	Macon County, TN	
	Robertson County, TN	
	Rutherford County, TN	
	Smith County, TN	
	Sumner County, TN	
	Trousdale County, TN	
	Williamson County, TN	
	Wilson County, TN	
35004	Nassau-Suffolk, NY	1.3145
	Nassau County, NY	
	Suffolk County, NY	
35084	Newark-Union, NJ-PA	1.2383
	Essex County, NJ	
	Hunterdon County, NJ	
	Morris County, NJ	
	Sussex County, NJ	
	Union County, NJ	
	Pike County, PA	
35300	New Haven-Milford, CT	1.2395
	New Haven County, CT	
35380	New Orleans-Metairie-Kenner, LA	0.9609
	Jefferson Parish, LA	
	Orleans Parish, LA	
	Plaquemines Parish, LA	
	St. Bernard Parish, LA	
	St. Charles Parish, LA	
	St. John the Baptist Parish, LA	
	St. Tammany Parish, LA	
35644	New York-White Plains-Wayne, NY-NJ	1.3601
	Bergen County, NJ	
	Hudson County, NJ	
	Passaic County, NJ	
	Bronx County, NY	
	Kings County, NY	
	New York County, NY	
	Putnam County, NY	
	Queens County, NY	
	Richmond County, NY	
	Rockland County, NY	
	Westchester County, NY	
35660	Niles-Benton Harbor, MI	0.9570
	Berrien County, MI	
35980	Norwich-New London, CT	1.2032
	New London County, CT	
36084	Oakland-Fremont-Hayward, CA	1.6987
	Alameda County, CA	
	Contra Costa County, CA	
36100	Ocala, FL	0.8985
	Marion County, FL	
36140	Ocean City, NJ	1.2135
	Cape May County, NJ	
36220	Odessa, TX	1.0002
	Ector County, TX	
36260	Ogden-Clearfield, UT	0.9662
	Davis County, UT	
	Morgan County, UT	
	Weber County, UT	
36420	Oklahoma City, OK	0.9209
	Canadian County, OK	
	Cleveland County, OK	
	Grady County, OK	
	Lincoln County, OK	
	Logan County, OK	
	McClain County, OK	
	Oklahoma County, OK	
36500	Olympia, WA	1.2178
	Thurston County, WA	
36540	Omaha-Council Bluffs, NE-IA	0.9966
	Harrison County, IA	
	Mills County, IA	
	Pottawattamie County, IA	
	Cass County, NE	
	Douglas County, NE	
	Sarpy County, NE	
	Saunders County, NE	
	Washington County, NE	
36740	Orlando-Kissimmee, FL	0.9618
	Lake County, FL	
	Orange County, FL	
	Osceola County, FL	
	Seminole County, FL	
36780	Oshkosh-Neenah, WI	1.0001
	Winnebago County, WI	
36980	Owensboro, KY	0.9168
	Daviess County, KY	
	Hancock County, KY	
	McLean County, KY	

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.2615
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9851
37380	Palm Coast, FL Flagler County, FL	0.9461
37460	Panama City-Lynn Haven, FL Bay County, FL	0.8825
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.8304
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8552
37764	Peabody, MA Essex County, MA	1.1345
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8700
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9540
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.1589
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0956
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.8367
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.9160
38340	Pittsfield, MA	1.1026

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
	Berkshire County, MA	
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9862
38660	Ponce, PR Juana Diaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4932
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	1.0495
38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.2093
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	1.0419
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.1527
39140	Prescott, AZ Yavapai County, AZ	1.0789
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.1291
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9903
39380	Pueblo, CO Pueblo County, CO	0.9197
39460	Punta Gorda, FL Charlotte County, FL	0.9475
39540	Racine, WI Racine County, WI	0.9557
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	1.0363

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
39660	Rapid City, SD Meade County, SD Pennington County, SD	1.0132
39740	Reading, PA Berks County, PA	0.9756
39820	Redding, CA Shasta County, CA	1.4494
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0891
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9884
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.2106
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.9141
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1837
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.9301
40420	Rockford, IL Boone County, IL Winnebago County, IL	1.0382
40484	Rockingham County, NH Strafford County, NH	1.0478
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9533
40660	Rome, GA Floyd County, GA	0.9642
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.4327
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.9186
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.1586
41100	St. George, UT Washington County, UT	0.9523
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0957

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.6392
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.5469
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.7038

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9507
41420	Salem, OR Marion County, OR Polk County, OR	1.1489
41500	Salinas, CA Monterey County, CA	1.5820
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9760
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9667
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.8892
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.9348
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.2179
41780	Sandusky, OH Erie County, OH	0.9363

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.5052
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.3133
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.2660
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.2571
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.7342
42140	Santa Fe, NM Santa Fe County, NM	1.1200
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.6391
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9661
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8796
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.2409
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9729
43100	Sheboygan, WI Sheboygan County, WI	0.9416
43300	Sherman-Denison, TX Grayson County, TX	0.9526
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8911
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.9411
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9874
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	1.0304
43900	Spartanburg, SC Spartanburg County, SC	0.9527
44060	Spokane, WA Spokane County, WA	1.1146
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9608
44140	Springfield, MA Franklin County, MA Hampden County, MA	1.0983

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
	Hampshire County, MA	
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8892
44220	Springfield, OH Clark County, OH	0.9369
44300	State College, PA Centre County, PA	0.9434
44700	Stockton, CA San Joaquin County, CA	1.2683
44940	Sumter, SC Sumter County, SC	0.8716
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	1.0331
45104	Tacoma, WA Pierce County, WA	1.1866
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.9462
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.9344
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9590
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8597
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9930
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.9243
45940	Trenton-Ewing, NJ Mercer County, NJ	1.1194
46060	Tucson, AZ Pima County, AZ	0.9742
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8915
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8968
46340	Tyler, TX Smith County, TX	0.9293
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8871
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.8473
46700	Vallejo-Fairfield, CA Solano County, CA	1.5157
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8576
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0942

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
47260	Virginia Beach-Norfolk-Newport News, VA-NC	0.9378
	Currituck County, NC	
	Gloucester County, VA	
	Isle of Wight County, VA	
	James City County, VA	
	Mathews County, VA	
	Surry County, VA	
	York County, VA	
	Chesapeake City, VA	
	Hampton City, VA	
	Newport News City, VA	
	Norfolk City, VA	
	Poquoson City, VA	
	Portsmouth City, VA	
	Suffolk City, VA	
	Virginia Beach City, VA	
	Williamsburg City, VA	
47300	Visalia-Porterville, CA	1.0708
	Tulare County, CA	
47380	Waco, TX	0.9074
	McLennan County, TX	
47580	Warner Robins, GA	0.9489
	Houston County, GA	
47644	Warren-Troy-Farmington Hills, MI	1.0455
	Lapeer County, MI	
	Livingston County, MI	
	Macomb County, MI	
	Oakland County, MI	
	St. Clair County, MI	
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV	1.1429
	District of Columbia, DC	
	Calvert County, MD	
	Charles County, MD	
	Prince George's County, MD	
	Arlington County, VA	
	Clarke County, VA	
	Fairfax County, VA	
	Fauquier County, VA	
	Loudoun County, VA	
	Prince William County, VA	
	Spotsylvania County, VA	
	Stafford County, VA	
	Warren County, VA	
	Alexandria City, VA	
	Fairfax City, VA	
	Falls Church City, VA	
	Fredericksburg City, VA	
	Manassas City, VA	
	Manassas Park City, VA	
	Jefferson County, WV	
47940	Waterloo-Cedar Falls, IA	0.8962
	Black Hawk County, IA	
	Bremer County, IA	
	Grundy County, IA	
48140	Wausau, WI	1.0150
	Marathon County, WI	
48260	Weirton-Steubenville, WV-OH	0.8528
	Jefferson County, OH	
	Brooke County, WV	
	Hancock County, WV	
48300	Wenatchee, WA	1.0075
	Chelan County, WA	
	Douglas County, WA	
48424	West Palm Beach-Boca Raton-Boynton Beach, FL	1.0299
	Palm Beach County, FL	
48540	Wheeling, WV-OH	0.7998
	Belmont County, OH	
	Marshall County, WV	
	Ohio County, WV	
48620	Wichita, KS	0.9573
	Butler County, KS	
	Harvey County, KS	
	Sedgwick County, KS	
	Sumner County, KS	
48660	Wichita Falls, TX	0.9323
	Archer County, TX	
	Clay County, TX	
	Wichita County, TX	

CBSA Code	Urban Area[1] (Constituent Counties)	Wage Index[2]
48700	Williamsport, PA Lycoming County, PA	0.8546
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.1291
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9594
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	1.0346
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.9517
49340	Worcester, MA Worcester County, MA	1.1438
49420	Yakima, WA Yakima County, WA	1.0501
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3947
49620	York-Hanover, PA York County, PA	1.0047
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.9411
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1756
49740	Yuma, AZ Yuma County, AZ	0.9797

[1]This column lists each CBSA area name and each county or county equivalent, in the CBSA area. Counties not listed in this Table are considered to be rural areas. Wage index values for these areas are found in Addendum B.

[2]Wage index values are based on FY 2005 hospital cost report data before reclassification. These data form the basis for the pre-floor, pre-reclassified hospital wage index. The budget neutrality adjustment factor (BNAF) or the hospice floor is then applied to the pre-floor, pre-reclassified hospital wage index to derive the hospice wage index Wage index values greater than or equal to 0 8 are subject to a BNAF.

The hospice floor calculation is as follows: wage index values below 0.8 are adjusted to be the greater of a) the 10 percent reduced BNAF OR b) the minimum of the pre-floor, pre-reclassified hospital wage index value x 1.15, or 0.8000.
For the FY 2010 hospice wage index, the BNAF was reduced by 10 percent.

[3]Because there are no hospitals in this CBSA, the wage index value is calculated by taking the average of all other urban CBSAs in Georgia

Addendum B. Final Hospice Wage Index for Rural Areas by CBSA- FY 2010

State Code	Nonurban Area	Wage Index
1	Alabama	0.8009
2	Alaska	1.2560
3	Arizona	0.8923
4	Arkansas	0.8000
5	California	1.2957
6	Colorado	1.0102
7	Connecticut	1.1628
8	Delaware	1.0516
10	Florida	0.8977
11	Georgia	0.8035
12	Hawaii	1.1611
13	Idaho	0.8076
14	Illinois	0.8852
15	Indiana	0.8944
16	Iowa	0.9293
17	Kansas	0.8500
18	Kentucky	0.8237
19	Louisiana	0.8000
20	Maine	0.9125
21	Maryland	0.9377
22	Massachusetts[1]	1.2319
23	Michigan	0.9381
24	Minnesota	0.9563
25	Mississippi	0.8006

State Code	Nonurban Area	Wage Index
26	Missouri	0.8426
27	Montana	0.9139
28	Nebraska	0.9215
29	Nevada	0.9904
30	New Hampshire	1.0787
31	New Jersey[2]	------
32	New Mexico	0.9302
33	New York	0.8598
34	North Carolina	0.9053
35	North Dakota	0.8000
36	Ohio	0.9065
37	Oklahoma	0.8162
38	Oregon	1.0786
39	Pennsylvania	0.8830
40	Puerto Rico[3]	0.4654
41	Rhode Island[2]	------
42	South Carolina	0.9013
43	South Dakota	0.9081
44	Tennessee	0.8222
45	Texas	0.8333
46	Utah	0.8727
47	Vermont	1.0639
48	Virgin Islands	0.8000
49	Virginia	0.8298
50	Washington	1.0747
51	West Virginia	0.8000
52	Wisconsin	0.9894
53	Wyoming	0.9833
65	Guam	1.0145

[1] There are no hospitals in the rural areas of Massachusetts, so the wage index value used is the average of the contiguous Counties.
[2] There are no rural areas in this state.
[3] Wage index values are obtained using the methodology described in this proposed rule.

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Federal Register

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 409, 424, 484, and 489 Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2010; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

42 CFR Parts 409, 424, 484, and 489

[CMS–1560–P]

RIN 0938–AP20

Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2010

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule sets forth an update to the Home Health Prospective Payment System (HH PPS) rates; the national standardized 60-day episode rates, the national per-visit rates, the non-routine medical supply (NRS) conversion factor, and the low utilization payment amount (LUPA) add-on payment amount, under the Medicare prospective payment system for home health agencies effective January 1, 2010. In addition, this rule proposes a change to the HH PPS outlier policy and proposes to require the submission of OASIS data as a condition for payment under the HH PPS. Also, this rule proposes payment safeguards that would improve our enrollment process, improve the quality of care that Medicare beneficiaries receive from HHAs, and reduce the Medicare program's vulnerability to fraud. This rule also proposes clarifying language to the ''skilled services'' section and Condition of Participation (CoP) section of our regulations. This proposed rule also clarifies the coverage of routine medical supplies under the HH PPS. We are also soliciting comments on: Physician/patient interaction associated with the home health plan of care (POC); a Consumer Assessment of Healthcare Providers and Systems (CAHPS) Home Health Care Survey; the Outcome and Assessment Information Set (OASIS), Version C, effective January 1, 2010; proposed pay for reporting measures for use in CY 2011; and a number of minor payment-related issues. We are also responding to comments received as a result of our solicitation in the CY 2008 HH PPS final rule with comment period.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on September 28, 2009.

ADDRESSES: In commenting, please refer to file code CMS–1560–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the ''More Search Options'' tab.

2. *By regular mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1560–P, P.O. Box 8016, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1560–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the ''Collection of Information Requirements'' section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. EST. To schedule an appointment to view public comments, phone 1–800–743–3951.

FOR FURTHER INFORMATION CONTACT:

Randy Throndset, (410) 786–0131 (overall HH PPS).

Sharon Ventura, (410) 786–1985 (for information related to payment rates and wage indexes).

James Bossenmeyer, (410) 786–9317 (for information related to payment safeguards).

Doug Brown, (410) 786–0028 (for quality issues).

Kathleen Walch, (410) 786–7970 (for skilled services requirements and clinical issues).

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I. Background

A. Requirements of the Balanced Budget Act of 1997 for Establishing the Prospective Payment System for Home Health Services

The Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) enacted on August 5, 1997, significantly changed the way Medicare pays for Medicare home health services. Section 4603 of the BBA mandated the development of the home health prospective payment system (HH PPS). Until the implementation of a HH PPS on October 1, 2000, home health agencies (HHAs) received payment under a cost-based reimbursement system.

Section 4603(a) of the BBA mandated the development of a HH PPS for all Medicare-covered home health services provided under a plan of care (POC) that were paid on a reasonable cost basis by adding section 1895 of the Social Security Act (the Act), entitled ''Prospective Payment For Home Health Services''. Section 1895(b)(1) of the Act requires the Secretary to establish a HH PPS for all costs of home health services paid under Medicare.

Section 1895(b)(3)(A) of the Act requires that: (1) The computation of a standard prospective payment amount include all costs for home health services covered and paid for on a reasonable cost basis and be initially based on the most recent audited cost report data available to the Secretary, and (2) the prospective payment amounts be standardized to eliminate the effects of case-mix and wage levels among HHAs.

Section 1895(b)(3)(B) of the Act addresses the annual update to the standard prospective payment amounts by the home health applicable percentage increase.

Section 1895(b)(4) of the Act governs the payment computation. Sections 1895(b)(4)(A)(i) and (b)(4)(A)(ii) of the Act require the standard prospective payment amount to be adjusted for case-mix and geographic differences in wage levels.

Section 1895(b)(4)(B) of the Act requires the establishment of an appropriate case-mix change adjustment factor that adjusts for significant variation in costs among different units of services.

Similarly, section 1895(b)(4)(C) of the Act requires the establishment of wage adjustment factors that reflect the relative level of wages, and wage-related costs applicable to home health services furnished in a geographic area compared to the applicable national average level. Pursuant to 1895(b)(4)(c), the wage-adjustment factors used by the Secretary may be the factors used under section 1886(d)(3)(E) of the Act.

Section 1895(b)(5) of the Act gives the Secretary the option to make additions or adjustments to the payment amount otherwise paid in the case of outliers because of unusual variations in the type or amount of medically necessary care. Total outlier payments in a given fiscal year (FY) or year may not exceed 5 percent of total payments projected or estimated.

In accordance with the statute, we published a final rule (65 FR 41128) in the **Federal Register** on July 3, 2000, to implement the HH PPS legislation. The July 2000 final rule established requirements for the new HH PPS for home health services as required by section 4603 of the BBA, as subsequently amended by section 5101 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act (OCESAA) for Fiscal Year 1999, (Pub. L. 105–277), enacted on October 21, 1998; and by sections 302, 305, and 306 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act (BBRA) of 1999, (Pub. L. 106–113), enacted on November 29, 1999. The requirements include the implementation of a HH PPS for home health services, consolidated billing requirements, and a number of other related changes. The HH PPS described in that rule replaced the retrospective reasonable cost-based system that was used by Medicare for the payment of home health services under Part A and Part B. For a complete and full description of the HH PPS as required by the BBA, see the July 2000 HH PPS final rule (65 FR 41128 through 41214).

B. Deficit Reduction Act of 2005

On February 8, 2006, the Deficit Reduction Act of 2005 (Pub. L. 109–171) (DRA) was enacted. Section 5201 of the DRA requires HHAs to submit data for purposes of measuring health care quality, and links the quality data submission to payment. This requirement is applicable for CY 2007 and each subsequent year. If an HHA does not submit quality data, the home health market basket percentage increase will be reduced 2 percentage points. In accordance with the statute, we published a final rule (71 FR 65884, 65935) in the **Federal Register** on November 9, 2006 to implement the pay-for-reporting requirement of the DRA, codified at 42 CFR 484.225(h) and (i).

C. System for Payment of Home Health Services

Generally, Medicare makes payment under the HH PPS on the basis of a national standardized 60-day episode payment rate that is adjusted for the applicable case-mix and wage index. The national standardized 60-day episode rate includes the six home health disciplines (skilled nursing, home health aide, physical therapy, speech-language pathology, occupational therapy, and medical social services). Payment for non-routine medical supplies (NRS), is no longer part of the national standardized 60-day episode rate and is computed by multiplying the relative weight for a particular NRS severity level by the NRS conversion factor (See section III.C.4.e). Durable medical equipment covered under the home health benefit is paid for outside the HH PPS payment. To adjust for case-mix, the HH PPS uses a 153-category case-mix classification to assign patients to a home health resource group (HHRG). Clinical needs, functional status, and service utilization are computed from responses to selected data elements in the OASIS assessment instrument.

For episodes with four or fewer visits, Medicare pays on the basis of a national per-visit rate by discipline; an episode consisting of four or fewer visits within a 60-day period receives what is referred to as a low utilization payment adjustment (LUPA). Medicare also adjusts the national standardized 60-day episode payment rate for certain intervening events that are subject to a

partial episode payment adjustment (PEP adjustment). For certain cases that exceed a specific cost threshold, an outlier adjustment may also be available.

D. Corrections

We published a final rule with comment period in the **Federal Register** on August 29, 2007 (72 FR 49762) that set forth a refinement and rate update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for home health services for CY 2008. In this final rule with comment period, in Table 10B (72 FR 49854), the short description for ICD–9–CM code 250.8x & 707.10–707.9 should read ''PRIMARY DIAGNOSIS = 250.8x AND FIRST OTHER DIAGNOSIS = 707.10–707.9''. Instead of a formal correction notice, we are notifying the public of this correction in this proposed rule, and subsequent final rule.

E. Updates to the HH PPS

As required by section 1895(b)(3)(B) of the Act, we have historically updated the HH PPS rates annually in the **Federal Register.**

We published a notice in the **Federal Register** on November 3, 2008 (73 FR 65351) that set forth the update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for home health services for CY 2009.

II. Analysis of and Responses to Comments on the HH PPS Refinement and Rate Update for CY 2008

Our August 29, 2007 final rule with comment period set forth an update to the 60-day national episode rates and the national per-visit rates under the Medicare prospective payment system for HHAs for CY 2008. For that final rule, analysis performed on home health claims data, from CY 2005, indicated a 12.78 percent increase in the observed case-mix since 2000. The case-mix represented the variations in conditions of the patient population served by the HHAs. We then performed a more detailed analysis on the 12.78 percent increase in case-mix to see if any portion of that increase was associated with a real change in the actual clinical condition of home health patients. CMS examined data on demographics, family support, pre-admission location, clinical severity, and non-home health Part A Medicare expenditure data to predict the average case mix weight for 2005. As a result of that analysis, CMS recognized that an 11.75 percent increase in case-mix was due to changes in coding practices and documentation rather than to treatment of more resource-intensive patients.

To account for the changes in case-mix that were not related to an underlying change in patient health status, CMS implemented a reduction over 4 years in the national standardized 60-day episode payment rates and the NRS conversion factor. That reduction was to be taken at 2.75 percent per year for three years beginning in CY 2008 and at 2.71 percent for the fourth year in CY 2011. CMS indicated that it would continue to monitor for any further increase in case-mix that was not related to a change in patient status, and would adjust the percentage reductions and/or implement further case-mix change adjustments in the future.

The CY 2008 HH PPS final rule with comment period specifically solicited comments on the 2.71 percent reduction that is scheduled to occur in 2011. In response, we received approximately 44 items of correspondence from the public. Comments originated from trade associations, HHAs, hospitals, and health care professionals such as physicians, nurses, social workers, and physical and occupational therapists. In the HH PPS Rate Update for CY 2009, we stated that we would delay our responses to these comments until future rulemaking, enabling us to respond more comprehensively as more current data became available. The following discussion, arranged by subject area, includes our responses to the comments.

A. Payment Reductions in the 4th Year (2011)

Comment: Commenters requested that CMS release the Abt technical report so that the industry could review the data and information within it. Without the Abt report, the commenters stated the industry would be unable to offer meaningful comments on the case mix-reductions.

Response: The Abt Technical Report was posted online and made available to the public on April 30, 2008 at: *http://www.cms.hhs.gov/Reports/downloads/Coleman_Final_April_2008.pdf.* Although we posted the report later than anticipated, we believe that the CY 2008 HH PPS final rule with comment period adequately presented information, documentation and evidence describing the Abt case-mix study and CMS' rationale for the reductions. Accordingly, we believe we have provided sufficient time and information to the public to fully review and comment upon the rate reductions that will take effect in CY 2011.

Comment: A commenter suggested that the 4th year cut of 2.71 percent be eliminated or indefinitely deferred until better data are available. Some commenters stated that an additional year of rate cuts will place a financial burden on HHAs, and will result in limited access to home care, especially in rural areas. These commenters further state that limited access may result in more hospitalizations and/or care being provided in more costly settings. Commenters also stated that imposing a 4th year reduction on HHAs would be detrimental and unduly harsh, as many HHAs are already struggling to meet the rising costs of providing care, and that the reductions will cause HHAs to operate at negative margins and likely close.

Several commenters suggested alternatives to CMS' approach to adjusting for nominal case-mix. For example, one commenter suggested spreading the total cuts across a 6-year period rather than a 4-year period, enabling CMS to better monitor the impact of the CY 2008 HH PPS refinements and CY 2008 and 2009 reductions prior to imposing additional reductions.

Another commenter suggested that CMS withdraw its decision to reduce the payment rates until CMS could design and implement a better method to analyze changes in the case-mix, based on adjusted final claims data that would utilize patient characteristics in the model, as well as changes in per-patient annual expenditures, patient clinical, functional, and service utilization data, and dynamic factors in the Medicare system that impact on the nature of patients served with home health care.

Response: Our continued analysis shows that Medicare nominal case-mix continues to increase. Therefore, we continue to believe it necessary to reduce rates through 2011 to counterbalance the Medicare expenditure effects of this nominal increase. We also continue to believe that phasing in the reductions over a four-year period provides fair and ample time for HHAs to prepare for the reductions.

As more current data become available, we will continue to update our case-mix analysis. As discussed in Section III.B. of this proposed rule, based on analysis of data through 2007, nominal case-mix has further increased. We now estimate that the nominal case-mix has grown by an estimated 13.56 percent between FY 1999 (the Interim Payment System (IPS) baseline period) and 2007, an additional 1.81 percentage points above the previously recognized

increase. If we were to account for the entire 13.56 percent increase in nominal case-mix in one year (taking into account that we have already imposed 2.75 percentage reductions in CY 2008 and CY 2009), we estimate that the percentage reduction in the national standardized 60-day episode payment rates and the NRS conversion factor would be 6.89 percent in CY 2010. If we were to account for the entire 13.56 percent increase in nominal case-mix over two years (taking into account that we have already imposed 2.75 percentage reductions in CY 2008 and CY 2009), we estimate that the percentage reduction in the national standardized 60-day episode payment rates and the NRS conversion factor for each of the remaining two years (2010 and 2011) would be 3.51 percent per year. As discussed in Section II.C. of this proposed rule, we currently plan to move forward with the CY 2010 reduction of 2.75 percent, as set forth in the CY 2008 final rule. However, we note that, in light of, among other things, new policy developments, more recent information, or changed circumstances from the time the CY 2008 rule was published, the Secretary is also considering making additional changes in the final rule to account for the residual increase in nominal case-mix discussed above. In such an instance, we would consider accounting for the residual increase in nominal case-mix in one year in the final rule, which we estimate would result in a 6.89 percent reduction to the national standardized 60-day episode payment rates and the NRS conversion factor for CY 2010. We are seeking comments on the full range of potential nominal case-mix reduction percentages.

With high projected HH margins and continued growth in the number of new HH agencies, we do not believe that the 2.71 percent reduction for 2011 will result in decreased access to home health care for Medicare beneficiaries. The Medicare Payment Advisory Commission's (MedPAC) March 2009 Annual Report states that the home health industry margin for 2007 was 16.6 percent and projects that average margins for 2009, which considers the 2.75 reduction, will be 12.2 percent. MedPAC also analyzed the average rate of HH cost growth and found that in most years, the rate of actual cost growth in HHAs has been lower than the rate of inflation indicated by the home health market basket. MedPAC reports that payments for HHAs have exceeded costs for all of the period under PPS by a wide margin.

Also, in their March 2009 report, MedPAC reports a 32 percent growth in the number of HH agencies since 2003, stating that the supply of agencies continues to increase faster than the growth in the overall number of Medicare beneficiaries. We believe that new home health providers continue to enter the home health industry because Medicare payment levels give them adequate incentive to do so.

In response to commenters who suggested that we consider alternative methods to identify nominal case-mix before we impose the CY 2011 reductions, we continue to believe that the Abt model adequately identifies nominal case-mix. As we described in our August 2007 final rule, our enhanced model included variables such as changes in the age structure of the home health user population, changes in the types of patients being admitted to home health, utilization of Medicare Part A services in the 120 days leading up to home health, the type of preadmission acute care stays when the patient last had such a stay and variables describing living situations. Many of these model enhancements addressed suggestions made by the industry in their proposed rule comments.

B. General Case-mix Comments

Our August 29, 2007 final rule with comment period solicited comments only on the 2.71 percent fourth year reduction (72 FR 49762). Nevertheless, we received several comments unrelated to the fourth year reduction. Because such comments (including comments on outliers, LUPAs (Low Utilization Payment Adjustments), OASIS, wage index, operational issues, diagnosis coding, HHRGs, and wound care payment) are out of the scope of this rulemaking, we are not responding to these comments in this proposed rule. However, we are responding to comments on case-mix measurement methodology, as we believe such comments are tangentially related to the reduction for CY 2011, and because we wish to fully address this issue.

Comment: A commenter stated that the August 27, 2007 final rule with comment period was not a ''logical outgrowth'' of the May 4, 2007 proposed rule. The commenter stated that CMS used a different methodology for evaluating case-mix weight scores and changes in patient characteristics than had been used in the proposed rule. The commenter recommended that CMS engage in another cycle of rulemaking in order to provide further opportunity to comment.

Response: The policy adopted in the August 2007 final rule was a policy that adjusted payments in order to account for increases in nominal case-mix. This policy was both proposed and finalized. The commenter is addressing not the policy of adjusting payments for nominal case-mix increases, but rather, how CMS implements this policy; that is, the methodology CMS uses for determining the level of nominal case-mix increase. While we do not believe we are required to subject our exact, final calculations regarding the increase to public comment, it is also important to note that our final methodology clearly was an outgrowth of the proposed rule. The proposed rule included a detailed analysis of various kinds of data, such as an extensive review of the content of changes in OASIS instructions, a review of changes in the frequencies of severity levels of the case-mix system, and a detailed presentation of how OASIS items other than those used for case-mix frequently changed little, if at all. We also discussed the pattern of change in functional items, showing that for a number of items, some changes occurred at the high-functioning end, while the worst-functioning levels didn't increase in the population. There was a similar analysis of wound item changes. Our interpretation of the totality of the data was that real case-mix did not materially change since the IPS baseline. We also identified a large increase in post-surgical patients with their traditionally lower case-mix index. However, we made an adjustment to our estimate of case-mix change to account for the change in the composition of the home health industry on account of the exit of some hospital-owned agencies. These details enabled the home health industry to analyze our proposed methodology and provide comments suggesting specific types of changes in patient acuity that could help to explain identified changes in home health case-mix. For the final rule, we enhanced our formal estimate of case-mix change, which we had statistically adjusted to account for change in the presence of hospital-owned agencies in the industry, with a methodology that statistically adjusted for multiple factors, including the types of factors mentioned by commenters. Application of this model allowed us to simultaneously ''subtract'' from the growth in the national case-mix index the effects of a multitude of factors besides the change in hospital-owned agencies. Additionally, in the May 4, 2007 proposed rule (72 FR 25395) we indicated that our analysis for the final rule would be updated to include 2005 data.

Specifically, for the final rule, we updated the case-mix index and some of the statistical data (*e.g.,* average resources per episode) to include 2005 data. We also added analyses focusing on certain types of patients, including those mentioned in public comments on the proposal (*e.g.,* knee replacement patients). Further, as just discussed in the paragraph above, we added results from a multivariate model of case-mix that isolated real case-mix change between the HH IPS baseline and 2005. The newly added data and the model responded to comments that cited circumstances of particular types of patients and/or sought additional types of evidence. These added data and analyses were made in response to the proposed rule comments. The data and information added for the final rule, along with the entire array of evidence we presented in the proposed and the final rule are the bases for the identification of nominal case-mix change.

Comment: Some commenters focused on the finding that only 8 percent of the case-mix change from 2000 to 2005 was real. These commenters recommended that CMS start with the assumption that all case-mix change is real, and only consider the amount that could be estimated as nominal to be unjustified.

Another commenter pointed to CMS' assertion that ''real'' case-mix increased prior to implementation of the HH PPS (prior to September 2000) and argued that this fact demonstrates that it was unreasonable for CMS to assume that none of the change after that point was real.

Commenters suggested that case-mix has increased due to several factors, including earlier discharges from general acute hospitals, PPS changes that provided incentives to treat higher-acuity patients, and other post-acute care regulations issued by CMS (such as the inpatient rehabilitation ''75% Rule''), which diverts more medically complex patients to homecare. One commenter urged CMS to defer any adjustment for case-mix change and to perform an analysis that accounted for these factors.

Response: The predictive model isolated 8.03 percent of the overall 12.78 percent increase in case-mix as real, resulting in an 11.75 percent nominal increase in case-mix. We relied on those results to arrive at the nominal case-mix reductions −2.75 percent for 3 years and −2.71 percent for the fourth year of the phase-in. (Refer to Section III.B. of this proposed rule for an update based on analysis of data through 2007.) Thus, our model allowed and presumed some real case-mix change. The model data relied on claims data instead of OASIS data (with the exception of one variable, which described the patient's living situation), to avoid reliance on data which we knew were subject to coding changes such as those resulting from educational improvements, changes in OASIS instructions, and financial incentives. The model takes into account the total change between the baseline and the follow-up year (2005) in the sources of patients (hospital, inpatient rehabilitation facility, and skilled nursing facility). It also takes into account total change in the types of acute hospital problems and hospital-recorded comorbidities experienced by patients before they entered home health care, total change in living situation, and total change in patients' Part A expenditures incurred in the 120 days leading up to the beginning of each episode (expenditures were adjusted for price increases). Length of stay is also accounted for by summing the number of inpatient days of various types. Additionally, we added analyses focusing on certain types of patients, including those mentioned in public comments on the proposal (*e.g.,* knee replacement patients).

Every predictive model has its limitations; however, we believe the model and data we used were the best available for the purposes of measuring case-mix in an unbiased manner. For example, we relied on hospital claims data instead of OASIS data (with the exception of one OASIS variable), and enhanced our calculation method to include a multivariate approach to case-mix measurement. For those patients who were hospitalized before home care, the model included whether the hospitalization was surgical or medical, and in many cases the model identified the particular, detailed conditions that were responsible for that hospital stay. These additions to the model were suggested by the industry in comments on the proposed rule.

Moreover, we again note that the Abt model was not the sole basis for the final regulation provision on nominal case-mix change. The basis for the final provision was the entire array of evidence we presented in the proposed and the final rules. In addition, in the May 4, 2007, proposed rule (72 FR 25362–25366) we noted data as well as commentary from observers indicating that therapy treatment plans were sometimes ''padded'' to reach the ten-visit therapy threshold; we consider this behavior a component of nominal case-mix change, because therapy visits help to determine the case-mix group.

In response to the comment that CMS should have started with the assumption that all case-mix growth was real, and then calculate what portion, if any, was nominal, the model did assess real case-mix using a variety of Part A claims. We then compared the model's prediction of real case-mix with the actual billed case-mix, determining the calculated difference to be nominal. The May 4, 2007, proposed rule put the case-mix of the Medicare home health population in historical perspective. It described the changes affecting the home health benefit since the Balanced Budget Act of 1997 and cited MedPAC, GAO and other literature findings that the HH IPS had a strong impact on the types of patients served. We compared the case-mix index from the Abt Associates study sample with the case-mix index of the HH IPS baseline (1999–2000), a comparison that suggested that changes in real case-mix did occur as a result of the HH IPS. Literature findings (GAO, ''Medicare Home Health Benefit: Impact of Interim Payment System and Agency Closures on Access to Services,'' September 1998, GAO/HEHS–98–238) describe an HH IPS incentive to admit many different patients with short-term or rehabilitation needs instead of lengthy low skilled care needs. We did not rule out that some of the change during that period was nominal, in part because the HH PPS proposed rule of 1999 probably affected provider behavior.

Moreover, our analysis of changes in resource use showed that resource use stayed below the resource use level of the HH IPS period for much of the succeeding five years, casting doubt on the commenters' assertion that patient acuity increased. Specifically, after the IPS was implemented, we saw a decline in visit use from 73 visits per person in 1997 to 42 visits per person in 1999. The number of visits further decreased under the HH PPS, decreasing to 37 in 2000, and 31 for each year 2001 through 2004.

Comment: A commenter believes that CMS's decision to implement these payment reductions is unjustified and flawed for two basic reasons: (1) There have been actual changes in the home health population; and (2) providers have improved the accuracy of OASIS coding. The commenter refers to recently released data by Outcome Concept Systems citing the average 2005 adjusted case-mix weight nationally and in New York was approximately 1.15, not 1.2361, as CMS asserts.

The commenter believes that the average case-mix weight has changed because CMS fails to consider therapy as a patient characteristic and because patients' clinical severity has increased. Furthermore, the commenter believes

that the increase in patients' clinical needs is largely due to an inpatient hospital payment system that has created incentives for early discharge of patients who require more care. The result is a home health population with higher acuity and more intense resource needs. The commenter also states that growth in Medicare Advantage plans has shifted lower acuity patients out of traditional Medicare, leaving higher need and higher cost beneficiaries within the traditional Medicare program.

A commenter stated that current OASIS data show that HHAs are admitting increased numbers of beneficiaries with: (1) Comorbidities such as diabetes and obesity; (2) abnormalities of gait; (3) wound infections; (4) urinary incontinence; and (5) increased cognitive function deficits. The accumulative effect of these admissions has necessitated increased therapy services which have resulted in higher clinical and functional scores in case-mix weights. In addition, the commenter believes that physical therapy services were underutilized during the HH IPS and at the onset of the HH PPS because of lack of clinical knowledge and understanding of best practice standards. The delivery of medical services in the home has improved over recent years. This is evident by implementation of quality measures and outcomes data. Several commenters believe that the increase in average case-mix can be attributed fully to an improvement in each agency's ability to correctly answer OASIS items and increased emphasis on OASIS validity by Quality Improvement Organizations (QIO). Another commenter stated that their agency has experienced a change in the percentage of orthopedic patients due to changes in regulations for rehabilitation hospitals.

Response: In the May 4, 2007 HH PPS proposed rule, we indicated that the analysis of national case-mix would be updated using 2005 data in that year's HH PPS final rule, and that the annual adjustments for nominal case-mix change would be modified accordingly.

As we have noted elsewhere, improvements in coding do not represent real case-mix changes, which means that the Medicare program arguably may have overpaid for some of the services which were provided after improvements in OASIS coding were implemented. CMS subsequently adjusted the standardized payment amount to compensate for the nominal change in case-mix used to pay claims in the years following the introduction of the PPS.

We acknowledge that therapy treatment services were used as a case-mix characteristic in the case-mix model, in the absence of sufficient explanatory power from OASIS data items to model resource use by themselves. However, we found a dramatic change in the distribution of episodes according to the number of therapy visits between the HH IPS baseline period and the early years of the HH PPS period, and the new distribution has persisted. We continue to believe that the change in this short period is an indication of behavioral change on the part of home health agencies, and is not necessarily related to real case-mix change. Moreover, the distributional shift occurred in the absence of convincing evidence from various OASIS items that patients were actually more impaired and sickly. Furthermore, when we took account of patient characteristics in the model of real case-mix change, the results did not support a large difference in patient acuity.

We also note that the reporting of more comorbidities by HHAs is not clear evidence of change in patient status, as it could be a result of improvements in coding training alone. In addition, changes in regulations affecting rehabilitation hospitals are represented in the case-mix change model by the variables that measure the source of admission.

To the extent that the home health industry has accomplished improvements in patient function without adding significant resources to the provision of care in home health episodes, we understand this is likely attributable to shifts in the service mix provided within the episode, as well as improved care practices. Again, however, the situation does not necessarily indicate a real change in case-mix.

Without more detailed information about their analysis, we are unable to comment on the implication in the statistic from Outcome Concept Systems in New York State (as reported by the commenter) that the average case-mix rose only 1.15 as compared to 1.2361 in CMS's analysis. The average case-mix is computed from an extremely large representative sample of national home health claims data. The commenter does not provide information about the method of adjustment, the conditions of data-gathering, or the quality or source of the data sources used by Outcome Concept Systems.

Comment: A commenter stated that CMS' review of 20 percent of claims (OASIS for 2004–2005) does not reflect the patient characteristics in 2007, and it certainly does not reflect those receiving services in 2010 and 2011.

Response: We based our proposals on the latest statistically representative data available, and those data were from 2005 at the time of the preparation of the final regulation. We will continue to update the data as they become available.

Comment: A commenter stated that CMS should look more closely at specific agencies it suspects may be upcoding and then seek financial restitution from those that are ultimately deemed to be following this practice. Across-the-board cuts of this magnitude are unwarranted at a time when the home health industry should be receiving additional support to serve an expanding older population.

Response: As we stated in the CY 2008 HH PPS final rule (72 FR at 49837), we believe that it is more appropriate to implement a nationwide approach to the issue of a case-mix change adjustment. An individual agency approach would be administratively burdensome and difficult to implement. Policies to address the identity of agencies in light of changes to organizational structures and configurations would need to be developed. Furthermore, smaller agencies might have difficulty in providing accurate measures of real case-mix changes because of their small caseloads. Because the nominal increase in case-mix grew significantly from 2003 to 2005 (8.7 percent to 11.75 percent), we spread out the schedule of adjustments from 3 years to 4 years in order to ameliorate the impact that would have been felt by HHAs had we decided to account for the entire 11.75 percent increase in case-mix over 3 years.

Comment: A commenter is concerned that CMS has not correctly addressed factors measuring the apparent ''creep''. Additionally, the commenter states that it was useful to have CMS clarify that they had excluded LUPAs from the two measurement bases utilized and that fact raises an issue that CMS did not address in the rule. When the original HH PPS was proposed (October 1999) and finalized (July 2000), CMS asserted that it expected LUPA incidence, as estimated by its actuaries, would be five percent. Actual incidence has, since implementation, averaged sixteen percent of total reimbursements. Using just a five percent rate of occurrence resulted in every original HHRG assigned a lower value than if CMS had used, say, a fifteen percent rate of incidence. Accordingly, the commenter argues that home health agencies were

under-compensated by approximately 11 percent for LUPA savings.

Response: While this comment is outside the scope of the topic (the 4th year reductions) which we solicited comments on, we will briefly respond. In the July 2000 final rule (65 FR 41162), we stated that the estimate of the percentage of LUPA episodes was an actuarial estimate, as were the estimates of incidence of SCICs, PEPs, and outliers. Our base episode payment rates are derived using the best data available at that time. The commenter is correct that the actual number of LUPA episodes is higher than our original estimate. However, while it is true that 16 percent of episodes from the 1998 pre-PPS data analysis were shown to be LUPA-type episodes (65 FR 41186), we also provided reasoning in that discussion as to why we believed actual LUPA incidence under the HH PPS would be lower. Granted, the incidence of LUPAs did not drop to the level of 5 percent of the total number of episodes as was originally estimated, however the average actual incidence of LUPAs is, and has always been considerably lower than the 16 percent suggested by the commenter. In fact, data analysis shows us that the incidence of LUPA episodes was first measured at approximately 15.2 percent of the total number of episodes and has continued to decrease under the HH PPS. Specifically, recent analysis of home health claims shows that LUPA episodes made up approximately 10.6 percent of the total number HH PPS episodes in CY 2007.

Another important fact that should not be lost, as part of this discussion, is that while the incidence of LUPAs is less than originally estimated, we note that the average number of home health visits provided per episode for non-LUPAs episodes is also lower than what we originally estimated (65 FR 41171) when we built the base payment rates (21.16 vs 25.5 home health visits). Hence, the national standardized 60-day episode payment is currently based on the delivery of significantly more home health visits per episode (25.5) than is currently being delivered (21.16).

It is also worth noting that the manner in which the commenter appears to arrive at their under-compensation of payment percentage is by subtracting the original estimate for LUPA episodes of 5 percent from their inaccurate estimate of 16 percent incidence of LUPA episodes. In addition to the commenters 16 percent being inaccurate (as mentioned above), it is important to point out that even in doing the math, an inaccurate 16 percent minus 5 percent actually reflects that there is an 11 percentage point difference between the two, not an 11 percent under-compensation in payment as the commenter suggests. Because the incidence of LUPAs is considerably lower than the 16 percent that the commenter suggests, and the average number of home health visits per episode is far less than originally estimated, HHAs have not been under-compensated by 11 percent, as the commenter suggests.

Since the inception of the HH PPS, we have monitored home health utilization in preparing the refinements to the HH PPS. We have always contended that it would not be appropriate to address single aspects of the system, as the many pieces/aspects of the system interact and there are causes and effects that each has on one another. Consequently, we have addressed those issues for which we believed we had adequate information, as a result of our analysis in the CY 2008 HH PPS proposed and final rules. In doing so, as is generally done in a prospective payment system, we decided not to make retroactive adjustments for actual utilization that differed from estimates.

III. Provisions of the Proposed Rule

A. Outlier Policy

1. Background

Section 1895(b)(5) of the Act allows for the provision of an addition or adjustment to the regular 60-day case-mix and wage-adjusted episode payment amount in the case of episodes that incur unusually high costs due to patient home health care needs. This section further stipulates that total outlier payments in a given year may not exceed 5 percent of total projected or estimated HH PPS payments. Section 1895(b)(3)(C) of the Act stipulates that the standard episode payment be reduced by such a proportion to account for the aggregate increase in payments resulting from outlier payments.

In the July 2000 final rule (65 FR 41189), we described and subsequently implemented an HH PPS outlier policy under which we reduce the standard episode payment by 5 percent, and target up to 5 percent of total projected estimated HH PPS payments to be paid as outlier payments. The July 2000 final rule described a methodology for determining outlier payments. Under this system, outlier payments are made for episodes whose estimated cost exceeds a threshold amount. The episode's estimated cost is the sum of the national wage-adjusted per-visit rate amounts for all visits delivered during the episode. The outlier threshold is defined as the national standardized 60-day episode payment rate for that case-mix group plus a fixed dollar loss (FDL) amount. Both components of the outlier threshold are wage-adjusted. The wage-adjusted FDL amount represents the amount of loss that an agency must experience before an episode becomes eligible for outlier payments. The wage-adjusted FDL amount is computed by multiplying the national standardized 60-day episode payment amount by the FDL ratio, and wage-adjusting that amount. That wage-adjusted FDL amount is added to the HH PPS payment amount to arrive at the wage-adjusted outlier threshold amount. The outlier payment is defined to be a proportion of the wage-adjusted estimated costs beyond the wage-adjusted outlier threshold amount. The proportion of additional costs paid as outlier payments is referred to as the loss-sharing ratio. The FDL ratio and the loss-sharing ratio were selected so that the estimated total outlier payments would not exceed the 5 percent level. We chose a value of 0.80 for the loss-sharing ratio, which is relatively high, but preserves incentives for agencies to attempt to provide care efficiently for outlier cases. A loss-sharing ratio of 0.80 means that Medicare pays 80 percent of the additional costs above the wage-adjusted outlier threshold amount. A loss-sharing ratio of 0.80 is also consistent with the loss-sharing ratios used in other Medicare PPS outlier policies, such as inpatient hospital, inpatient rehabilitation, long-term hospital, and inpatient psychiatric payment systems. In CY 2000, we estimated that a FDL ratio of 1.13 would yield estimated total outlier payments that were projected to be no more than 5 percent of total HH PPS payments. As discussed in the October 1999 proposed rule (64 FR 58169) and the July 2000 final rule (65 FR 41189), the percentage constraint on total outlier payments creates a tradeoff between the values selected for the FDL amount and the loss-sharing ratio. For a given level of outlier payments, a higher fixed dollar loss amount reduces the number of cases that receive outlier payments, but makes it possible to select a higher loss-sharing ratio and therefore increase outlier payments per episode. Alternatively, a lower fixed dollar loss amount means that more episodes qualify for outlier payments but outlier payments per episode must be lower. Therefore, setting these two parameters involves policy choices about the number of outlier cases and their rate of payment.

When the data became available, we performed an analysis of CY 2001 home

health claims data. This analysis revealed that outlier episodes represented approximately 3 percent of total episodes and 3 percent of total HH PPS payments. Additionally, we performed the same analysis on CY 2002 and CY 2003 home health claims data and found the number of outlier episodes and payments held at approximately 3 percent of total episodes and total HH PPS payments, respectively. Based on these analyses and comments we received, we decided that an update to the FDL ratio would be appropriate.

To that end, for the October 22, 2004 HH PPS rate update for the CY 2005 final rule, we performed data analysis on CY 2003 HH PPS claims data. The results of that analysis indicated that a FDL ratio of 0.70 was consistent with the existing loss-sharing ratio of 0.80 and a projected target percentage of estimated outlier payments of no more than 5 percent. Consequently, we updated the FDL ratio from the initial ratio of 1.13 to an FDL ratio of 0.70. Our analysis showed that reducing the FDL ratio from 1.13 to 0.70 would increase the percentage of episodes that qualified for outlier episodes from 3.0 percent to approximately 5.9 percent. A FDL ratio of 0.70 also better met the estimated 5 percent target of outlier payments to total HH PPS payments. We believed that this updated FDL ratio of 0.70 preserved a reasonable degree of cost sharing, while allowing a greater number of episodes to qualify for outlier payments.

Our CY 2006 update to the HH PPS rates (70 FR 68132) updated the FDL ratio from 0.70 to 0.65 to allow even more home health episodes to qualify for outlier payments and to better meet the estimated 5 percent target of outlier payments to total HH PPS payments. For the CY 2006 update, we used CY 2004 home health claims data.

In our CY 2007 update to the HH PPS rates (71 FR 65884) we again updated the FDL ratio from 0.65 to 0.67 to better meet the estimated 5 percent target of outlier payments to total HH PPS payments. For the CY 2007 update, we used CY 2005 home health claims data.

In the CY 2008 final rule with comment period, in the interest of using the latest data and best analysis available, we performed supplemental analysis on the most recent data available in order to best estimate the FDL ratio. That analysis derived a final FDL ratio of 0.89 for CY 2008.

In order to determine the appropriate value for the FDL ratio for the CY 2009 rate update, in the November 3, 2008 HH PPS Rate Update for CY 2009 notice (73 FR 65351), we performed an analysis using the most recent, complete available data at the time (CY 2006), applying a methodology similar to that which we used to update the FDL ratio in the CY 2008 HH PPS final rule. That updated analysis projected that in CY 2009 we would expend an estimated 10.26 percent of total estimated HH PPS payments in outlier payments, more than twice our 5 percent statutory limit. Our analysis also revealed that this growth in outlier payments was primarily the result of excessive growth in outlier payments in a few discrete areas of the country. We noticed statistical anomalies in outlier payments in terms of both high outlier dollars and as a percentage of total HH PPS payments, in areas such as Miami-Dade Florida, where outlier payments to providers far exceed the national average and the 5 percent target for outlier payments. Using similar analysis to what was performed for the CY 2008 final rule with comment, we estimated that we would need to raise our FDL ratio from 0.89 to 2.71 for CY 2009 in order for estimated outlier payments to be no more than 5 percent of total HH PPS payments. In addition, the size of these statistical anomalies raised concerns about the medical necessity of the outlier episodes in some areas. However, in our CY 2009 payment update, we did not raise the FDL ratio to 2.71, given the statistical outlier data anomalies that we identified in certain targeted areas, because program integrity efforts, such as payment suspensions for suspect HHAs, were underway to address excessive, suspect outlier payments that were occurring in these areas. Instead, we maintained the then-current (CY 2008) FDL ratio of 0.89 in CY 2009 while actions to remedy any inappropriate outlier payments in these target areas of the country were effectuated.

2. Proposed Change to Target Outlier Payment Percentage

For CY 2010 rulemaking, we have expanded our outlier analysis. In addition to assessing what FDL ratio would most accurately achieve the 5 percent target of outlier payments as a percentage of total HH PPS payments, we also performed analyses to assess the appropriateness of adopting a lower target percentage of outlier payments to total HH PPS payments. Some commenters to our CY 2008 proposed rule suggested that CMS should consider targeting a lower percentage in outlier payments to total estimated HH PPS payments.

Commenters suggested that by lowering the target outlier percentage to total estimated HH payments, CMS could then return to the national standardized 60-day episode payment rate, a portion of that 5 percent which was originally withheld from the rates to fund the 5 percent of total estimated HH PPS outlier payments. In our response to the CY 2008 comments, we described our concern that reducing the target outlier percentage could risk access to home care for high needs patients. However, recent analysis of more current data, specifically CY 2007 and CY 2008 data, suggests that a target around that of 2.5 percent in outlier payments to total estimated HH PPS payments may be a more appropriate target than 5 percent, while not risking access to care for high needs patients. Section 1895(b)(5) of the Act states that the Secretary ''may'' provide for an addition or adjustment to the payment amount otherwise made in the case of outliers. It goes on to say that if the Secretary decides to provide such a payment, that the total amount of the additional payments or payment adjustments may not exceed 5 percent of the total payment projected or estimated to be made under the payment system. Consequently, providing an addition or adjustment to the payment amount for outliers is optional and not statutorily required. We performed an analysis of all providers who receive outlier payments, focusing our analysis on total HH PPS payments, total outlier payments, number of episodes, number of outlier episodes, and location of provider. As discussed below under ''Proposed Outlier Cap Policy'', our analysis incorporates a proposed 10 percent cap on outliers and looks at outlier payments as a percentage of total HH PPS payments with that 10 percent cap in place. In our analysis of 2007 data, after implementing the 10 percent cap, outlier dollars accounted for approximately 2.1 percent of total HH PPS payments.

Additionally, we performed a separate analysis on a major association of home health agencies who claim to be safety-net providers, serving sicker, more costly patients. The average outlier payment to these agencies is also under 2 percent. Therefore, we believe a target of less than 5 percent for outlier dollars as a percentage of total estimated HH PPS payments is appropriate. However, past years' data trends show us that outlier payments will likely continue to grow. Consequently, we propose to change our target percentage of outlier payments from 5 percent to approximately 2.5 percent of total estimated HH PPS payments.

Currently, we reduce the national standardized 60-day episode payment

rates, the national per-visit rates, the LUPA add-on amount, and the NRS conversion factor by 5 percent in order to create an outlier pool that accommodates estimated outlier payments of 5 percent of total HH PPS payments. Targeting the percentage of outlier payments at approximately 2.5 percent will allow us to create a smaller outlier pool and return the remaining 2.5 percent to the HH PPS rates. We would retain a 2.5 percent reduction to the national standardized 60-day episode rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor to fund the proposed target of approximately 2.5 percent of total estimated HH PPS payments in outlier payments, adhering to the statutory requirement in Section 1895(b)(3) of the Act.

3. Proposed Outlier Cap Policy

Although program integrity efforts associated with excessive outlier payments continue in targeted areas of the country, we continue to be at risk of exceeding the 5 percent statutory limit on estimated outlier expenditures. Therefore, our recent analysis also focused on whether a broader policy change to our outlier payment policy might also be warranted, to mitigate possible billing vulnerabilities associated with excessive outlier payments, and to adhere to our statutory limit on outlier payments.

We also considered eliminating outlier payments altogether and restoring the 5 percent, originally taken out of the national standardized 60-day episode rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor to pay for the existing outlier policy, back into the HH PPS rates. Eliminating outlier payments would simplify payments to HHAs and remove the vulnerability associated with inappropriate outlier payments. However, we are concerned that eliminating outlier payments to HHAs could result in denying added protection to HHAs that historically treat sicker, more costly patients.

In attempts to better estimate outlier payments as a percentage of total HH PPS payments and to mitigate vulnerabilities associated with inappropriate outlier payments, we also looked into options that would impose an outlier cap, at the agency level, such that in any given year, an individual HHA would receive no more than a set percentage of its total HH PPS payments in outlier payments. We performed extensive analyses to model the impact to HHAs of a variety of percent caps in outlier payments. A primary focus of this analysis was to identify HHAs which would be representative of the types of agencies we are most concerned about disadvantaging with an outlier policy that included an outlier cap at the agency level. Our analysis revealed that a 10 percent agency cap in outlier payments would mitigate potential inappropriate outlier billing vulnerabilities while minimizing the access to care risk for high needs patients.

We used CY 2007 claims data to perform a detailed impact analysis. We identified 1137 HH agencies whose outlier payments exceeded 10 percent of their total HH PPS payments in CY 2007. However, we excluded 700 of these agencies from the impact analysis, because these agencies received sizeable outlier payments (totaling at least around $100,000), had high percentages (at least around 30 percent) of outlier payments to total HH PPS payments, and were located in the counties in FL, TX and CA where we believe possible program integrity issues had been identified.

We targeted our in-depth impact analysis to the remaining 437 agencies, about 5 percent of all Medicare home health agencies. We analyzed these agencies as a group and individually. Our analysis focused on total HH PPS payments, total outlier payments, number of episodes, number of outlier episodes, percentage reductions in payments if a 10 percent outlier cap were imposed, and location. Analyzing CY 2007 data, these 437 agencies would have experienced about a 10 percent decrease in their total HH payments if an outlier cap of 10 percent, at the agency level, were imposed. As we looked closely at the individual 437 agencies, we excluded additional agencies for a number of reasons. Specifically, we excluded 70 agencies that had fewer than 20 Medicare HH episodes, believing that Medicare beneficiaries account for such a small part of their business that they are not representative of the types of agencies we are most concerned about disadvantaging with an outlier cap policy.

We excluded an additional 197 agencies because they are also located in the counties identified as experiencing program integrity problems. While these 197 agencies did not receive exorbitant outlier payments, their relatively high outlier payment percentages to total agency HH PPS payments led us to suspect inappropriate payments. We believe that the remaining 170 agencies, representing less than 2 percent of all Medicare home health agencies, are representative of the types of agencies we are most concerned about disadvantaging with an outlier policy that included a 10 percent cap at the agency level.

This analysis showed that almost all of the 170 agencies are in urban areas, with only 16 agencies in rural areas. The total number of episodes that resulted in outlier payments is 4,497, about 15 percent of their total episodes. The total HH PPS payments for these agencies equaled about $85 million in CY 2007. The total outlier payments for these agencies equaled $14.4 million, representing an average of about 17 percent of their total HH PPS payments. The total amount of payments that would be lost by these providers due to a 10 percent cap would be $6.6 million, representing an average of approximately 7.9 percent of their total HH PPS payments. However, because most affected agencies are in urban areas, and there is not an access problem with regard to receiving home health services in urban areas, we do not expect that an outlier cap of 10 percent at the agency level would result in any access to care issues.

Additionally, we also performed a separate analysis of the major home health agency association which claims to service a sicker, more costly population. In 2007, only one of these agencies exceeded 10 percent of its total episode payments in outlier payments, receiving approximately 15 percent of its total HH PPS payments in outlier payments.

Finally, we performed an analysis of the impact that imposing an outlier cap of 10 percent at the agency level would have on total outlier payments as a percentage of total HH PPS payments. The FDL ratio for CY 2007 was 0.67. In simulating for 2010 using 2007 data, imposing an outlier cap of 10 percent at the agency level, we estimate that we would pay approximately 2.32 percent of total HH PPS payments in outlier payments.

Therefore, to mitigate possible billing vulnerabilities associated with excessive outlier payments, and to adhere to our statutory limit on outlier payments, we propose to implement an agency level outlier cap such that in any given calendar year, an individual HHA would receive no more than 10 percent of its total HH PPS payments in outlier payments. Additionally, we propose to reduce the FDL ratio to 0.67 for CY 2010. This combination of a 10 percent agency level outlier cap, and reduced FDL ratio of 0.67, and allowing for future growth in outlier payments, results in a projected target outlier payment outlay of approximately 2.5

percent of total HH PPS payments in outlier payments.

Our analysis demonstrates that approximately 2 percent of HH agencies may experience an average 7.9 percent decrease in payments. This decrease will be mitigated by a 2.5 percent increase in the HH PPS rates, as a result of lowering the outlier pool from 5 percent to 2.5 percent. However, these impacts are averages. Some agencies that legitimately serve a sicker population may experience a larger decrease. Because MedPAC reported in their January 2009 public meeting (*http://www.medpac.gov/transcripts/0108-0109MedPAC.final.pdf*) that Medicare beneficiaries have access to an adequate number of HHAs, we do not believe this policy will result in access to home care issues for high needs patients.

As discussed in the CY 2009 HH PPS Update notice (73 FR 65357), past experience has shown that outlier payments have been increasing as a percentage of total payments from 4.1 percent in CY 2005, to 5.0 percent in CY 2006, to 6.4 percent in CY 2007. Analysis at the time of the above notice indicated that we could expect outlier payments as a percentage of total HH PPS payments to be approximately 8.1 percent of total payments in CY 2008, and increase to approximately 10.26 percent in CY 2009. Given that predicted trend in outlier payments, we estimated that we would have had to raise our FDL ratio from 0.89 to 2.71 for CY2009 in order to ensure that estimated outlier payments would be no more than 5 percent of total HH PPS payments. We believe that it is the high suspect outlier payments in suspect areas of the country that cause existing data analysis to seemingly require such a high FDL ratio in order to meet the target 5 percent of total HH PPS payments.

Because outlier payments continues to grow, and those outlier payments as a percentage of total HH PPS payments already exceed the statutory limit, absent our proposed outlier cap of 10 percent at the agency level, we would be required to raise the FDL ratio to a level much higher than either the current 0.89 or the proposed 0.67, and doing so would deleteriously affect agencies providing legitimate care to home health beneficiaries. We do not believe that raising the FDL ratio to such a high level, making it even harder for legitimate episodes to qualify for outlier payments, is the appropriate policy, especially given the fact that we believe it is these high suspect outlier payments in suspect areas of the country that are causing outlier payments as a percentage of total HH PPS payments to continue to increase to levels beyond the existing 5 percent target. Conversely, we believe that our proposed outlier policy that includes a 10 percent cap on outlier payments at the agency level, in concert with a new 2.5 percent outlier pool (as opposed to the existing 5 percent outlier pool), and returning 2.5 percent back into the national standardized 60-day episode rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor, with a 0.67 FDL ratio, would be the appropriate policy at this time. We expect the new outlier policy to curtail approximately $340 million, in CY 2010, in what we believe to be inappropriate outlier payments.

Finally, CMS will continue to monitor the trends in outlier payments and these policy effects. Specifically, CMS plans to analyze overall national spending on outlier payments relative to the new 2.5 percent outlier pool by geographic area and provider type. CMS also plans on looking at outlier payments, per HHA, relative to the proposed 10 percent cap on outlier payments at the agency level by geographic area and provider type. So far as activities related to high suspect outlier payments, CMS is continuing with program integrity efforts including possible payment suspensions for suspect agencies. If we are unable to see measurable improvements with respect to suspected fraudulent billing practices as they relate to HHA outlier payments, CMS may consider eliminating the outlier policy entirely in future rulemaking.

Proposed implementation approach to a 10 percent agency level outlier cap.

CMS envisions the proposed 10 percent cap on outlier payments at the agency level would be managed by the claims processing system. For each HH provider, for a given calendar year, the claims processing system would maintain a running tally of YTD total HH PPS payments and YTD actual outlier payments. The claims processing system would ensure that each time a claim for a provider was processed; YTD outlier payments for that calendar year could never exceed 10 percent of YTD total HH PPS payments for that provider for that calendar year. As a provider's claims (RAPs and final claims) were processed and YTD HH PPS payments for that calendar year increased throughout the course of the year, the claims processing system would be triggered to pay outlier payments, adjusting prior final claims by paying previously unpaid outlier payments, as the YTD total HH PPS payments for that calendar year allowed, never exceeding 10 percent of total YTD HH payments for that calendar year. In cases where a provider submitted a claim with an outlier payment early in the year when YTD total HH PPS payments for that calendar year were low, outlier payments would be delayed until YTD total HH PPS payments for that calendar year reached a level to pay the outlier payment.

More specifically, instead of a given claim being readjusted several times as total HH PPS payments increase, but not enough to pay an entire outlier payment on a given claim, we are considering a process by which an outlier payment on a previous claim would not be adjusted until total HH PPS payments for that calendar year were such that the entire outlier payment could be made without exceeding 10 percent of total HH PPS payments for a particular HHA for that calendar year. Doing so would avoid not only the cost of possible multiple adjustments to a given claim, but would also simplify the process making adjustments easier to track and understand. We solicit comments on these proposed outlier policy changes.

B. Case-Mix Measurement Analysis

In the CY 2008 HH PPS final rule with comment period, we stated that we would continue to monitor case-mix changes in the HH PPS and to update our analysis to measure change in case-mix, both nominal and real. We have continued to monitor case-mix changes and our latest analysis supports the payment adjustments which we implemented in the CY 2008 HH PPS.

We have updated our examination of five conditions that commenters on our case mix change adjustment suggested indicate a real case mix change. This analysis was originally summarized as Table 8 in the August 29, 2007, final rule. The updated results (see Table 1 below) show that the shares of episodes preceded by a hospital discharge for hip fracture, congestive heart failure, and cerebrovascular accident have continued to decline since the IPS baseline. The percent share for hip and knee replacements rose and then began to decline slightly around the middle of the time series shown. (**Note:** data since 2005 for joint replacements differ slightly from the original Table regarding the five conditions published in the August 29, 2007, Final Rule because we changed our methodology to recognize several ICD–9 procedure code changes that affected joint replacements). The increase in joint replacements as a proportion of all episodes was not sustained at the 2004–2005 level by the end of the period, perhaps because whatever mechanism operated to cause the growth lost some

of its strength, or perhaps because even faster growth occurred in other types of episodes (such as outlier episodes and/or later episodes).

Our interpretation of these trends in the Aug. 29, 2007, Final Rule was that, with the possible exception of knee replacements, the trends observed at that time were not clearly indicative of a more-severe case mix. If anything, the sustained downward trend for hip fracture, CHF, and CVA suggest that the burden of these diseases on home health providers is lighter now than it used to be. For hip replacement, the share appears to have ended up (thus far) below the share of such patients during the IPS period. For knee replacements, it appears that shares may have ceased climbing. Our interpretation of the knee replacement trend in the August 29, 2007, final rule was that this category constituted a small share, that the Abt case mix change model took account of it, and that based on the model results the knee replacement change apparently was not enough to move the estimate of real case mix change very much. The updated data now suggest that knee replacements leveled off as a share of total episodes since around 2005. As a result, we have not changed our interpretation of the trends in episode shares for these five conditions.

Our estimates of average number of days from hospital discharge to entrance into home health were an attempt to examine the hypothesis that patients were entering home health in a more sickly condition. We did not see any evidence of that for the three medical conditions; the number of days prior to entering home health exhibits no clear trend. For joint replacements, as in the earlier analysis, we saw a continuing decline in the average number of days prior to entering home health. These patients may present in a more sickly condition than was the case under IPS, but they are no longer a growing share of the HH caseload and represent slightly less than 4% of the episodes. Combined with the downward or stabilizing trends in the shares for all five conditions, the shortening of the time period to admission for the two joint replacement conditions does not suggest an overall more-acute case mix, at least as indicated by these five conditions. As we noted in the CY 2008 final rule, the Abt Associates model simultaneously takes account of all of the kinds of patients incurring home health episodes, including the five conditions detailed here.

TABLE 1

		FY 2000	CY 2001	CY 2002	CY 2003	CY 2004	CY 2005	CY 2006	CY 2007	CY 2008*
Hip fracture	pct share	0.82	0.83	0.75	0.73	0.70	0.62	0.56	0.50	0.48
	days prior to entering	7.19	7.12	7.17	7.21	7.30	7.10	7.08	7.20	7.00
Congestive heart failure	pct share	3.31	3.06	2.96	2.89	2.72	2.45	2.23	1.95	2.06
	days prior to entering	3.38	3.28	3.35	3.33	3.36	3.40	3.40	3.53	3.55
Cerebrovascular accident	pct share	1.52	1.45	1.40	1.29	1.15	1.03	0.92	0.85	0.82
	days prior to entering	4.32	4.23	4.21	4.29	4.20	4.32	4.31	4.42	4.59
Hip replacement	pct share	1.47	1.65	1.64	1.59	1.63	1.49	1.38	1.33	1.27
	days prior to entering	6.45	6.32	6.26	6.29	5.92	5.56	5.30	5.01	4.78
Knee replacement	pct share	1.89	2.20	2.31	2.44	2.59	2.74	2.62	2.49	2.64
	days prior to entering	5.40	5.30	5.42	5.19	4.93	4.60	4.25	3.99	3.71

Note: Based on a 10% beneficiary HH user sample.
*CY 2008 data for first quarter of the year only.

In the course of updating the estimate of real case-mix change, our analysis contractor, Abt Associates, discovered a number of errors in data handling for the case-mix change model. The analysis files included relatively small numbers of records that should have been excluded, and relatively small numbers that were dropped but that should have been included. Another error was in the handling of missing data for one of the key variables in the regression model (patient's living situation); data were not recognized as missing and were therefore miscoded. Methodologically, an improvement was implemented to ensure that the observation period for the IPS baseline sample was consistent with the observation period for the PPS sample (2005).

Abt Associates made corrections in response to each problem identified. The only significant change in results came from correcting the handling of missing data. Correcting this error (by imputing values for cases with missing data) caused an increase in the estimated real change in case-mix. Our original estimate, published in the CY 2008 HH PPS final rule (72 FR 49842), was that about 8.03 percent of the increase in case-mix between the IPS baseline (1999–2000) and 2005 was due to actual changes in patient characteristics (*i.e.,* ''real''). After this correction, the real case-mix change estimate for the same period increased by several percentage points. Had the data corrections and improvements been implemented in the CY 2008 HH PPS final rule, our estimate of real case-mix change, as a percentage of total case-mix change, would have been approximately 14.15 percent as opposed to 8.03 percent (73 FR 49833, 49842). Updating that analysis, using PPS data from 2006, our best estimate of real case-mix change, as a percentage of total case-mix change, is slightly lower (11.45 percent). This is due to the combination of continued strong annual growth between 2005 and 2006 in the average case-mix weight, along with little change between 2005 and 2006 in patient characteristics.

We have further updated our case-mix analysis, for this rule, using PPS data from 2007. That analysis indicated a 15.03 percent increase in the overall observed case-mix since 2000. We next determined what portion of that increase was associated with a real change in the actual clinical condition of home health patients. As was done for the CY 2008 final rule, using Abt Associates' 6-phase model, we examined data on demographics, family support, pre-admission location, clinical severity, and non-home health Part A Medicare expenditure data to predict the average case mix weight for 2007. As such, our best estimate is that approximately 9.77 percent of the 15.03 percent increase in the overall observed case-mix between the IPS baseline and 2007 is real, that is, due to actual changes in patient characteristics.

The estimate of real case-mix change continues to decrease for a number of reasons: First, because the nominal change in case mix continues to grow, real case-mix as a percentage of the total change/increase in case-mix becomes

less. With each successive sample, beginning with 2005 data (in the CY 2008 final rule), the predicted average national case-mix weight is moving very little because the variables in the model used to predict case-mix are not changing much. At the same time, the actual average case-mix continues to grow steadily. Thus, the gap between the predicted case-mix value, which is based on information external to the OASIS, and the actual case-mix value, grows with each successive sample. Consequently, as a result of this analysis, CMS recognizes that a 13.56 percent nominal increase ($15.03 - (15.03 \times 0.0977)$) in case-mix is due to changes in coding practices and documentation rather than to treatment of more resource-intensive patients.

To compensate for this growth over four years, an increase of this magnitude (13.56 percent), had it existed when the CY 2008 final rule was published, would have implied reductions in the rates of 3.13 percent per year for 4 years (CY 2008–CY 2011). We stated in our CY 2008 HH PPS proposed and final rules that we might find it necessary to adjust the offsets as new data became available. Given that we have adjusted the rates for two consecutive years by −2.75 percent in each year, based on 2007 data available for this proposed rule, if we were to account for the residual increase in nominal case-mix over the next two years, maintain our existing policy of a −2.75 percent case-mix change in 2010, and account for the residual increase in nominal case-mix in 2011, we estimate that the percentage reduction in the rates for nominal case-mix change in 2011 would be 4.26 percent. If we were to account (in the final rule) for the full residual increase in nominal case-mix in CY 2010, we estimate that the percentage reduction to the national standardized 60-day episode rates and the NRS conversion factor would be 6.89 percent. Similarly, if we were to account (in the final rule) for the full residual increase in nominal case-mix in two years, we estimate that the percentage reduction to the national standardized 60-day episode payment rates and the NRS conversion factor would be 3.51 percent, per year, in CY 2010 and CY 2011. We are planning to move forward with our existing policy, as implemented in the August 22, 2007 HH PPS Refinement and Rate Update for CY 2008 final rule with comment, of imposing a 2.75 percent reduction to the national standardized 60-day episode rates and the NRS conversion factor for CY 2010. We are accepting comments on the reduction percentages. We will continue to monitor any future changes in case-mix as more current data become available. Given the continued growth in nominal case-mix, we expect to revise, upward, the 2.71 percent reduction to the national standardized 60-day episode rates and the NRS conversion factor for CY 2011 in next year's rule. Analysis in next year's rule will update the measure of the nominal increase in case-mix and compute the appropriate percent reduction to the national standardized 60-day episode rates and the NRS conversion factor to account for that increase.

We may update the above-mentioned analysis for the final rule in a number of ways. We have been assembling data to enhance the Abt model to take into account factors that might have been unmeasured in the original model. We plan to introduce diagnostic summaries created from a broader sweep of the patient's claims history, including Part B claims. Specifically, we may add information from the Medicare Hierarchical Coexisting Condition (HCC) data file to identify diagnoses for home health users and their impact on the predicted real case-mix weight. The HCC system is used for risk adjustment in Part C of the Medicare program. CMS annually produces an HCC record containing diagnosis flags and an HCC ''score'' for every beneficiary. The diagnoses used for HCC risk adjustment come from hospital inpatient claims (primary and secondary diagnoses) (including rehabilitation, long-term, and psychiatric hospitals), hospital outpatient department claims, physician claims, and claims from clinically trained nonphysicians such as podiatrists, psychologists, and physical therapists. Until now, diagnostic information for the Abt model came from Part A inpatient claims only.

Commenters have suggested that we take into account changes in the role of managed care in the Medicare program. These commenters stated that growth in managed care enrollment implies a generally sicker population remaining in the fee-for-service program; a change in home health users' general health status might be reflected in OASIS items that determine the episode's HHRG. Medicare managed care began to grow modestly in 2004, but growth accelerated in 2006. Therefore, another enhancement that we may test is a variable measuring managed care penetration in the beneficiary's area; this variable is intended to capture any possible effects of attrition from FFS Medicare due to growing enrollment in Medicare Advantage plans. Attrition might result in the exit of relatively healthy beneficiaries from the FFS program, leaving a population in FFS whose average health status worsens over time. It is only the FFS population that is at risk for home health benefit use in the HH PPS.

C. Proposed CY 2010 Rate Update

1. The Home Health Market Basket Update

Section 1895(b)(3)(B) of the Act requires for CY 2010 that the standard prospective payment amounts be increased by a factor equal to the applicable home health market basket update for those HHAs that submit quality data as required by the Secretary.

The proposed HH PPS market basket update for CY 2010 is 2.2 percent. This is based on Global Insight Inc.'s first quarter 2009 forecast, utilizing historical data through the fourth quarter 2008. A detailed description of how we derive the HHA market basket is available in the CY 2008 Home Health PPS proposed rule (72 FR 25356, 25435).

2. Home Health Care Quality Improvement

Section 1895(b)(3)(B)(v)(II) of the Act requires that ''each home health agency shall submit to the Secretary such data that the Secretary determines are appropriate for the measurement of health care quality. Such data shall be submitted in a form and manner, and at a time, specified by the Secretary for purposes of this clause.'' In addition, section 1895(b)(3)(B)(v)(I) of the Act dictates that ''for 2007 and each subsequent year, in the case of a home health agency that does not submit data to the Secretary in accordance with subclause (II) with respect to such a year, the home health market basket percentage increase applicable under such clause for such year shall be reduced by 2 percentage points.'' This requirement has been codified in regulations at § 484.225.

CMS published information about the quality measures in the **Federal Register** as a proposed rule on May 4, 2007 (72 FR 25449, 25452) and as a final rule with comment period on August 29, 2007 (72 FR 49861, 49864). We proposed and made final, the decision to use a subset of OASIS data that is publicly reported on Home Health Compare as the appropriate measure of home health quality.

Reporting these quality data has also required the development of several supporting mechanisms such as the HAVEN software, used to encode and transmit data using a CMS standard electronic record layout, edit specifications, and data dictionary. The HAVEN software includes the required

OASIS data set that has become a standard part of HHA operations. These early investments in data infrastructure and supporting software that CMS and HHAs have made over the past several years in order to create this quality reporting structure have been successful in making quality reporting and measurement an integral component of the HHA industry.

Development and selection of home health quality measures is a constant and dynamic process based on the characteristics and needs of the population served. A total of 54 quality measures are currently reported to home health agencies for use in their Outcomes Based Quality Improvement (OBQI) activities. Every three years a selection of Home Health quality measures are submitted to the National Quality Forum (NQF) for consideration and endorsement through their consensus process. A subset of measures are chosen by CMS for public reporting on the Home Health Compare Web site. The following twelve measures are currently publicly reported:

- Improvement in ambulation/locomotion,
- Improvement in bathing,
- Improvement in transferring,
- Improvement in management of oral medications,
- Improvement in pain interfering with activity,
- Acute care hospitalization,
- Emergent care,
- Discharge to community,
- Improvement in Dyspnea,
- Improvement in urinary incontinence,
- Improvement in status of surgical wounds, and
- Emergent care for wound infections, deteriorating wound status.

Accordingly, for CY 2010, we propose to continue to use submission of OASIS data and the quality measures that are publicly reported on Home Health Compare to meet the requirement that the HHA submit data appropriate for the measurement of health care quality. Continuing to use the specified measures from the OASIS instrument for purposes of measuring health care quality ensures that providers will not have an additional burden of reporting through a separate mechanism, and that the costs associated with the development and testing of a new reporting mechanism can be avoided.

We are proposing for CY 2010 to consider OASIS assessments submitted by HHAs to CMS in compliance with HHA conditions of participation for episodes beginning on or after July 1, 2008 and before July 1, 2009 as fulfilling the quality reporting requirement for CY 2010. This time period would allow 12 full months of data collection and would provide us the time necessary to analyze and make any necessary payment adjustments to the payment rates in CY 2010 and each year thereafter. We propose to reconcile the OASIS submissions with claims data in order to verify full compliance with the quality reporting requirements in CY 2010 and each year thereafter on an annual cycle July 1 through June 30 as described above.

As set forth in the CY 2008 final rule with comment period (72 FR 49863), agencies do not need to submit quality measures for reporting purposes for those patients who are excluded from the OASIS submission requirements under the Home Health Conditions of Participation (CoP). The conditions of participation (42 CFR 484.200–484.265) that require submission also provide for exclusions from this requirement if:

- Those patients are receiving only non-skilled services,
- Neither Medicare nor Medicaid is paying for home health care (patients receiving care under a Medicare or Medicaid Managed Care Plan are not excluded from the OASIS reporting requirement),
- Those patients are receiving pre- or post-partum services, or
- Those patients are under the age of 18 years.

As set forth in the CY 2008 final rule with comment period (72 FR 49863), agencies that certify on or after May 31 of the preceding year involved are excluded from any payment penalty for quality reporting purposes for the following CY. Therefore, HHAs that are certified on or after May 1, 2009 are excluded from the quality reporting requirement for CY 2010 payments since data submission and analysis will not be possible for an agency certified this late in the reporting time period. At the earliest time possible after obtaining the CMS Certification Number (CCN), reporting would be mandatory. These exclusions only affect quality reporting requirements and do not affect the HHA's reporting responsibilities under the CoP.

HHAs that meet the reporting requirements would be eligible for the full home health market basket percentage increase. HHAs that do not meet the reporting requirements would be subject to a 2 percent reduction to the home health market basket increase. We provide the proposed payment rates in Tables 1, 2, and 3.

Section 1895(b)(3)(B)(v)(III) of the Act further requires that ''[t]he Secretary shall establish procedures for making data submitted under subclause (II) available to the public. Such procedures shall ensure that a home health agency has the opportunity to review the data that is to be made public with respect to the agency prior to such data being made public.'' To meet the requirement for making such data public, we propose to continue using the *Home Health Compare* Web site, which lists HHAs geographically. Currently, the Home Health Compare Web site lists 12 quality measures from the OASIS set as described above. The Home Health Compare Web site is located at the following Web address: *http://www.medicare.gov/HHCompare/Home.asp.* Each HHA currently has pre-publication access (through the CMS contractor) to its own quality data (which the contractor updates periodically). We plan to continue this process, to enable each agency to view its quality measures before public posting of data on *Home Health Compare.*

CMS is requesting OMB approval to modify the OASIS data set. This process is in the final stages of OMB clearance. Pending OMB approval, CMS intends to implement the use of the OASIS–C (Form Number CMS–R–245 (OMB# 0938–0760)) on January 1, 2010. This revision to the current OASIS version B–1 has undergone additional testing as part of the information collection request approved under OMB control number 0938–1040. As part of the OMB approval process, the revision to the current OASIS version was also distributed for public comment and other technical expert recommendations over the past few years. We propose that this new version of OASIS be collected on episodes of care with a corresponding OASIS item (M0090) date of January 1, 2010 or later. The OASIS–C can be found using the following link: *http://www.cms.hhs.gov/PaperworkReductionActof1995/PRAL/itemdetail.asp?filterType=none&filterByDID=-99&sortByDID=2&sortOrder=descending&itemID=CMS1217682&intNumPerPage=10*

We are also planning to update *Home Health Compare* to reflect the addition of the following 13 new process of care measures:

- Timely initiation of care,
- Influenza immunization received for current flu season,
- Pneumococcal polysaccharide vaccine ever received,
- Heart failure symptoms addressed during short-term episodes,
- Diabetic foot care and patient education implemented during short-term episodes of care,
- Pain assessment conducted,
- Pain interventions implemented during short-term episodes,

• Depression assessment conducted,
• Drug education on all medications provided to patient/caregiver during short-term episodes.
• Falls risk assessment for patients 65 and older,
• Pressure ulcer prevention plans implemented,
• Pressure ulcer risk assessment conducted, and
• Pressure ulcer prevention included in the plan of care.

Also under consideration are three additional process of care measures that may be added to Home Health Compare based on results of consumer testing. Those additional process measures are:
• Drug education on high risk medications provided to patient/caregiver at start of episode;
• Potential medication issues identified and timely physician contact at start of episode;
• Potential medication issues identified and timely physician contact during episode.

The implementation of OASIS–C will impact the quality data reporting requirement for the CY 2011 HH PPS. However, we expect the conversion from OASIS–B1 to OASIS–C to have little to no impact on HHAs' ability to meet the quality data reporting requirements under Section 1895(b)(3)(B)(v).

For CY 2011, CMS proposes to expand the home health quality measures reporting requirements to include the Consumer Assessment of Healthcare Providers and Systems (CAHPS®) Home Health Care Survey (pending OMB approval). The CAHPS® Home Health Care Survey (hereafter ''HHCAHPS'') is a quality tool that we believe that we can use to collect quality of care data, as required by section 1895(b)(3)(B)(v)(II) of the Act, and as permitted under section 1861(o)(8) of the Act, which requires any Medicare participating HHA to ''meet [] such additional requirements * * * as the Secretary finds necessary for the effective and efficient operation of the program''. The HHCAHPS data collection will support the effective and efficient operation of the program because patients' feedback on their perspectives of the home health quality of care from the agency cannot be obtained from any other quality measure in the program. The Home Health Care Survey is part of a family of CAHPS® surveys that ask patients to report on and rate their experiences with health care. The HHCAHPS survey developed by the Agency for Healthcare Research and Quality (AHRQ) which is part of the Department of Health and Human Services, presents home health patients with a set of standardized questions about their home health care providers and the quality of their home health care. Prior to this survey, there was no national standard for collecting information about patient experiences that would enable valid comparisons across all HHAs.

AHRQ developed the HHCAHPS survey with the assistance of many entities (for example, government agencies, professional stakeholders, consumer groups and other key individuals and organizations involved in home health care). The HHCAHPS survey was designed to measure and assess the experiences of those persons receiving home health care with the following three goals in mind:
• To produce comparable data on patients' perspectives of care that allow objective and meaningful comparisons between home health agencies on domains that are important to consumers;
• To create incentives for agencies to improve their quality of care through public reporting of survey results; and
• To hold health care providers accountable by informing the public about the providers' quality of care (*http://www.homehealthcahps.org*).

These three goals support Section 1861(o)(8) of the Act, which requires any Medicare participating HHA to ''meet [] such additional requirements * * * as the Secretary finds necessary for the effective and efficient operation of the program.''

The development process for the survey began in 2006 and included a public call for measures, review of the existing literature, consumer input, stakeholder input, public response to **Federal Register** notices, and a field test conducted by AHRQ. AHRQ conducted this field test to validate the length and content of the HHCAHPS survey. CMS submitted the survey to the National Quality Forum (NQF) for consideration and endorsement via their consensus process. NQF endorsement represents the consensus opinion of many healthcare providers, consumer groups, professional organizations, health care purchasers, Federal agencies and research and quality organizations. The survey received NQF endorsement on March 31, 2009.

The HHCAHPS survey includes 34 questions that cover topics such as specific types of care provided by home health providers, communication with providers, interactions with the HHA, and global ratings of the agency. For public reporting purposes, CMS will utilize composite measures and global ratings of care. Each composite measure consists of four or more questions that ask about one of the following related topics:
• Patient care;
• Communications between providers and patients;
• Specific care issues (medications, home safety and pain).

There are also two global ratings; the first rating asks the patient to assess the care given by the HHA's care providers, and the second asks the patient about his/her willingness to recommend the HHA to family and friends.

We are proposing two options for administering the HHCAHPS survey. The agency can choose to administer the existing HHCAHPS survey, or the HHA can integrate additional questions within the HHCAHPS survey. If an agency chooses to implement an integrated survey, the core questions from the HHCAHPS survey (questions 1 through 25) must be placed before any specific/supplemental questions that the HHA wishes to add to the survey. Questions 26 through 34 (the ''About You'' survey questions) must be administered as a unit—although they may be placed either before or after any supplemental questions that the HHA wishes to add to the HHCAHPS survey. If no HHA-specific questions are to be added to the HHCAHPS survey, the ''About You'' questions should follow the core questions (numbered 1 through 25) on the HHCAHPS survey.

The survey is currently available in both English and Spanish. HHAs and their survey vendors will *not* be permitted to translate the HHCAHPS survey into any other languages on their own. However, CMS will provide additional translations of the survey over time. The Web site *https://www.homehealthcahps.org* will provide information about the subsequent availability of additional translations. CMS also solicits user suggestions for any additional language translations. Such suggestions should be submitted online to the HHCAHPS Survey Coordination Team, at *HHCAHPS@rti.org*. HHAs interested in learning about the survey are encouraged to view the HHCAHPS survey Web site, at *https://www.homehealthcahps.org*. Agencies can also call toll-free, 1–866–354–0985, or send an e-mail to the HHCAHPS Survey Coordination Team at *HHCAHPS@rti.org* for more information.

The following types of home health care patients will be considered eligible to participate in the HHCAHPS survey:
• Current or discharged patients who had at least one home health visit at any time during the sample month;

• Patients who were at least 18 years of age at any time during the sample period, and are believed to be alive;

• Patients who received *at least two visits* from HHA personnel during a 60-day look-back period (Note that the 60-day look-back period is defined as the 60-day period prior to and including the last day in the sample month.);

• Patients who have not been selected for the monthly sample during any month in the current quarter or during the 5 months immediately prior to the sample month;

• Patients who are not currently receiving hospice care;

• Patients who do not have routine ''maternity'' care as the primary reason for receiving home health care; and

• Patients who have *not* requested ''no publicity status.''

CMS has modeled HHCAHPS after the Hospital CAHPS survey where both the CAHPS and clinical data are collected for both Medicare and non-Medicare patients to get a complete picture of hospital quality. Since HHCAHPS data are not used to develop case-mix collection of data for HHCAHPS are not carried out under the auspices of section 4602(e) of the BBA, such collections are not subject to the OASIS limitation to Medicare and Medicaid patients only, set out under section 704(a) of the MMA. To collect and submit HHCAHPS data to CMS, Medicare-certified agencies will need to contract with an approved HHCAHPS survey vendor. Interested vendors can now apply to become approved HHCAHPS vendors. The application process is delineated online at *https://www.homehealthcahps.org.* Vendors will also be required to attend training conducted by CMS and the HHCAHPS Survey Coordination Team. HHAs that are interested in participating in the HHCAHPS survey may do so on a voluntary basis for the remaining months of 2009. Such agencies must select a vendor from the list of HHCAHPS approved survey vendors. This listing will be available on the Web site *https://www.homehealthcahps.org* during the summer of 2009.

CMS proposes that beginning in the first quarter of CY 2010, all Medicare-certified HHAs shall begin to collect the CAHPS® Home Health Care (HHCAHPS) survey data in accordance with the Protocols and Guidelines Manual located on the HHCAHPS Web site *https://www.homehealthcahps.org.* HHAs shall contract with approved HHCAHPS survey vendors that are posted on *https://www.homehealthcahps.org* to conduct the survey on behalf of HHAs. CMS proposes that participating home health agencies conduct a dry run of the survey for at least one month in the first quarter of 2010 (January, and/or February, and/or March 2010), and submit the dry run data to the Home Health CAHPS® Data Center by 11:59 p.m. EST on June 23, 2010. The dry run data would not be publicly reported on the *Home Health Compare.* This dry run would provide an opportunity for vendors and HHAs to acquire first-hand experience with data collection, including sampling and data submission to the Home Health CAHPS® Data Center, with no public reporting of the results. CMS proposes that all Medicare-certified HHAs continuously collect HHCAHPS survey data every quarter beginning in the second quarter (April, May and June) of 2010, and submit these data for the second quarter of 2010 to the Home Health CAHPS® Data Center by 11:59 p.m. EST on September 22, 2010. CMS proposes that these data submission deadlines are firm; that is, there will be no late submissions allowed.

The Medicare-certified HHAs will need to provide their respective survey vendors with information about their survey-eligible patients (either current or discharged) every month in accordance with the Protocols and Guidelines Manual posted on *https://www.homehealthcahps.org.* The details about selecting the HHA sample are delineated in the Protocols and Guidelines manual on the Web site *https://www.homehealthcahps.org.* It is proposed that the HHCAHPS survey data be submitted and analyzed quarterly, and that the sample selection and data collection occur on a monthly basis. HHAs should target 300 HHCAHPS survey completes annually. Smaller agencies that are unable to reach 300 survey completes by sampling should survey all HHCAHPS eligible patients. For reasons of statistical precision, a target minimum of 300 or more completed Home Health CAHPS surveys has been set for each home health agency. 300 completes is based on a reliability target of 0.8 or higher. We propose that survey vendors initiate the survey for each monthly sample within three weeks after the end of the sample month. All data collection for each monthly sample would have to be completed within six weeks (42 days) after data collection began. CMS has approved three modes of the survey to be used: Mail only, telephone only, and mail with telephone follow-up (the ''mixed mode''). We are proposing that for mail-only and mixed-mode surveys, data collection for a monthly sample would have to end six weeks after the first questionnaire was mailed. For telephone-only surveys, data collection would have to end six weeks following the first telephone attempt.

CMS is aware that there is a wide variation in the size of Medicare-certified HHAs. CMS proposes that the requirement to collect HHCAHPS survey data be waived for agencies that serve fewer than 60 HHCAHPS eligible patients annually. We are proposing this threshold amount in order to exempt agencies that serve a very small home health eligible population. These agencies serve, on average, 5 or fewer patients per month. The HHCAHPS eligible, unduplicated patient counts for the period of October 1 through September 30 for a given year would be used to determine if the HHA would have to participate in the HHCAHPS survey in the next calendar year. If a Medicare-certified HHA had fewer than 60 eligible, unduplicated HHCAHPS eligible patients for the period October 1 through September 30, then they would be excluded from the HHCAHPS requirement for the next calendar year. For example, if a small HHA had 85 patients in the period October 1, 2008 through September 30, 2009, and 45 of the patients were routine maternity patients, then there would only be 40 HHCAHPS eligible patients. This agency would therefore not be required to participate in the HHCAHPS survey. Alternatively, if a small HHA had 85 patients for the period October 1, 2008 through September 30, 2009, and 70 of these patients were eligible to participate in the HHCAHPS survey (*i.e.,* because they: (1) Were 65 years or older; (2) were recently discharged from the hospital to their homes; (3) were not receiving hospice care; (4) were not designated as ''no publicity'' patients; and (5) had received at least two home health visits) this agency would be required to participate in the HHCAHPS survey. Only Medicare-certified HHAs with fewer than 60 eligible, unduplicated patients for the period October 1, 2008 through September 30, 2009 would submit their patient counts to the HHCAHPS Data Center by Wednesday, January 13, 2010.

We also propose that newly Medicare-certified HHAs (that is, those certified on or after January 1, 2010 for payments to be made in CY 2011) be excluded from the HHCAHPS survey reporting requirement, as data submission and analysis would not be possible for an agency so late in the reporting period. In future years, agencies that first certify on or after January 1 of the preceding year would be excluded from any payment penalty for reporting purposes in the following CY. We note that this exclusion for new HHAs pertains only

to the HHCAHPS survey reporting requirement.

CMS strongly recommends that HHAs participating in HHCAHPS survey promptly review the required Data Submission Summary Reports that are delineated in the Protocols and Guidelines Manual posted on *https://www.homehealthcahps.org.* These reports will enable the HHA to ensure that its survey vendor has submitted their data on time, and that the data has been accepted/received by the Home Health CAHPS® Data Center.

CMS anticipates first reporting HHCAHPS survey data in early 2011 on *Home Health Compare.* The HHCAHPS survey data would be updated quarterly. HHAs would be provided a preview of the data each quarter before it was reported on *Home Health Compare.*

CMS proposes that vendors and HHAs be required to participate in HHCAHPS survey oversight activities to ensure compliance with HHCAHPS survey protocols, guidelines and survey requirements. The purpose of the oversight activities is to ensure that HHAs and approved survey vendors follow the Protocols and Guidelines Manual. It is proposed that all approved survey vendors develop a Quality Assurance Plan (QAP) for survey administration in accordance with the Protocols and Guidelines Manual. The QAP should include the following:

- Organizational chart;
- Work plan for survey implementation;
- Description of survey procedures and quality controls;
- Quality assurance oversight of on-site work and of all subcontractors work; and
- Confidentiality/Privacy and Security procedures in accordance with the Health Insurance Portability and Accountability Act (HIPAA).

As part of the oversight activities the HHCAHPS Survey Coordination Team would conduct on-site visits or conference calls. The HHCAHPS Survey Coordination Team would review the survey vendor's survey systems, and will assess administration protocols based on the Protocols and Guidelines Manual posted on *https://www.homehealthcahps.org.* All materials relevant to survey administration would be subject to review. The proposed systems and program review would include, but not be limited to: (a) Survey management and data systems; (b) printing and mailing materials and facilities; (c) data receipt, entry and storage facilities; and (d) written documentation of survey processes. Organizations would be given a defined time period in which to correct any problems and provide follow-up documentation of corrections for review. Survey vendors will be subject to follow-up site visits as needed.

CMS strongly recommends that all HHAs participating in the HHCAHPS survey regularly check the Web site, *https://www.homehealthcahps.org* for program updates and information.

As mandated in current law, all HHAs, unless covered by specific exclusions, will continue to be required to meet the quality reporting requirements or be subject to a 2 percent reduction in the home health market basket percentage increase in accordance with section 1895(b)(3)(B)(v)(I) of the Act. A reconsideration and appeals process is being developed for HHAs who fail to meet the HHCAHPS reporting requirements. These procedures would be outlined in the HH PPS proposed rule for CY 2011 in which we are proposing that the HHCAHPS survey would be linked to home health payment, as a requirement under the regulation requiring the reporting of quality data.

3. Home Health Wage Index

Sections 1895(b)(4)(A)(ii) and (b)(4)(C) of the Act require the Secretary to establish area wage adjustment factors that reflect the relative level of wages and wage-related costs applicable to the furnishing of home health services and to provide appropriate adjustments to the episode payment amounts under the HH PPS to account for area wage differences. As discussed previously, we apply the appropriate wage index value to the labor portion (77.082 percent) of the HH PPS rates based on the site of service for the beneficiary (defined by section 1861(m) of the Act as the beneficiary's place of residence). Generally, we determine each HHA's labor market area based on definitions of Metropolitan Statistical Areas (MSAs) issued by the Office of Management and Budget (OMB). We have consistently used the pre-floor, pre-reclassified hospital wage index data to adjust the labor portion of the HH PPS rates. We believe the use of the pre-floor, pre-reclassified hospital wage index data results in the appropriate adjustment to the labor portion of the costs as required by statute.

In the November 9, 2005 final rule for CY 2006 (70 FR 68132), we adopted revised labor market area definitions based on Core-Based Statistical Areas (CBSAs). At the time, we noted that these were the same labor market area definitions (based on OMB's new CBSA designations) implemented under the Hospital Inpatient Prospective Payment System (IPPS). In adopting the CBSA designations, we identified some geographic areas where there are no hospitals and, thus, no hospital wage data on which to base the calculation of the home health wage index. We continue to use the methodology discussed in the November 9, 2006 final rule for CY 2007 (71 FR 65884) to address the geographic areas that lack hospital wage data on which to base the calculation of their home health wage index. For rural areas that do not have IPPS hospitals, we use the average wage index from all contiguous CBSAs as a reasonable proxy. This methodology is used to calculate the wage index for rural Massachusetts. However, we could not apply this methodology to rural Puerto Rico due to the distinct economic circumstances that exist there, but instead continue using the most recent wage index previously available for that area (from CY 2005). For urban areas without IPPS hospitals, we use the average wage index of all urban areas within the State as a reasonable proxy for the wage index for that CBSA. The only urban area without IPPS hospital wage data is Hinesville-Fort Stewart, Georgia (CBSA 25980).

On November 20, 2008, OMB issued Bulletin No. 09–01 located at Web address *http://www.whitehouse.gov/omb/bulletins/fy2009/09–01.pdf.* This bulletin highlights three geographic areas that were previously classified as Micropolitan Statistical Areas but now qualify as Metropolitan Statistical Areas. The three areas are (1) CBSA 16020, Cape Girardeau-Jackson, MO–IL (this includes Alexander County in Illinois and Bollinger and Cape Girardeau Counties in Missouri); (2) CBSA 31740, Manhattan, KS (this includes Geary, Pottawatomie, and Riley Counties in Kansas); and (3) CBSA 31860, Mankato-North Mankato, MN (this includes Blue Earth and Nicollet Counties in Minnesota). These three new CBSAs and their associated wage index values are shown in Addendum B.

4. Proposed CY 2010 Payment Update

a. National Standardized 60-Day Episode Rate

The Medicare HH PPS has been in effect since October 1, 2000. As set forth in the final rule published July 3, 2000 in the **Federal Register** (65 FR 41128), the unit of payment under the Medicare HH PPS is a national standardized 60-day episode rate. As set forth in § 484.220, we adjust the national standardized 60-day episode rate by a case-mix relative weight and a wage

index value based on the site of service for the beneficiary.

In the CY 2008 HH PPS final rule with comment period, we refined the case-mix methodology and also rebased and revised the home health market basket. The labor-related share of the case-mix adjusted 60-day episode rate is 77.082 percent and the non-labor-related share is 22.918 percent. The proposed CY 2010 HH PPS rates use the same case-mix methodology and application of the wage index adjustment to the labor portion of the HH PPS rates as set forth in the CY 2008 HH PPS final rule with comment period. We multiply the national 60-day episode rate by the patient's applicable case-mix weight. We divide the case-mix adjusted amount into a labor and non-labor portion. We multiply the labor portion by the applicable wage index based on the site of service of the beneficiary. We add the wage-adjusted portion to the non-labor portion yielding the case-mix and wage adjusted 60-day episode rate subject to any additional applicable adjustments.

In accordance with section 1895(b)(3)(B) of the Act, we update the HH PPS rates annually in a separate **Federal Register** document. The HH PPS regulations at 42 CFR 484.225 set forth the specific annual percentage update. In accordance with § 484.225(i), in the case of a HHA that does not submit home health quality data, as specified by the Secretary, the unadjusted national prospective 60-day episode rate is equal to the rate for the previous calendar year increased by the applicable home health market basket index amount minus two percentage points. Any reduction of the percentage change will apply only to the calendar year involved and will not be taken into account in computing the prospective payment amount for a subsequent calendar year.

For CY 2010, we will base the wage index adjustment to the labor portion of the HH PPS rates on the most recent pre-floor and pre-reclassified hospital wage index. As discussed in the July 3, 2000 HH PPS final rule, for episodes with four or fewer visits, Medicare pays the national per-visit amount by discipline, referred to as a LUPA. We update the national per-visit rates by discipline annually by the applicable home health market basket percentage. We adjust the national per-visit rate by the appropriate wage index based on the site of service for the beneficiary, as set forth in § 484.230. We will adjust the labor portion of the updated national per-visit rates used to calculate LUPAs by the most recent pre-floor and pre-reclassified hospital wage index, as discussed in the CY 2008 HH PPS final rule with comment period. We are also updating the LUPA add-on payment amount and the NRS conversion factor by the applicable home health market basket update of 2.2 percent for CY 2010.

Medicare pays the 60-day case-mix and wage-adjusted episode payment on a split percentage payment approach. The split percentage payment approach includes an initial percentage payment and a final percentage payment as set forth in § 484.205(b)(1) and § 484.205(b)(2). We may base the initial percentage payment on the submission of a request for anticipated payment (RAP) and the final percentage payment on the submission of the claim for the episode, as discussed in § 409.43. The claim for the episode that the HHA submits for the final percentage payment determines the total payment amount for the episode and whether we make an applicable adjustment to the 60-day case-mix and wage-adjusted episode payment. The end date of the 60-day episode as reported on the claim determines which calendar year rates Medicare would use to pay the claim.

We may also adjust the 60-day case-mix and wage-adjusted episode payment based on the information submitted on the claim to reflect the following:

- A low utilization payment provided on a per-visit basis as set forth in § 484.205(c) and § 484.230.
- A partial episode payment adjustment as set forth in § 484.205(d) and § 484.235.
- An outlier payment as set forth in § 484.205(e) and § 484.240.

b. Proposed Updated CY 2010 National Standardized 60-Day Episode Payment Rate

In calculating the annual update for the CY 2010 national standardized 60-day episode payment rates, we first look at the CY 2009 rates as a starting point. The CY 2009 national standardized 60-day episode payment rate is $2,271.92.

As previously discussed in section II.B., ''Outlier Policy'', of this proposed rule, in our proposed policy of targeting outlier payments to be approximately 2.5 percent of total HH PPS payments in CY 2010, we are proposing to return 2.5 percent back into the HH PPS rates, to include the national standardized 60-day episode payment rate. As such, to calculate the proposed CY 2010 national standardized 60-day episode payment rate, we first increase the CY 2009 national standardized 60-day episode payment rate ($2,271.92) to adjust for the 5 percent originally set aside for outlier payments. We then reduce that adjusted payment amount by 2.5 percent, the proposed target percentage of outlier payments as a percentage of total HH PPS payment. Next, we update by the current proposed CY 2010 home health market basket update percentage of 2.2 percent.

As previously discussed in Section II.C., ''Case-Mix Measurement Analysis'', of this proposed rule, our updated analysis of the change in case-mix not due to an underlying change in patient health status reveals additional increase in nominal change in case-mix. However, we are maintaining our existing policy to reduce rates by 2.75 percent in CY 2010. Consequently, to calculate the proposed CY 2010 national standardized 60-day episode payment rate, we then reduce the rate by 2.75 percent, for a proposed updated CY 2010 national standardized 60-day episode payment rate of $2,325.79. The proposed updated CY 2010 national standardized 60-day episode payment rate for an HHA that submits the required quality data is shown in Table 2. The proposed updated CY 2010 national standardized 60-day episode payment rate for an HHA that does not submit the required quality data (home health market basket update of 2.2 percent is reduced by 2 percent) is shown in Table 3.

TABLE 2—PROPOSED NATIONAL STANDARDIZED 60-DAY EPISODE PAYMENT RATE UPDATED BY THE PROPOSED HOME HEALTH MARKET BASKET UPDATE FOR CY 2010, BEFORE CASE-MIX ADJUSTMENT AND WAGE ADJUSTMENT BASED ON THE SITE OF SERVICE FOR THE BENEFICIARY

CY 2009 National Standardized 60-Day Episode Payment Rate	Adjusted to return the outlier funds, that paid for the original 5% target for outlier payments	Adjusted to account for the proposed 2.5% outlier policy	Multiply by the proposed home health market basket update (2.2 percent) [1]	Reduce by 2.75 percent for nominal change in case-mix	Proposed CY 2010 National Standardized 60-Day Episode Payment Rate
$2,271.92	/ 0.95	× 0.975	× 1.022	× 0.9725	$2,317.47

[1] The proposed estimated home health market basket update of 2.2 percent for CY 2010 is based on Global Insight Inc., 1st Qtr 2009 forecast with historical data through 4th Qtr 2008.

TABLE 3—FOR HHAS THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA; PROPOSED NATIONAL STANDARDIZED 60-DAY EPISODE PAYMENT RATE UPDATED BY THE PROPOSED HOME HEALTH MARKET BASKET UPDATE FOR CY 2010, BEFORE CASE-MIX ADJUSTMENT AND WAGE ADJUSTMENT BASED ON THE SITE OF SERVICE FOR THE BENEFICIARY

Total CY 2009 National Standardized 60-Day Episode Payment Rate	Adjusted to return the outlier funds, that paid for the original 5% target for outliers	Adjusted to account for the proposed 2.5% outlier policy	Multiply by the proposed home health market basket update (2.2 percent) [1] minus 2 percent for a 0.2 percent update	Reduce by 2.75 percent for nominal change in case-mix	Proposed CY 2010 National Standardized 60-Day Episode Payment Rate for HHAs that do not submit required quality data
$2,271.92	/ 0.95	× 0.975	× 1.002	× 0.9725	$2,272.12

[1] The proposed estimated home health market basket update of 2.2 percent for CY 2010 is based on Global Insight Inc., 1st Qtr 2009 forecast with historical data through 4th Qtr 2008.

c. Proposed National Per-Visit Rates Used To Pay LUPAs and Compute Imputed Costs Used in Outlier Calculations

In calculating the proposed CY 2010 national per-visit rates used to calculate payments for LUPA episodes and to compute the imputed costs in outlier calculations, we start with the CY 2009 national per-visit rates. We first adjust the CY 2009 national per-visit rates to adjust for the 5 percent originally set aside for outlier payments. We then reduce those national per-visit rates by 2.5 percent, the proposed target percentage of outlier payments as a percentage of total HH PPS payment. Next we update by the current proposed CY 2010 home health market basket update percentage of 2.2 percent. National per-visit rates are not subject to the 2.75 percent reduction related to the nominal increase in case-mix because they are per-visit rates and hence not case-mix adjusted. The proposed CY 2010 national per-visit rates per discipline are shown in Table 4. The six home health disciplines are Home Health Aide (HH aide), Medical Social Services (MSS), Occupational Therapy (OT), Physical Therapy (PT), Skilled Nursing (SN), and Speech Language Therapy (SLP).

TABLE 4—PROPOSED NATIONAL PER-VISIT RATES FOR LUPAS (NOT INCLUDING THE LUPA ADD-ON PAYMENT AMOUNT FOR A BENEFICIARY'S ONLY EPISODE OR THE INITIAL EPISODE IN A SEQUENCE OF ADJACENT EPISODES) AND OUTLIER CALCULATIONS UPDATED BY THE PROPOSED CY 2010 HOME HEALTH MARKET BASKET UPDATE, BEFORE WAGE INDEX ADJUSTMENT

Home Health Discipline Type	CY 2009 Per-Visit Amounts Per 60-Day Episode for LUPAs	Adjusted to return the outlier funds that paid for the original 5% target for outlier payments	Adjusted to account for the proposed 2.5% outlier policy	For HHAs that DO submit the required quality data		For HHAs that DO NOT submit the required quality data	
				Multiply by the proposed home health market basket update (2.2 percent) [1]	CY 2010 per-visit payment amount for HHAs that DO submit the required quality data	Multiply by the proposed home health market basket update (2.2 percent) [1] minus 2 percent, for a 0.2 percent update	CY 2010 per-visit payment amount for HHAs that DO NOT submit the required quality data
Home Health Aide	$48.89	/ 0.95	× 0.975	× 1.022	$51.28	× 1.002	$50.28
Medical Social Services	173.05	/ 0.95	× 0.975	× 1.022	181.51	× 1.002	177.96
Occupational Therapy	118.83	/ 0.95	× 0.975	× 1.022	124.64	× 1.002	122.20
Physical Therapy	118.04	/ 0.95	× 0.975	× 1.022	123.81	× 1.002	121.39
Skilled Nursing	107.95	/ 0.95	× 0.975	× 1.022	113.23	× 1.002	111.01
Speech-Language Pathology	128.26	/ 0.95	× 0.975	× 1.022	134.53	× 1.002	131.90

[1] The proposed estimated home health market basket update of 2.2 percent for CY 2010 is based on Global Insight Inc., 1st Qtr 2009 forecast with historical data through 4th Qtr 2008.

d. Proposed LUPA Add-On Payment Amount Update

Beginning in CY 2008, LUPA episodes that occur as the only episode or initial episode in a sequence of adjacent episodes are adjusted by adding an additional amount to the LUPA payment before adjusting for area wage differences. As previously discussed, we are proposing to return 2.5 percent back into the HH PPS rates, to include the LUPA add-on payment amount, as a result of our proposed policy to target outlier payments to be approximately 2.5 percent of total HH PPS payments in CY 2010. As such, we first adjust the CY 2009 LUPA add-on payment amount to adjust for the 5 percent originally set aside for outlier payments. We then reduce that amount by 2.5 percent, the proposed target percentage of outlier payments as a percentage of total HH PPS payment. Next we update by the current proposed CY 2010 home health market basket update percentage of 2.2 percent. The LUPA add-on payment amount is not subject to the 2.75 percent reduction related to the nominal increase in case-mix because it is an add-on to the per-visit rates which are not case-mix adjusted. The proposed CY 2010 LUPA add-on payment amount is shown in Table 5 below. Just as the standardized 60-day episode rate and the per-visit rates paid to HHAs that do not submit the required quality are reduced by 2 percent, the additional LUPA payment should be reduced by 2 percent also. In neither the CY 2008 nor the CY 2009 HH PPS rulemaking did we include such an adjustment to the LUPA add-on payment amount. For CY 2010, we propose that the add-on to the LUPA payment to HHAs that submit the required quality data would be updated by the home health market basket update. We propose that the add-on to the LUPA payment to HHAs that do not submit the required quality data would be updated by the home health market basket update minus two percent.

TABLE 5—PROPOSED CY 2010 LUPA ADD-ON PAYMENT AMOUNTS

CY 2009 LUPA add-on payment amount adjusted to return the outlier funds, that paid for the original 5% target for outliers	Adjusted to return the outlier funds, that paid for the original 5% target for outliers	Adjusted to account for the proposed 2.5% outlier policy	For HHAs that DO submit the required quality data		For HHAs that DO NOT submit the required quality data	
			Multiply by the proposed home health market basket update (2.2 percent)[1]	Proposed CY 2010 LUPA add-on payment amount for HHAs that DO submit required quality data	Multiply by the proposed home health market basket update (2.2 percent) [1] minus 2 percent, for a 0.2 percent update	Proposed CY 2010 LUPA add-on payment amount for HHAs that DO NOT submit required quality data
$90.48	/ 0.95	× 0.975	× 1.022	$94.90	× 1.002	$93.05

[1] The proposed estimated home health market basket update of 2.2 percent for CY 2010 is based on Global Insight Inc., 1st Qtr 2009 forecast with historical data through 4th Qtr 2008.

e. Proposed Non-Routine Medical Supply Conversion Factor Update

Payments for non-routine medical supplies (NRS) are computed by multiplying the relative weight for a particular severity level by the NRS conversion factor. We first adjust the CY 2009 NRS conversion factor ($52.39) to adjust for the 5 percent originally set aside for outlier payments. We then reduce that amount by 2.5 percent, the proposed target percentage of outlier payments as a percentage of total HH PPS payment. Next we update by the current proposed CY 2010 home health market basket update percentage of 2.2 percent. Finally, we then reduce that adjusted payment amount by 2.75, to account for the increase in nominal case-mix. The proposed CY 2010 NRS conversion factor is shown in Table 6a below. The NRS conversion factor for CY 2009 was $52.39. Consequently, for CY 2010, the proposed NRS conversion factor would be $53.44.

TABLE 6a—PROPOSED CY 2010 NRS CONVERSION FACTOR FOR HHAS THAT DO SUBMIT THE REQUIRED QUALITY DATA

CY2009 NRS Conversion Factor	Adjusted to return the outlier funds, that paid for the original 5% target for outlier payments	Adjusted to account for the proposed 2.5% outlier policy	Multiply by the proposed home health market basket update (2.2 percent)	Reduce by 2.75 percent for nominal change in case-mix	Proposed CY 2010 NRS Conversion Factor for HHAs that Do submit the required quality data
$52.39	/ 0.95	× 0.975	× 1.022	× 0.9725	$53.44

The proposed payment amounts, using the above computed proposed CY 2010 NRS conversion factor ($53.44), for the various severity levels based on the proposed updated conversion factor are calculated in Table 6b.

TABLE 6b—RELATIVE WEIGHTS FOR THE 6-SEVERITY NRS SYSTEM

Severity level	Points (scoring)	Relative weight	Proposed NRS payment amount
1	0	0.2698	$14.42
2	1 to 14	0.9742	52.06
3	15 to 27	2.6712	142.75
4	28 to 48	3.9686	212.08
5	49 to 98	6.1198	327.04
6	99 +	10.5254	562.48

For HHAs that do not submit the required quality data, we again begin with the CY 2009 NRs conversion factor. We first adjust the CY 2009 NRS conversion factor ($52.39) to adjust for the 5 percent originally set aside for outlier payments. We then reduce that amount by 2.5 percent, the proposed target percentage of outlier payments as a percentage of total HH PPS payment. Next we update by the current proposed CY 2010 home health market basket update percentage of 2.2 percent minus 2 percent for a 0.002 percent update. Finally, we then reduce that adjusted payment amount by 2.75, to account for the increase in nominal case-mix. The proposed CY 2010 NRS conversion factor is shown in Table 7a below.5

TABLE 7a—PROPOSED CY 2010 NRS CONVERSION FACTOR FOR HHAS THAT DO NOT SUBMIT THE REQUIRED QUALITY DATA

CY 2009 NRS Conversion Factor	Adjusted to return the outlier funds, that paid for the original 5% target for outlier payments	Adjusted to account for the proposed 2.5% outlier policy	Multiply by the proposed home health market basket update (2.2 percent) minus 2 percent for a 0.25 update	Reduce by 2.75 percent for nominal change in case-mix	Proposed CY 2010 NRS Conversion Factor for HHAs that Do submit the required quality data
$52.39	/ 0.95	× 0.975	× 1.002	× 0.9725	$52.39

The proposed payment amounts for the various severity levels based on the proposed updated conversions factor, for HHAs that do not submit quality data, are calculated in Table 7b, below.

TABLE 7b—RELATIVE WEIGHTS FOR THE 6-SEVERITY FOR HHAS THAT DO NOT SUBMIT QUALITY DATA

Severity level	Points (scoring)	Relative weight	Proposed NRS payment amount
1	0	0.2698	$14.13
2	1 to 14	0.9742	51.04
3	15 to 27	2.6712	139.94
4	28 to 48	3.9686	207.91
5	49 to 98	6.1198	320.62
6	99 +	10.5254	551.43

D. OASIS Issues

1. HIPPS Code Reporting

We would first like to clarify our policy regarding the submission of the Health Insurance Prospective Payment System (HIPPS) code to CMS via the OASIS. § 484.250 requires HHAs to submit to CMS the OASIS data described in § 484.55(b)(1) and § 484.55(d)(1) in order for CMS to administer the payment rate methodologies. Also, as described in § 484.20, HHAs must electronically report all OASIS data collected in accordance with § 484.55 as a condition of participation, and HHAs must encode and electronically transmit the completed OASIS assessment to CMS in the standard data format as described in § 484.20(d). For those OASIS assessments required for payment, the standard format which is electronically transmitted by the HHA to CMS includes a HIPPS code, generated by grouper software at the HHA. When an HHA electronically transmits OASIS assessments to CMS (via the State agency), the CMS OASIS submission system performs a validation check of the transmitted OASIS items, including the submitted HIPPS code. If the CMS OASIS submission system validation determines that the submitted HIPPS code is in error, it informs HHAs of that error via the Final Validation Report which is returned to HHA. The Final Validation Report will include the valid, CMS OASIS submission system calculated HIPPS code. We have become aware of a proliferation of incidents where the HIPPS code submitted to CMS on the OASIS does not match the HIPPS code which is calculated by the CMS OASIS submission system. The HH PPS Grouper Software, which is used by the CMS OASIS submission system in its validation, is the official grouping software of the HH PPS, and thus the HIPPS code produced by the CMS OASIS submission system is the HIPPS code that should ultimately be billed on the claim. Consequently, in the interest of accurate coding and billing, we propose that the HHA be required to ensure that the HIPPS code billed on the claim is consistent with that which CMS' OASIS submission system calculated. In the case where the Final Validation Report returns to the HHA a HIPPS code which is different than the HIPPS code submitted to CMS by the HHA on the OASIS, the HHA must ensure that the HIPPS code from the Final Validation report is the HIPPS code reported on the bill.

2. OASIS Submission as a ''Condition of Payment''

Section 484.20 requires that HHAs must electronically report to CMS (via the State agency or OASIS contractor) all OASIS data collected in accordance with § 484.55 as a condition of participation. Additionally, § 484.250 requires that HHAs must submit to CMS the OASIS data described at § 484.55(b)(1) and (d)(1) in order for CMS to administer the payment rate methodologies. Building on the above clarification for HHAs to ensure the HIPPS code reported on the bill is consistent with that which CMS' OASIS submission system calculated, and in order to be consistent with § 484.250, we are proposing to require the electronic reporting of OASIS to CMS as a condition of payment in § 484.210. Currently, as a requirement for pay for reporting, HHAs are required to submit quality data (that being OASIS data) in order to receive the full home health market basket update to the rates. The

burden associated with the requirement for the HHA to submit the OASIS is currently accounted for under OMB# 0938–0761. Making OASIS submission a condition for payment is consistent with both OASIS submissions being a condition of participation and a requirement to receive full market basket updates under pay for reporting. As such, we are proposing to revise § 484.210 ''Data used for the calculation of the national prospective 60-day episode payment'' to reflect this requirement.

E. Qualifications for Coverage as They Relate to Skilled Services Requirements

To qualify for Medicare coverage of home health services a Medicare beneficiary must meet each of the following requirements as stipulated in § 409.42: Be confined to the home or an institution that is not a hospital, SNF, or nursing facility as defined in sections 1861(e)(1), 1819(a)(1) or 1919 of Act; be under the care of a physician as described in § 409.42(b); be under a plan of care that meets the requirements specified in § 409.43; the care must be furnished by or under arrangements made by a participating HHA, and the beneficiary must be in need of skilled services as described in § 409.42(c). Subsection 409.42(c) of our regulations requires that the beneficiary need at least one of the following services as certified by a physician in accordance with § 424.22: Intermittent skilled nursing services and the need for skilled services which meet the criteria in § 409.32; Physical therapy which meets the requirements of § 409.44(c), Speech-language pathology which meets the requirements of § 409.44(c); or have a continuing need for occupational therapy that meets the requirements of § 409.44(c), subject to the limitations described in § 409.42(c)(4).

Basis for Revisions to § 409.42(c)(1), 409.44(b), and § 424.22

In recent years, MedPAC, the HHS Office of the Inspector General (OIG), and Medicaid State agencies suggested the need for CMS to clarify the Medicare home health coverage criteria regarding the skilled services specified at *§ 409.42.* In their March 2004 report (*http://www.medpac.gov/documents/Mar04_Entire_reportv3.pdf*), MedPAC reported that the Medicare eligibility criteria for the home health benefits leaves a great deal open to interpretation, describing a particular concern with the lack of clarity regarding the Medicare home health skilled nursing services requirement. In their Memorandum Report dated February 5, 2009 titled ''Medicaid and Medicare Home Health Payments for Skilled Nursing and Home Health Aide Services'' (*http://oig.hhs.gov/oei/reports/oei-07–06–00641.pdf*), the OIG also stated that Medicare coverage policy regarding skilled nursing services lacked clarity. The OIG indicated that our payment methodology might be prone to error. HHAs were unclear about which skilled nursing services were covered by Medicare's home health benefit. Further, Medicaid State agencies have also communicated to CMS their concerns that HHAs find it difficult to accurately determine when services provided to dually Medicare and Medicaid eligible individuals (''dual eligibles'') meet the Medicare coverage criteria, especially the requirements for needing skilled nursing care on an intermittent basis. State Medicaid agencies have communicated to CMS that this ambiguity is resulting in some HHAs routinely submitting all claims for dual-eligible persons with chronic care needs to their State Medicaid agencies for payment. State Medicaid agencies and CMS are concerned about this practice, referencing the requirement under the Social Security Act that Medicaid must be the payer of last resort. State agencies have told CMS that some of these claims would have been covered and paid by Medicare if they were submitted for payment. Other State agencies have used Medicaid post payment reviews to identify claims they believe should have been paid by another payer (*e.g.,* Medicare).

In 2006, CMS and certain Medicaid State Agencies embarked on an educational initiative to improve the ability of HHAs, State Agencies, and CMS contractors to make appropriate coverage decisions, resulting in an improved ability by HHAs to identify the appropriate payer for services provided, ultimately improving HHA billing accuracy.

As part of its provider education program, CMS focused on clarifying § 409.42 ''Beneficiary qualifications for coverage of services''. During the course of the training, it became apparent that confusion existed among certain Medicaid State Agencies and HHAs regarding under what circumstances the overall management and evaluation of a care plan would constitute a skilled service. HHAs asked what underlying conditions, complications, or circumstances would require a patient otherwise receiving unskilled services to need care plan management and evaluation by a registered nurse, thus rendering such care skilled. CMS therefore ensured that the training provided a particular focus on the requirement that a beneficiary be in need of skilled services. CMS provided comprehensive guidance to clarify that in the home health setting, management and evaluation of a patient care plan is considered a reasonable and necessary skilled service only when underlying conditions or complications are such that only a registered nurse can ensure that essential non-skilled care is achieving its purpose. Another area of confusion that surfaced during the training was when the need for patient education services constitutes skilled services in the home health setting. HHAs questioned which specific sorts of educational services would render the education a skilled service in the home health setting.

To address the concerns identified by OIG, MedPAC, State Medicaid agencies and the clarity concerns home health agencies communicated to CMS during the 2006 training, we propose to revise § 409.42(c)(1) to further clarify that in order for services to be considered skilled in the home health setting, certain limitations (discussed below) would apply. We believe these revisions would assist HHAs in their determination of home health eligibility and will enable HHAs to more accurately bill for their dual eligible population.

Proposed Revisions to § 409.42(c)(1)

To clarify what constitutes skilled services in the home health setting, we are proposing the following revision to § 409.42. We propose to add a qualifying instruction to § 409.42(c)(1) to explain that intermittent skilled nursing services meeting the criteria for skilled services and the need for skilled services found in § 409.32 (with examples in § 409.33 (a) and (b)) are subject to certain limitations in the home health setting. We propose to describe the limitations in two new paragraphs, § 409.42(c)(1)(i) and § 409.42(c)(1)(ii).

Proposed New Paragraph § 409.42(c)(1)(i)

Our policy at § 409.33(a)(1) describes that the development, management, and evaluation of a patient's care plan based on physician's orders constitute skilled services when, because of the patient's physical or medical condition, oversight by technical or professional personnel is needed to promote recovery and ensure medical safety. The examples described in § 409.33(a)(1)(ii) further describe that when the patient's overall condition supports a finding that recovery and safety can be ensured only if the total care is planned, managed, and evaluated by technical or professional personnel,

it is appropriate to infer that skilled services are being provided.

We propose in § 409.42(c)(1)(i) that in the home health setting, management and evaluation of a patient care plan is considered a reasonable and necessary skilled service only when underlying conditions or complications are such that only a registered nurse can ensure that essential non-skilled care is achieving its purpose.

Further, in § 409.42(c)(1)(i) we also propose to clarify that to be considered a skilled service, the complexity of the necessary unskilled services that are a necessary part of the medical treatment must require the involvement of licensed nurses to promote the patient's recovery and medical safety in view of the overall condition. Where nursing visits are not needed to observe and assess the effects of the nonskilled services being provided to treat the illness or injury, skilled nursing care would not be considered reasonable and necessary, and the management and evaluation of the care plan would not be considered a skilled service.

Additionally, we propose to further clarify in § 409.42(c)(1)(i) that in some cases, the condition of the patient may require that a service that would normally be considered unskilled be classified as a skilled nursing service given a patient's unique circumstances. This would occur when the patient's underlying condition or complication required that only a registered nurse could ensure that essential non-skilled care was achieving its purpose. The registered nurse would ensure that services were safely and effectively performed. However, any individual service would not be deemed a skilled nursing service merely because it was performed by or under the supervision of a licensed nurse. Where a service can be safely and effectively performed (or self administered) by the average non-medical person without the direct supervision of a nurse, the service cannot be regarded as a skilled service although a nurse actually provided the service.

Proposed New Paragraph § 409.42(c)(1)(ii)

Additionally, we also propose a new § 409.42(c)(1)(ii), which would clarify when patient education services as described in § 409.33(a)(3) constituted skilled services in the home health setting. Current § 409.32(a)(3) states that patient education services are skilled services if the use of technical or professional personnel is necessary to teach patient self-maintenance. However, to address the concerns and lack of clarity surrounding when educations services are skilled services as described above, we are proposing to add a new paragraph, § 409.42(c)(1)(ii). In the home health setting, skilled education services would be deemed to no longer be needed when it became apparent, after a reasonable period of time, that the patient, family, or caregiver could not or would not be trained. Further teaching and training would cease to be reasonable and necessary in this case, and would cease to be considered a skilled service. Notwithstanding that the teaching or training was unsuccessful, the services for teaching and training would be considered to be reasonable and necessary prior to the point that it became apparent that the teaching or training was unsuccessful, as long as such services were appropriate to the patient's illness, functional loss, or injury.

Proposed Change to § 409.44(b)

We are proposing to revise the introductory material at § 409.44(b)(1), to refer to the newly proposed limitations of skilled services in the home health benefit at § 409.42(c)(1)(i) and 409.42(c)(1)(ii). The clauses under the revised paragraphs (i) through (iv) would remain unchanged.

Proposed Revision to § 424.22(a)(1)(i) and § 424.22(b)(2)

We also propose to revise § 424.22(a)(1)(i) and § 424.22(b)(2) to require a written narrative of clinical justification on the physician certification and recertification for the targeted condition where the patient's overall condition supports a finding that recovery and safety could be ensured only if the care was planned, managed, and evaluated by a registered nurse. We believe that this revision would address HHAs' questions regarding the specific circumstances which would necessitate the need for skilled management and evaluation of the care plan. Additionally, we believe this requirement would be an important step in enhancing the physician accountability and involvement in the patient's plan of care.

As we described above, many Medicaid State Agencies and HHAs contend that there is confusion as to when overall management and evaluation of a care plan constitute a skilled service. They questioned what specific beneficiary underlying conditions, or complications or circumstances would warrant a patient who was receiving unskilled services to need care plan management and evaluation by a registered nurse, thus rendering the care skilled. To clarify for home health agencies what specific circumstances would necessitate the involvement of a registered nurse in the development, management, and evaluation of a patient's care plan when only unskilled services are being provided, we propose additions to the home health certification content requirements as described at § 424.22(a)(i) and recertification content requirements at § 424.22(b)(2). Specifically, when a patient's underlying condition or complication requires exclusively that a registered nurse ensure that essential non-skilled care is achieving its purpose, and necessitates a registered nurse be involved in the development, management, and evaluation of a patient's care plan, we propose to require the physician include a written narrative on the certification and recertification describing the physician's clinical justification of this need.

In the Physician Fee Schedule proposed rule published in the July 7, 2008 **Federal Register** (73 FR 38578), we solicited comments asking the industry to suggest options to enhance contact between the physician and the patient. In that solicitation of comments, we described policy options that we had been considering such as a review of the RVUs associated with the certification and recertification of the HH plan of care (POC), and that we were considering proposing new requirements, for example, a requirement for ''direct'' patient contact with the physician, to ensure more active physician involvement in the certification and recertification of the HH POC.

As a result of this solicitation, some commenters suggested that CMS establish documentation expectations associated with the certification and recertification of the need for Medicare home health services. We are continuing to consider policy options to enhance the physician-patient interaction in the home health setting. We believe that the commenters' suggestion that CMS establish documentation expectations associated with the certification and recertification, such as our proposed clinical justification narrative requirement, may be a first step in achieving this goal.

Finally, we believe that this new requirement would increase physician accountability and oversight of the certification and recertification of home health services and plan of care by focusing attention on the physician's responsibility to set out the clinical basis for this skilled need as indicated in the patient's medical record.

This brief narrative could be written or typed on the certification form itself. We do not believe that this brief narrative should be allowed as an attachment to the certification form because an attachment could easily be prepared by someone other than the physician, and what we are seeking is more direct involvement on part of the physician. We seek comments on whether this proposed requirement would increase physician engagement in the certification and recertification process, and clarify industry confusion associated with when a patient's condition would require the need for a registered nurse to oversee the patient's care plan, thus rendering such ''skilled care'' under our payment system.

F. OASIS for Significant Change in Condition: No Longer Associated With Payment

We propose to remove an obsolete reference to ''new case-mix assignments'' as a result of significant changes in a patient's condition that appears in 42 CFR 484 subpart E at § 484.55(d)(1)(ii). The significant change in condition (SCIC), as it relates to new case-mix assignments affecting payment, was an element of the HH PPS at the time of its first implementation in fiscal year 2000. However, as part of the HH PPS payment refinements implemented in CY 2008, we eliminated the SCIC policy, and the assignment of subsequent case-mix assignments under the HH PPS. However, it should be noted that it was not the SCIC payment policy that required the HHA to perform the assessment, but rather the significant change in the patient's condition. We are not proposing to change that requirement. A HHA would still be required to perform an assessment in the event that a patient experienced a significant change in condition. The proposed modification is only that a new case-mix assignment is no longer associated with this assessment.

In addition, we propose to revise § 484.250 to delete an obsolete reference to § 484.237. § 484.237 referred to the SCIC payment policy and was removed in the CY 2008 HH PPS final rule (72 FR 49879).

G. Proposed Payment Safeguards for Home Health Agencies

The provisions contained in this section are designed to: (1) Improve our ability to verify that home health agencies (HHAs) meet minimum enrollment criteria; (2) ensure that HHAs that are changing ownership meet and continue to meet the Conditions of Participation for HHAs found in 42 CFR Part 484; and (3) improve the quality of care that Medicare beneficiaries receive from HHAs.

1. Program Integrity Concerns Involving Home Health Agencies (HHAs)

The fraudulent business practices of certain HHAs continue to cost the Medicare program millions of dollars nationwide. This issue was discussed in a recent report issued by the Government Accountability Office (GAO) entitled ''Improvements Needed to Address Improper Payments in Home Health'' (GAO–09–185). This report, discussed in more detail below, concluded, in part, that ''In the absence of greater prevention, detection, and enforcement efforts, the Medicare home health benefit will continue to be a ready target for fraud and abuse.''

The problem has been especially acute in, though by no means limited to, the States of Texas and California. In Los Angeles County in California, for instance, the amount of money for which HHAs in that county billed Medicare between Fiscal Years 2003 and 2006 rose from $569 million to $921 million–an increase of 62 percent, and one that was not accompanied by a similar increase in the county's Medicare beneficiary population. There has also been an abnormal proliferation of HHAs in California as a whole. Between October 2002 and May 2007, the number of HHAs in the State rose by 25 percent—again, without a concomitant upswing in the number of Medicare beneficiaries in California. This suggests that there may also be an increase in improper billing. HHA proliferation has been an even bigger problem in Texas. Between October 2002 and October 2006, the number of HHAs in the State doubled, while—during this same period—the number of HHAs in Harris County, Texas (which includes the city of Houston) increased by almost 150 percent. As with California, these figures are out of all proportion with any increase in the beneficiary population or demand for HHA services in Texas or Harris County.

The aforementioned GAO report expressed similar concerns. It noted that, nationwide, ''spending on the Medicare home health benefit grew about 44 percent from 2002 through 2006, despite an increase of just less than 17 percent in the number of beneficiaries using the benefit during that 5-year period.'' The report also noted discrepancies in States other than Texas and California. To illustrate, between 2002 and 2006, the number of HHAs that billed Medicare rose in Florida by 100 percent, in Michigan by 62 percent, in Illinois by 59 percent, in Ohio by 42 percent, in Arizona by 32 percent, and in the District of Columbia by 67 percent. However, the increases in the number of Part A beneficiaries who used HHA services in these six jurisdictions were as follows: Florida—28 percent; Michigan—19 percent; Illinois—23 percent; Ohio—14 percent; Arizona—4 percent; and the District of Columbia—2 percent.

The disparity in many jurisdictions between the increase in the number of HHAs and the rise in the number of beneficiaries is so overwhelming that it cannot be attributed solely to an aging populace. The fact that, as shown above, between 2002 and 2006, the number of HHAs in Arizona rose at a rate 8 times greater than the number of Part A beneficiaries that use HHA services—and that the rate was an astounding 33 times greater in Washington, DC—must raise serious questions as to the legitimacy of some of these entities.

The GAO report also outlined a number of instances of allegedly fraudulent activities on the part of HHAs. In a particularly glaring example in Houston, Texas, the GAO noted the following: ''One PSC (Program Safeguard Contractor) interviewed 670 Houston beneficiaries who had the most severe clinical rating and who were patients of HHAs identified by the PSC as having aberrant billing patterns. The PSC found 91 percent of claims for these beneficiaries to be in error. Nearly 50 percent of the beneficiaries were not homebound and therefore were not eligible to receive any Medicare home health services. The investigators also found that while 39 percent of the beneficiaries they interviewed were eligible for the benefit, their clinical severity had been exaggerated. The PSC concluded that only 9 percent of claims for the 670 beneficiaries were properly coded. In addition, the PSC found that other home health beneficiaries it interviewed were not homebound; for instance, some were mowing their lawns when investigators came to interview them.''

Of particular concern to CMS is that the problems discussed above have been seen with HHAs on a far greater scale than with any other type of certified provider. The dramatic rise in the number of HHAs in relation to the increase in Medicare beneficiaries has not been even remotely duplicated with other Part A entities. In sum, the relative level of potentially fraudulent behavior among HHAs exceeds that of other certified provider types, and it is for this reason that CMS needs to take additional steps to ensure that only legitimate, bona fide HHAs remain enrolled in the Medicare program.

2. Prohibition on Sharing of Practice Location

In 2008, we determined that a number of HHAs had enrolled or attempted to enroll into the Medicare program using the same practice location or base of operations listed in Section 4 of their respective Medicare provider enrollment applications. In one case, a business attempted to enroll more than twenty different HHAs with the same Section 4 practice location as the base of operations.

We believe that allowing HHAs to share practice locations, operations, and other aspects of the provider's operations (for example, patient and financial records) in this manner constitutes a significant risk to the Medicare program. To allow an HHA to share its Section 4 practice location or base of operations with another Medicare-enrolled HHA or supplier limits the ability of CMS, a State survey agency, or an accreditation organization to ensure that each HHA meets the Conditions of Participation specified at 42 CFR part 484. Indeed, pursuant to Section 1866(j)(1)(A) of the Act, the Secretary is required to establish by regulation a process for the enrollment of providers and suppliers into the Medicare program. However, the sharing of HHA practice locations or bases of operations listed in Section 4 of the Medicare provider enrollment application hinders CMS's ability to properly enroll HHAs into Medicare because of the extreme difficulty in determining which site is in operation at a particular time, and which provider has control over the space, staff, equipment, *etc.* We do not believe that legitimate HHA providers share Section 4 practice locations or bases of operations with another Medicare-enrolled HHA or supplier.

At § 489.19, we are proposing a provision that would prohibit an HHA from sharing, leasing, or subleasing its practice location or base of operations listed in Section 4 of its Medicare provider enrollment application with or to another Medicare-enrolled HHA or supplier. We believe that this provision is consistent with existing provisions found in § 410.33(g)(15), which established limitations on the sharing of space (that is, a practice location) by independent diagnostic testing facilities (IDTF).

At § 489.12(a)(5), we are proposing to allow CMS to refuse to enter into a provider agreement with a prospective HHA if we determined, under proposed 42 CFR 489.19, that the HHA was sharing, leasing, or subleasing its practice location or base of operations listed in Section 4 of its Medicare provider enrollment application with or to another Medicare-enrolled HHA or supplier.

At § 424.530(a)(8), we are proposing to allow a Medicare contractor, including a Regional Home Health Intermediary or A/B MAC, to deny Medicare billing privileges to an HHA if it determined, under proposed 42 CFR 489.19, that the HHA was sharing, leasing, or subleasing its practice location or base of operations listed in Section 4 of its Medicare provider enrollment application with or to another Medicare-enrolled HHA or supplier.

At § 424.535(a)(11), we are proposing to allow a Medicare contractor, including a Regional Home Health Intermediary or A/B MAC, to revoke the Medicare billing privileges of an HHA that it determined, under proposed 42 CFR 489.19, was sharing, leasing, or subleasing its practice location or base of operations listed in Section 4 of its Medicare provider enrollment application with or to another Medicare-enrolled HHA or supplier.

We are, nevertheless, soliciting comments on whether there are legitimate business reasons for a Medicare-enrolled HHA to share space with another Medicare-enrolled HHA or supplier when there is common ownership. We are also soliciting comments on whether there are legitimate business reasons for a Medicare-enrolled HHA to be co-located with another Medicare-enrolled HHA or supplier when there is no common ownership. In addition, we are soliciting comments on whether there are legitimate business reasons for a Medicare-enrolled HHA to engage in leasing or subleasing arrangements with a Medicare-enrolled supplier when there is common ownership.

3. Sale or Transfer of Ownership Within 3 Years of Enrollment

We have recently found instances where owners of a HHA, some of which were working in concert with brokers or organizations operating ''turn-key'' businesses, have enrolled or have attempted to enroll in the Medicare program for the specific purpose of selling the Medicare billing privileges and the Medicare provider agreement of their HHA to a third-party. In this scenario, the buyer or seller of the HHA typically would notify Medicare of the sale or change of ownership via the Medicare enrollment application (CMS–855A) after the billing privileges have been transferred when the HHA is sold.

Current CMS policy recommends surveys when there is a change of ownership. However, surveys in cases of a change of ownership do not occur with the frequency that they do when providers initially enroll in Medicare. Consequently, there are instances in which a change of ownership takes place yet the new owner does not undergo a survey, in which case Medicare cannot conclusively ascertain whether the business, under new ownership, meets the Conditions of Participation under 42 CFR part 484. This serves as an incentive for certain prospective providers to enroll in the Medicare program with the sole purpose of transferring Medicare billing privileges and the associated provider agreement when the business is sold.

This is problematic for two reasons. First, the prospective provider has minimal incentive for ensuring quality care for its patients after it is enrolled because its exclusive objective for participating in Medicare in the first place is to sell the business shortly after receiving Medicare billing privileges. In other words, the provider, aware that it may be able to sell the business without the HHA having to undergo a survey, may have little motivation to ensure that it is in compliance with the Conditions of Participation under 42 CFR part 484, since it intends on selling the business in any event. Medicare beneficiaries, therefore, may receive inadequate services as a result of this activity. Second, without the protection that a survey provides, the HHA may attempt to bill Medicare for these insufficient services. These circumstances increase the risk for an HHA to submit inappropriate and potentially fraudulent claims to Medicare, which places the Medicare Trust Funds at risk.

We further note that 42 CFR 424.550(a) states that a provider or supplier ''is prohibited from selling its Medicare billing number or privileges to any individual or entity, or allowing another individual or entity to use its Medicare billing number.'' We believe that the ''turn-key'' scenarios described in this subsection 2 fall within the general intent and purview of this provision, in that the broker may focus more on the selling of the HHA's billing privileges, rather than of the HHA itself. Nevertheless, while the provisions of 42 CFR § 424.550(a) and (b) were designed to prohibit this type of practice, we cannot realistically enforce the prohibitions on the sale, including an asset sale or stock transfer, or transfer of billing privileges, unless we can confirm the nature of the financial arrangements involved therein.

We recognize that the issue of a potential lack of a survey in HHA ownership changes exists with respect

to other types of providers and certified suppliers. Yet there are several reasons as to why this concern is more acute with HHAs than with other provider types. First, and as already outlined in subsection 1, the level of fraud in the HHA sector appears to be more prevalent than with other provider categories. Second, CMS has not seen the types of turn-key arrangements described above with any type of provider or certified supplier other than HHAs. It is the combination of these two factors that, in our view, make it necessary for us to focus the proposed provisions below on HHAs, rather than on provider types with whom our concerns are not nearly as acute. We stress that CMS in the past has undertaken a number of enrollment initiatives to ensure that only eligible and qualified providers and suppliers obtain and maintain Medicare billing privileges; specifically, CMS promulgated rules to address fraud and abuse and quality of care concerns for IDTFs (in 42 CFR 410.33(g)) as well as suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) (42 CFR 424.57(c)). We therefore believe, for the reasons just stated, that a similar approach is warranted here with respect to HHAs. With that said, and in view of the aforementioned schemes that appear to be designed to subvert Medicare's existing statutory and regulatory authorities related to enrollment and State survey procedures, we maintain that additional tools are needed to address this program vulnerability.

At 42 CFR 424.550(b)(1), we are proposing that an HHA undergoing an ownership change (including asset sales and stock transfers) must obtain an initial State survey or accreditation by an approved accreditation organization if the change takes place within 36 months after the effective date of the HHA's enrollment in Medicare. This means that any change of ownership that occurs during the 36 months following an initial enrollment would not result in the transfer of the HHA's provider agreement and Medicare billing privileges to the new owner. The new owner of the existing HHA would instead be required to enroll in the Medicare program as a new provider under the provisions of § 424.510 and obtain an initial State survey or accreditation by an approved accreditation organization. This is to ensure that the HHA under new ownership remains in compliance with the Conditions of Participation in 42 CFR part 484. We believe that this will help deter turn-key entities from purchasing HHAs for the sole purpose of selling them, in that the facility will be unable to undergo a change of ownership within the above-referenced 36-month period without the HHA being subject to a State survey.

We further believe that 36 months is an appropriate period of time for which to apply this requirement. It is long enough to ensure that a newly-enrolled HHA is serious about furnishing quality services to Medicare beneficiaries and is not merely looking to sell the HHA's Medicare billing privileges at the earliest possible moment. Conversely, a 36-month timeframe is, in our view, not so extensive as to greatly hinder the ability of a bonafide HHA to sell its business after the HHA has been operational and providing legitimate Medicare services for a reasonable period of time. While we do recognize that some legitimate, newly-enrolling HHAs may be inconvenienced by their inability to utilize, for a certain amount of time, the change of ownership provisions in 42 CFR 489.18, we also stress that the aforementioned survey requirement will, to a substantial extent, benefit legitimate members of the HHA provider community, in that it will help ensure that unqualified HHAs are no longer in the Medicare program. This will, for bonafide HHAs, reduce competition from less than legitimate HHAs and, on a larger level; help protect the Medicare Trust Funds.

Finally, if adopted, we believe that any change of ownership (including asset sales or stock transfers) that is pending a Medicare contractor's review and approval at the time this rule becomes effective, would be subject to this provision.

4. Home Health Agency Reactivations of Medicare Billing Privileges

In order to help address CMS' concerns about potentially inappropriate activity by HHAs, an additional tool that we therefore believe is necessary to help stem this behavior involves enhanced safeguards for use as part of the reactivation process identified in § 424.540(a).

To ensure that HHAs whose Medicare billing privileges have been deactivated for 12 months of non-billing and who seek to reactivate these privileges are still in compliance with the Conditions of Participation in 42 CFR part 484, we propose to revise § 424.540(b)(3) from its current form, ''Reactivation of Medicare billing privileges does not require a new certification of the provider or supplier by the State survey agency or the establishment of a new provider agreement'' to ''With the exception of home health agencies, reactivation of Medicare billing privileges does not require a new certification of the provider or supplier by the State survey agency or the establishment of a new provider agreement.'' We are also proposing to add § 424.540(b)(3)(i), which states that any HHA whose Medicare billing privileges are deactivated under the provisions found in § 424.540(a) are also required to obtain an initial State survey or accreditation by an approved accreditation organization before its Medicare billing privileges can be reactivated.

As already explained, CMS remains concerned about the excessive level of potentially inappropriate activity in the HHA arena. To this end, CMS believes that the proposed provisions outlined in this subsection will, for reasons already identified, help address the concerns outlined in the aforementioned GAO report by ensuring that HHAs are in constant and verifiable compliance with the HHA Conditions of Participation found in 42 CFR part 484, and that only qualified and legitimate home health providers are enrolled in Medicare.

H. Physician Certification and Recertification of the Home Health Plan of Care

a. Background

Sections 1814(a)(2)(C) and 1835(a)(2)(A) of the Act require that a plan for furnishing home health services be established and periodically reviewed by a physician in order for Medicare payments for those services to be made. Our regulations at § 409.43(e) specifically states that a home health plan of care (HH POC) must be reviewed, signed, and dated by the physician who reviews the POC (as specified in § 409.42(b)) in consultation with agency clinical staff at least every 60 days (or more frequently as specified in § 409.43(e)(1)). Additionally, § 424.22(b) states that a recertification is required at least every 60 days, preferably at the time the plan is reviewed, and must be signed by the physician who reviews the home health POC. These schedules, for the review of the POC and the recertification, coordinate well with the 60-day episode payment unit under the HH PPS. In implementing the statutory requirement as well as these regulations, we believed that these requirements would encourage enhanced physician involvement in the HH POC and patient management, and would include more direct ''in-person'' patient encounters (as logistically feasible).

Currently, physicians are paid for both the certification and recertification

of the HH POC under HCPCS codes G0180 and G0179, respectively. The basis for the payment amounts of these physician services is the relative resources in RVUs required to furnish these services. We believe physician involvement is very important in maintaining quality of care under the HH PPS.

In the HH PPS proposed rule published in the October 28, 1999 **Federal Register** (64 FR 58196), we had proposed to require the physician to certify the case-mix weight/home health resource group (HHRG) as part of the required physician certification of the POC. This reflected our belief that the physician should be more involved in the decentralized delivery of home health services. However, in the final rule published in the July 3, 2000 **Federal Register** (65 FR 41163), we did not finalize that proposal and decided to focus our attention on physician certification and education in order to better involve the physician in the delivery of home health services.

b. Solicitation of Comments

It has come to our attention that physician involvement in the certification and recertification of HH POC varies greatly. While some physicians have direct contact with their patients in the delivery of home health services, we believe that a significant number of physicians provide only a brief, albeit thorough, review of the HH POC, without any direct contact with the patient. We continue to believe that active involvement of the physician, including ''in-person'' contact with the patient, during the certification and recertification of the HH POC is essential for the delivery of high quality HH services.

In the Physician Fee Schedule proposed rule published in the July 7, 2008 **Federal Register** (73 FR 38578), we mentioned several options to enhance direct contact between the physician and the patient. First, we considered a review of the RVUs associated with the certification and recertification of the HH POC. As a result of that review, the payment amounts to physicians could be reduced based on a more accurate determination of the actual RVUs required to provide these services. We also considered proposing new requirements; for example, a requirement for ''direct'' patient contact with the physician, to ensure more active physician involvement in the certification and recertification of the HH POC. We specifically solicited comments on these policy options. The following is a summary of the comments and our responses as published in the Physician Fee Schedule final rule published in the November 19, 2008 **Federal Register** (73 FR 69855).

Most commenters suggested that we leave our current policies and payment to physicians unchanged, at least until further analysis is completed. To that end, it was suggested that we continue to study the role of the physician in home care and determine which factors enhance a physician's ability to conduct oversight activities, ensure appropriateness of care, and work collaboratively with HHAs without further burdening Medicare beneficiaries. Commenters urged CMS to engage with industry organizations that represent the physicians that furnish these services, to determine goals and assess options. Commenters further suggested that goals and options could include revising the procedure codes used for billing, assessing the current RVUs, and establishing documentation expectations.

Some commenters suggested that payments to physicians for certifying and recertifying HH POCs should be restructured to provide incentives for greater physician involvement, to include personally seeing the patients. Specifically, some commenters suggested adding different payments for the varying levels of physician involvement in the certification and recertification of HH POCs. Other commenters urged CMS to consider how home telehealth can be employed to a greater degree to increase input of clinical information directly to physicians in lieu of face-to-face contact.

Other commenters suggested that we actively support amending the Medicare statute to allow nurse practitioners (NPs) to certify and recertify HH POCs. Some commenters suggested that we actively support demonstrations and legislative proposals to build on the concept of merging home care with primary care under a single care management entity for persons in the advanced stages of chronic illnesses. Other commenters suggested that payment to medical directors should be restored to HHAs, along with requirements for their education and a definition of their role, and that we consider reimbursement for a planning teleconference between the physician and home health personnel.

In the November 19, 2008 final rule, we expressed our appreciation for the comments and responded that we would continue to analyze and consider the comments and suggestions in future rulemaking. Additionally, as a result of comments received on the above physician rule, as it relates to physician-patient contact, we are considering the possibility of requiring physicians to make phone calls to patients at various times over the course of home health treatment (prior to recertifications), as a means to promote that physician-patient contact and to help ensure the delivery of high quality HH services to our beneficiaries.

In this HH PPS proposed rule for CY 2010, we are specifically soliciting additional comments on this topic.

I. Routine Medical Supplies

HHAs have expressed to the HHS Office of the Inspector General (OIG) some confusion regarding routine medical supplies and how we account for the cost of those supplies. Therefore, we would like to reiterate our policy regarding routine medical supplies and how they are reimbursed under the HH PPS.

Section 1895(b)(1) states that ''all services covered and paid on a reasonable cost basis under the Medicare home health benefit as of the date of the enactment of this section, including medical supplies, shall be paid for on the basis of a prospective payment amount * * *.'' The cost of routine medical supplies was included in the average cost-per-visit amounts derived from the audit sample. These average cost-per-visit amounts were used to calculate the initial HH PPS rates published in the July 3, 2000 HH PPS final rule (FR 65 41184). Because reimbursement for routine medical supplies is bundled into the HH PPS 60-day episode rate and the per-visit rates, HHAs may not bill separately for routine supplies.

As noted in Chapter 7—Home Health Services of the Medicare Benefit Policy Manual (Pub. 100–02), sections 50.4.1.2 and 50.4.1.3, routine supplies are supplies that are customarily used in small quantities during the course of most home care visits. They are usually included in the staff's supplies and not designated for a specific patient. Routine supplies would not include those supplies that are specifically ordered by the physician or are essential to HHA personnel in order to effectuate the plan of care. Examples of supplies which are usually considered routine include, but are not limited to:

A. Dressings and Skin Care

- Swabs, alcohol preps, and skin prep pads;
- Tape removal pads;
- Cotton balls;
- Adhesive and paper tape;
- Nonsterile applicators; and
- 4 X 4's.

B. Infection Control Protection

- Nonsterile gloves;
- Aprons;
- Masks; and
- Gowns.

C. Blood Drawing Supplies

- Specimen containers.

D. Incontinence Supplies

- Incontinence briefs and Chux covered in the normal course of a visit. For example, if a home health aide in the course of a bathing visit to a patient determines the patient requires an incontinence brief change, the incontinence brief in this example would be covered as a routine medical supply.

E. Other

- Thermometers; and
- Tongue depressors.

There are occasions when the supplies listed in the above examples would be considered non-routine and thus would be considered a billable supply, *i.e.,* if they are required in quantity, for recurring need, and are included in the plan of care. Examples include, but are not limited to, tape, and 4 X 4s for major dressings.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-Day notice in the **Federal Register** and solicit public comment before a collection of information (COI) requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

A. ICRs Regarding the Requirements for Home Health Services

Section 424.22 proposes that if a patient's underlying condition or complication required a registered nurse to ensure that essential non-skilled care was achieving its purpose, and necessitated a registered nurse be involved in the development, management, and evaluation of a patient's care plan, the physician would include a written narrative describing the clinical justification of this need.

The burden associated with this requirement would be the time and effort put forth by the physician to include the written narrative. We estimate it would take one physician approximately 5 minutes to meet this requirement. We estimate the frequency of such a situation to occur in about 5 percent of episodes (or about 345,600 episodes a year); therefore, the total annual burden associated with this requirement would be 28,800 hours for CY 2010.

B. ICRs Regarding Deactivation of Medicare Billing Privileges

In the proposed § 424.540(b)(3)(i), an HHA whose Medicare billing privileges are deactivated under the provisions found in 424.540(a) must obtain an initial State survey or accreditation by an approved accreditation organization before its Medicare billing privilege can be reactivated. The burden associated with this requirement would be the time and effort put forth by the HHA to obtain a State survey or accreditation. We estimate it would take the prospective provider/owner 60 hours to obtain a State survey or accreditation. We estimate that there would be 2,000 such occurrences annually; therefore, the total annual burden associated with this requirement would be 120,000 hours.

C. ICRs Regarding Prohibition Against Sale or Transfer of Billing Privileges

At § 424.550(b)(1) we propose that an HHA undergoing an ownership change would have to obtain an initial State survey or accreditation by an approved accreditation organization if the change takes place within 36 months after the effective date of the HHA's participation in Medicare. Between April 2008 and April 2009, approximately 2,000 Medicare-enrolled HHAs—or 22.5 percent of the 9,000 total number of HHAs enrolled in Medicare—underwent a change of ownership. Naturally, the magnitude of the ownership changes varied by HHA, but the fact that almost one-quarter of all Medicare-enrolled HHAs changed ownership in some form within the past year is, for the reasons outlined in the preamble to this proposed rule, significant.

It is also important to note that of the 2,000 ownership changes, approximately 20 percent occurred in Texas, another 20 percent in Florida, and 14 percent in California, meaning that over one-half of all changes in ownership occurred in three States. Though it is possible that, if this provision was implemented, the number of total annual ownership changes would decrease, we will assume that the figure of 2,000 would remain constant. The burden associated with the proposed requirement in § 424.550(b)(1) would be twofold. First, the HHA would need to complete and submit a Medicare enrollment application (paper or electronic) as an initial applicant. This can be done electronically via the Internet-Based Provider Enrollment, Chain and Ownership System (PECOS) or by using the paper CMS–855 enrollment application. The estimated burden of completing the entire application as a new enrollee is 3 hours. Thus, the estimated annual burden for the approximately 2,000 HHAs that will change ownership would be 6,000 hours. Second, the provider would need to undergo a survey (or obtain accreditation in lieu of a survey) and perform administrative activities associated therewith. We estimate that the total hourly burden to the HHA for said activities would be 60 hours, for an annual burden of 120,000 hours (2,000 HHAs × 60 hours). Therefore, we estimate that the total annual burden of compliance with § 424.550(b)(1) would be 126,000 hours (120,000 hours + 6,000 hours).

D. ICRs Regarding Patient Assessment Data

Section 484.210 would require an HHA to submit to CMS the OASIS data described at § 484.55(b)(1) and (d)(1) in order for CMS to administer the payment rate methodologies described in §§ 484.215, 484.230 and 484.235.

The burden associated with this is the time and effort put forth by the HHA to submit the OASIS data. This burden is currently accounted for under OMB# 0938–0761.

OMB No.	Number of Requirements	Number of respondents	Burden hours	Total annual burden hours
None	424.22	345,600	1/12	28,800

OMB No.	Number of Requirements	Number of respondents	Burden hours	Total annual burden hours
None	424.540(a)(3)(i)	2,000	60	120,000
None	424.550(b)(1)	2,000	63	126,000
0938–0761	484.210	(1)	(1)	(1)

[1] Not applicable.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget,

Attention: CMS Desk Officer, CMS–1560–P.

Fax: (202) 395–6974; or

E-mail: *OIRA_submission@omb.eop.gov*

E. ICRs Regarding Annual Update of the Unadjusted National Prospective 60-day Episode Payment Rate

Section 484.225(i) requires the submission of quality measures as specified by the Secretary. As part of this requirement, each HHA sponsoring a Home Health Care CAHPS (HHCAHPS) Survey must prepare and submit to its survey vendor a file containing patient data on patients served the preceding month that will be used by the survey vendor to select the sample and field the survey. This file (essentially the sampling frame) for most home health agencies can be generated from existing databases with minimal effort. For some small HHAs, preparation of a monthly sample frame may require more time. However, data elements needed on the sample frame will be kept at a minimum to reduce the burden on all HHAs.

The burden associated with this requirement is the time and effort put forth by the HHA to prepare and submit the file containing patient data on patients. The survey instrument and procedures for completing the instrument are designed to minimize burden on all respondents. No significant burden is expected for small agencies beyond providing their contracted vendor with a monthly file of patients served.

Initially, we estimate it would take one HHA 5 hours for the first month to meet this requirement. The subsequent monthly burden is estimated to be 30 minutes per HHA. We estimate approximately 7,000 HHAs would be submitting this data annually. Based on that number, the burden associated with the first month is estimated at 35,000 hours. The burden would decrease to 2,100 for subsequent months. Therefore, the total annual burden for the first year would total 58,100.

The burden associated with the home health patient's submission of the HHCAHPS survey is currently pending OMB approval (CMS–10275/OMB# 0938–NEW). Once OMB approval has been obtained, CMS will revise the package to include the burden on the HHAs as discussed above.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this proposed rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993 as further amended) the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (as amended by Executive Order 13258) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for rules with economically significant effects ($100 million or more in any 1 year). We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a Regulatory Impact Analysis, that to the best of our ability, presents the costs and benefits of the rulemaking.

1. HHA Provisions Regarding Co-Mingling, Ownership Changes, and Reactivation of Billing Privileges

We believe that our proposals regarding: (1) The prohibition against co-mingling, (2) HHA changes of ownership, and (3) the reactivation of HHA billing privileges would have minimal budgetary impact, as the total number of entities that will be effected each year would be small. Moreover, we believe that these changes are necessary to ensure that currently enrolled and prospective HHAs are billing for the services provided and are in compliance with the conditions of participation in 42 CFR part 484, and all other Medicare requirements.

As for the issue of beneficiary access, the number of affected HHAs is such that we do not believe that beneficiaries would be adversely impacted by the proposed provisions. To the contrary, any reduction in the number of enrolled HHAs that would result from the implementation of these proposed provisions would be more than offset by the assurance that those HHAs that cannot meet Medicare requirements and quality standards are no longer in the program.

We are unable to determine the exact extent to which currently enrolled and prospective HHAs would be able to meet the requirements outlined in the proposed provisions. In addition, as a result of a dearth of quantifiable data, we cannot effectively derive an estimate of the monetary impacts of these provisions. Accordingly, we are seeking public comment so that the public may provide any data available that provides a calculable impact or any alternative to the proposed provisions.

1. CY 2010 Update

The update set forth in this proposed rule applies to Medicare payments under HH PPS in CY 2010. Accordingly, the following analysis describes the impact in CY 2010 only. We estimate that the net impact of the proposals in this rule, including a 2.75 percent reduction to the national standardized

60-day episode payment rates and the NRS conversion factor to account for the case-mix change adjustment, is approximately $100 million in CY 2010 savings. The estimated $100 million impact reflects the distributional effects of an updated wage index (−$10 million) as well as the 2.2 percent home health market basket increase (an additional $390 million in CY 2010 expenditures attributable only to the CY 2010 home health market basket), and the 2.75 percent decrease (−$480 million for the third year of a 4-year phase-in) to the HH PPS national standardized 60-day episode rate to account for the case-mix change adjustment under the HH PPS. The $100 million is reflected in column 5 of Table 8 as a 0.86 percent decrease in expenditures when comparing the current CY 2009 system to the CY 2010 system. If the Secretary were to impose a 6.89 percent decrease to the national standardized 60-day episode rates and the NRS conversion factor in CY 2010, to account for the increase in nominal case-mix, the impact would be an estimated decrease in payments to HHAs of 4.9 percent (column 3 of Table 8) or $1,220 million. Similarly, if the Secretary were to impose a 3.51 percent decrease to the national standardized 60-day episode rates and the NRS conversion factor in CY 2010, to account for the increase in nominal case-mix, the impact would be an estimated decrease in payments to HHAs of 1.6 percent (column 4 of table 8) or $590 million. For comparison purposes, estimated impacts that take these alternative percentage reductions (6.89 percent and 3.51 percent) into account can be found in columns 3 and 4 of Table 8 in Section VI.B. of this rule.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7 million to $34.5 million in any 1 year. For the purposes of the RFA, approximately 75 percent of HHAs are considered to small businesses according to the Small Business Administration's size standards with total revenues of $13.5 million or less in any 1 year. Individuals and States are not included in the definition of a small entity. Excluding HHAs in areas of the country where high and suspect outlier payments exist, this proposed rule is estimated to have an overall positive effect upon small entities (see section IB.B ''Anticipated Effects'', of this proposed rule, for supporting analysis).

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis, if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. This proposed rule applies to home health agencies. Therefore, the Secretary has determined that this proposed rule will not have a significant economic impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of about $100 million or more in 1995 dollars, updated for inflation. That threshold is currently approximately $133 million in 2009. This proposed rule is not anticipated to have an effect on State, local, or tribal governments, in the aggregate, or by the private sector, of $133 million or more.

Executive Order 13132 established certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this proposed rule under the threshold criteria of Executive Order 13132, Federalism, and have determined that it would not have substantial direct effects on the rights, roles, and responsibilities of States, local, or tribal governments.

B. Anticipated Effects

This proposed rule sets forth updates to the HH PPS rates contained in the CY 2009 notice (73 FR 65351, November 3, 2008). The impact analysis of this proposed rule presents the estimated expenditure effects of policy changes proposed in this rule. We use the latest data and best analysis available, but we do not make adjustments for future changes in such variables as number of visits or case-mix.

This analysis incorporates the latest estimates of growth in service use and payments under the Medicare home health benefit, based on Medicare claims from 2007. We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to errors resulting from other changes in the impact time period assessed. Some examples of such possible events are newly-legislated general Medicare program funding changes made by the Congress, or changes specifically related to HHAs. In addition, changes to the Medicare program may continue to be made as a result of the BBA, the BBRA, the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, the MMA, the DRA, or new statutory provisions. Although these changes may not be specific to the HH PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon HHAs.

Table 8 represents how home health agency revenues are likely to be affected by the policy changes described in this rule. For this analysis, we used linked home health claims and OASIS assessments; the claims represented a 20-percent sample of 60-day episodes occurring in CY 2007. Column one of this table classifies HHAs according to a number of characteristics including provider type, geographic region, and urban versus rural location.

For the purposes of analyzing impacts on payments, we performed three simulations and compared them to each other. Based on our assumption that outliers, as a percentage of total HH PPS payments, will be no more than 5 percent in CY 2009, the 2009 baseline, for the purposes of these simulations, we assumed that the full 5 percent outlay for outliers will be paid under our policy in 2009 of a 0.89 FDL ratio. As described in section III.A. of this proposed rule, given our proposed policies of a 0.67 FDL ratio and a 10 percent cap on outlier payments, we would return 2.5 percent back into the national standardized 60-day episode payment rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor, and then estimate outlier payments to be approximately 2.5 percent of total HH PPS payments in CY 2010. All three simulations use a CBSA-based wage index reported on the 2007 claims to determine the appropriate wage index.

The first simulation estimates CY 2009 payments under the current system (to include the 2009 wage index). The second simulation estimates CY 2009 payments under the current system, but with the 2010 wage index. The second simulation produces an estimate of what total payments using

the sample data would have been in CY 2009 without any of the proposed provisions in this rule, except for that of the 2010 wage index. The third simulation estimates CY 2010 payments with the 2010 wage index, incorporating our maintaining of the 2.75 percent reduction to the HH PPS rates, as well as all the proposed provisions of this rule.

These simulations demonstrate the effects of: A new 2010 wage index, a 2.75 percent reduction to account for the increase in nominal case-mix, a 2.2 percent market basket update, a 2.5 percent increase to account for a new outlier target of 2.5 percent, a 0.67 FDL ratio, and a 10 percent cap on outlier payments. Specifically, the second column of Table 8 shows the percent change due to the effects of the 2010 wage index. The third and fourth columns are for comparison purposes, and show the percent change due to the combined effects of the 2010 wage index, an alternative 6.89 percent reduction (column 3) or an alternative 3.51 percent reduction (column 4) to the rates to account for the increase in nominal case-mix, the 2.2 percent home health market basket update, the 2.5 percent increase to the HH PPS rates to account for an approximate 2.5 percent target for outliers as a percentage of total HH PPS payments, a 0.67 FDL ratio, and a 10 percent outlier cap. The fifth column of Table 8 shows the percent change due to the combined effects of the 2010 wage index, our maintaining of a 2.75 percent reductions to the rates to account for the increase in nominal case-mix, the 2.2 percent home health market basket update, the 2.5 percent increase to the HH PPS rates to account for an approximate 2.5 percent target for outliers as a percentage of total HH PPS payments, a 0.67 FDL ratio, and a 10 percent outlier cap.

The overall percentage change, for all HHAs, in estimated total payments from CY 2009 to CY 2010 is a decrease of approximately 0.86 percent. Rural HHAs, however, are estimated to see an increase in payments from CY 2009 to CY 2010 of about 3.45 percent. On the other hand, urban HHAs are expected to see a decrease of approximately 1.64 percent in payments from CY 2009 to CY 2010.

Voluntary non-profit HHAs (3.52 percent), facility-based HHAs (3.90 percent), and government owned HHAs (3.11 percent) are estimated to see an increase in the percentage change in estimated total payments from CY 2009 to CY 2010. Proprietary and freestanding HHAs, on the other hand, are estimated to see decreases of 3.14 percent and 1.73 percent, respectively, in estimated total payments from CY 2009 to CY 2010. Freestanding HHAs, broken out, show that voluntary non-profit and governmental HHAs are estimated to see increases of 3.22 percent and 2.63 percent, respectively, in estimated total payments from CY 2009 to CY 2010.

HHAs in the North and Midwest regions are expected to experience a percentage change increase in the estimated total payments from CY 2009 to CY 2010 of 3.79 percent and 3.67 percent, respectively. HHAs in the South and West regions of the country are estimated to experience decreases in the percentage change in estimated total payments from CY 2009 to CY 2010 of 4.01 percent and 1.52 percent. We believe that the major contributors to the estimated decreases in payments in these areas of the country are those with high and suspect outlier payments.

Breaking this down even further, it is estimated that New England, Mid Atlantic, East South Central, East North Central, and West North Central area HHAs are all expected to experience increases in their payments in CY 2010 ranging from just over 2 percent to almost 5 percent. Conversely, South Atlantic and Pacific HHAs are expected to experience decreases, 11.68 percent and 2.90 percent respectively, in the percentage change in estimated total payments from CY 2009 to CY 2010. Again, we believe that the major contributors to the estimated decreases in payments in these areas of the country are those with high and suspect outlier payments.

Larger HHAs (those with 200 or more Medicare home health initial episodes per year) are estimated to experience an increase in payments from CY 2009 to CY 2010 of approximately 2.44 percent. Mid-size to small agencies are expected to see a decrease in their payments in CY 2010, ranging from 1.77 percent to 15.93 percent. However, we believe that the major contributors to the estimated decreases in payments for mid-size to small agencies are those agencies in areas of the country with high and suspect outlier payments. Consequently, we have provided a more detailed discussion, and analysis in Table 9 below, that demonstrates where, in the country, these estimated large decreases for mid-size to small agencies are occurring.

TABLE 8—IMPACT BY AGENCY TYPE

Group	Comparisons			
	Percent change due to the effects of the updated wage index only (percent)	(For comparison purposes) Impact of CY 2010 proposed policies [1] (w/alternative 6.89 percent reduction in place of the proposed 2.75 percent reduction) (percent)	(For comparison purposes) Impact of CY 2010 proposed policies [1] (w/alternative 3.51 percent reduction in place of the proposed 2.75 percent reduction) (percent)	Impact of CY 2010 proposed policies [1] (percent)
Type of Facility:				
Free-Standing/Other Vol/NP	−0.01	−0.89	2.47	3.22
Free-Standing/Other Proprietary	−0.05	−7.25	−4.00	−3.27
Free-Standing/Other Government	−0.32	−1.49	1.88	2.63
Facility-Based Vol/NP	−0.12	−0.22	3.19	3.96
Facility-Based Proprietary	−0.22	−0.57	2.89	3.66
Facility-Based Government	−0.27	−0.56	2.88	3.65
Subtotal: Freestanding	−0.05	−5.74	−2.46	−1.73
Subtotal: Facility-based	−0.15	−0.29	3.13	3.90
Subtotal: Vol/PNP	−0.06	−0.62	2.76	3.52
Subtotal: Proprietary	−0.05	−7.12	−3.87	−3.14

TABLE 8—IMPACT BY AGENCY TYPE—Continued

Group	Comparisons			
	Percent change due to the effects of the updated wage index only (percent)	(For comparison purposes) Impact of CY 2010 proposed policies [1] (w/alternative 6.89 percent reduction in place of the proposed 2.75 percent reduction) (percent)	(For comparison purposes) Impact of CY 2010 proposed policies [1] (w/alternative 3.51 percent reduction in place of the proposed 2.75 percent reduction) (percent)	Impact of CY 2010 proposed policies [1] (percent)
Subtotal: Government	−0.30	−1.05	2.35	3.11
Total	−0.06	−4.90	−1.60	−0.86
Type of Facility (Rural * Only):				
Free-Standing/Other Vol/NP	−0.50	−0.61	2.83	3.60
Free-Standing/Other Proprietary	−0.14	−0.98	2.51	3.29
Free-Standing/Other Government	−0.58	−0.52	2.88	3.63
Facility-Based Vol/NP	−0.44	−0.52	2.91	3.68
Facility-Based Proprietary	−0.62	−1.30	2.16	2.93
Facility-Based Government	−0.42	−0.47	2.97	3.74
Type of Facility (Urban * Only):				
Free-Standing/Other Vol/NP	0.06	−0.93	2.41	3.16
Free-Standing/Other Proprietary	−0.03	−8.11	−4.89	−4.17
Free-Standing/Other Government	−0.04	−2.58	0.76	1.51
Facility-Based Vol/NP	−0.04	−0.14	3.27	4.03
Facility-Based Proprietary	0.03	−0.10	3.35	4.13
Facility-Based Government	−0.03	−0.71	2.75	3.52
Type of Facility (Urban* or Rural*):				
Rural	−0.31	−0.79	2.67	3.45
Urban	−0.02	−5.64	−2.37	−1.64
Total	−0.06	−4.90	−1.60	−0.86
Facility Location: Region*:				
North	0.05	−0.30	3.04	3.79
South	−0.05	−7.95	−4.73	−4.01
Midwest	−0.23	−0.57	2.89	3.67
West	−0.08	−5.55	−2.26	−1.52
Outlying	0.37	0.21	3.68	4.46
Total	−0.06	−4.90	−1.60	−0.86
Facility Location: Area of the Country:				
New England	0.53	0.75	4.13	4.88
Mid Atlantic	−0.21	−0.87	2.44	3.19
South Atlantic	0.27	−15.29	−12.34	−11.68
East South Central	−0.23	−0.57	2.94	3.72
West South Central	−0.29	−3.71	−0.34	0.41
East North Central	−0.27	−0.62	2.85	3.62
West North Central	−0.07	−0.37	3.08	3.85
Mountain	0.33	−2.05	1.33	2.09
Pacific	−0.23	−6.88	−3.63	−2.90
Outlying	0.37	0.21	3.68	4.46
Total	−0.06	−4.90	−1.60	−0.86
Facility Size: (Number of First Episodes):				
< 19	0.12	−19.43	−16.57	−15.93
20 to 49	0.03	−15.28	−12.29	−11.62
50 to 99	−0.04	−12.79	−9.72	−9.04
100 to 199	−0.13	−5.79	−2.51	−1.77
200 or More	−0.07	−1.70	1.69	2.44
Total	−0.06	−4.90	−1.60	−0.86

Note: Based on a 20% sample of CY 2007 claims linked to OASIS assessments.

*Urban/rural status, for the purposes of these simulations, is based on the wage index on which episode payment is based. The wage index is based on the site of service of the beneficiary.

REGION KEY:
New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; **Middle Atlantic** = Pennsylvania, New Jersey, New York; **South Atlantic** = Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; **East North Central** = Illinois, Indiana, Michigan, Ohio, Wisconsin; **East South Central** = Alabama, Kentucky, Mississippi, Tennessee; **West North Central** = Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; **West South Central** = Arkansas, Louisiana, Oklahoma, Texas; **Mountain** = Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; **Pacific** = Alaska, California, Hawaii, Oregon, Washington; **Outlying** = Guam, Puerto Rico, Virgin Islands

[1] **Percent change due to the effects of the update wage index, the 2.2% home health market basket update, the 2.75% reduction to the national standardized episode rates, the national per-visit rates, the LUPA add-on payment amount, and the NRS conversion factor for nominal increase in case-mix, the 2.5% increase in the rates due to the new approximate 2.5% target for outliers as a percentage of total HH PPS payments, a 0.67 FDL ratio, and a 10% outlier cap**

Given the overall large negative impact observed by smaller agencies, we performed more detailed analysis targeted at identifying where the large negative impacts were occurring. Table 9 below presents the results of the regional analysis for small agencies. Column 1, of Table 9, shows the regional and agency size classifications similar to those in Table 8. In column 2 we repeat the overall impacts (from Table 8) for those classifications. In columns 3 through 7, we drill down in our analysis, looking at those classifications by the size of the agency (as defined by the number of first episodes). It is clear from this analysis that, for smaller agencies, the vast majority of the negative impact is occurring in areas of the country (such as the South and South Atlantic) where there exist high and suspect outlier payments. Specifically, in columns 3, 4, and 5 of Table 9, for the South Atlantic area of the country (which includes Miami-Dade, Florida), the negative percentage impacts in payment ranging from around 40 percent to just over 53 percent are evidence that it is the high and suspect outlier payments in areas such as this, that are skewing the results of the overall impact analysis. Estimated impacts for small agencies in the South (negative impacts ranging around 15 percent to 22 percent) and the Pacific (negative impacts ranging from around 11 percent to 17%) areas of the country, reflect similar results. Conversely, small HHAs in most other parts of the country are estimated to see increases in payments in CY 2010, ranging from 0.20 percent to almost 4.5 percent. Consequently, we believe that small HHAs without high and suspect outlier payments, on average, will see a positive impact on their payments in CY 2010. We do not believe there would be any significant impact on beneficiaries, as a result of the provisions of this rule. Areas where negative impacts have been estimated for HHAs, are primarily urban, and thus we believe that beneficiaries have a reasonable pool of HHAs from which to receive home health services.

TABLE 9—SMALL AGENCY IMPACTS

Group	Comparison of 2009–2010 Changes					
	Overall (percent)	< 20 episodes (percent)	20–49 episodes (percent)	50–99 episodes (percent)	100–199 episodes (percent)	200 or more episodes (percent)
Facility Location: Region of the Country						
North	3.79	0.20	3.05	3.06	3.70	3.83
South	−4.01	−21.93	−17.44	−14.71	−3.67	1.29
Midwest	3.67	2.63	3.45	3.52	3.79	3.75
West	−1.52	−5.67	−10.21	−9.16	−3.78	1.98
Outlying	4.46	4.48	4.41	4.86	4.40	4.44
TOTAL	−0.86	−15.93	−11.62	−9.04	−1.77	2.44
Facility Location: Region of the Country (Census Region)						
New England	4.88	−3.21	3.53	4.79	4.05	5.04
Mid Atlantic	3.19	3.94	2.59	1.42	3.30	3.21
South Atlantic	−11.68	−53.28	−45.86	−40.50	−16.47	−0.59
East South Central	3.72	4.11	2.30	3.90	3.24	3.79
West South Central	0.41	−5.64	−2.55	−1.26	1.67	2.27
East North Central	3.62	2.45	3.21	3.61	3.88	3.69
West North Central	3.85	4.05	4.69	3.17	3.46	3.99
Mountain	2.09	1.59	−1.38	1.52	1.80	2.99
Pacific	−2.90	−11.37	−16.68	−13.11	−6.55	1.65
Outlying	4.46	4.48	4.41	4.86	4.40	4.44
TOTAL	−0.86	−15.93	−11.62	−9.04	−1.77	2.44
Facility Size (Number of First Episodes)						
< 19 episodes	−15.93	−15.93	.....	.....	.....	.....
20 to 49	−11.62	.....	−11.62	.....	.....	.....
50 to 99	−9.04	.....	.....	−9.04	.....	.....
100 to 199	−1.77	.....	.....	.....	−1.77	.....
200 or More	2.44	.....	.....	.....	.....	2.44

TABLE 9—SMALL AGENCY IMPACTS—Continued

Group	Comparison of 2009–2010 Changes					
	Overall (percent)	< 20 episodes (percent)	20–49 episodes (percent)	50–99 episodes (percent)	100–199 episodes (percent)	200 or more episodes (percent)
TOTAL	−0.86	−15.93	−11.62	−9.04	−1.77	2.44

REGION KEY:
New England = Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont;
Middle Atlantic = Pennsylvania, New Jersey, New York; **South Atlantic** = Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; **East North Central** = Illinois, Indiana, Michigan, Ohio, Wisconsin; **East South Central** = Alabama, Kentucky, Mississippi, Tennessee; **West North Central** = Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota; **West South Central** = Arkansas, Louisiana, Oklahoma, Texas; **Mountain** = Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming; **Pacific** = Alaska, California, Hawaii, Oregon, Washington; **Outlying** = Guam, Puerto Rico, Virgin Islands.

C. Accounting Statement and Table

Whenever a rule is considered a significant rule under Executive Order 12866, we are required to develop an Accounting Statement showing the classification of the expenditures associated with the provisions of this proposed rule.

Table 10, below provides our best estimate of the decrease in Medicare payments under the HH PPS as a result of the changes presented in this proposed rule based on the best available data. The expenditures are classified as a transfer to the Federal Government of $100 million dollars.

TABLE 10—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2009 HH PPS CALENDAR YEAR TO THE 2010 HH PPS CALENDAR YEAR

Category	Transfers
Annualized Monetized Transfers.	Negative transfer—Estimated decrease in expenditures: $100 million.
From Whom To Whom.	Federal Government to HH Providers.

D. Conclusion

In conclusion, we estimate that the net impact of the proposals in this rule, including a 2.75 percent reduction to the national standardized 60-day episode rates and the NRS conversion factor to account for the case-mix change adjustment, is approximately $100 million in CY 2010 savings. The $100 million impact reflects the distributional effects of an updated wage index (−$10 million) as well as the 2.2 percent home health market basket increase (an additional $390 million in CY 2010 expenditures attributable only to the CY 2010 home health market basket), and the 2.75 percent decrease (−$480 million for the third year of a 4-year phase-in) to the national standardized 60-day episode rates and the NRS conversion factor to account for the case-mix change adjustment under the HH PPS. This analysis above, together with the remainder of this preamble, provides a Regulatory Impact Analysis.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and budget.

List of Subjects

42 CFR Part 409

Health facilities, Medicare.

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 484

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 409—HOSPITAL INSURANCE BENEFITS

1. The authority citation for part 409 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

2. Section 409.42 is amended as follows:

A. Revising paragraph (c)(1).

B. Adding paragraph (c)(1)(i) and (c)(1)(ii)

The revisions and additions read as follows:

§ 409.42 Beneficiary qualifications for coverage of services.

* * * * *

(c) * * *

(1) Intermittent skilled nursing services that meet the criteria for skilled services and the need for skilled services found in § 409.32. (Also see § 409.33(a) and (b) for a description of examples of skilled nursing and rehabilitation services.) These criteria are subject to the following limitations in the home health setting:

(i) In the home health setting, management and evaluation of a patient care plan is considered a reasonable and necessary skilled service only when underlying conditions or complications are such that only a registered nurse can ensure that essential non-skilled care is achieving its purpose. To be considered a skilled service, the complexity of the necessary unskilled services that are a necessary part of the medical treatment must require the involvement of licensed nurses to promote the patient's recovery and medical safety in view of the overall condition. Where nursing visits are not needed to observe and assess the effects of the non-skilled services being provided to treat the illness or injury, skilled nursing care would not be considered reasonable and necessary, and the management and evaluation of the care plan would not be considered a skilled service. In some cases, the condition of the patient may cause a service that would originally be considered unskilled to be considered a skilled nursing service. This would occur when the patient's underlying condition or complication requires that only a registered nurse can ensure that essential non-skilled care is achieving its purpose. The registered nurse is ensuring that service is safely and effectively performed. However, a service is not considered a skilled nursing service merely because it is performed by or under the supervision of a licensed nurse. Where a service can be safely and effectively performed (or

self administered) by non-licensed staff without the direct supervision of a nurse, the service cannot be regarded as a skilled service even if a nurse actually provides the service.

(ii) In the home health setting, skilled education services are no longer needed if it becomes apparent, after a reasonable period of time, that the patient, family, or caregiver could not or would not be trained. Further teaching and training would cease to be reasonable and necessary in this case, and would cease to be considered a skilled service. Notwithstanding that the teaching or training was unsuccessful, the services for teaching and training would be considered to be reasonable and necessary prior to the point that it became apparent that the teaching or training was unsuccessful, as long as such services were appropriate to the patient's illness, functional loss, or injury.

* * * * *

3. Section 409.43 is amended by revising paragraph (e)(1)(ii) to read as follows:

§ 409.43 Plan of care requirements.

* * * * *

(e) * * *

(1) * * *

(ii) Significant change in condition; or

* * * * *

4. Section 409.44 is amended by revising the introductory paragraph of (b)(1) to read as follows:

§ 409.44 Skilled services requirements.

* * * * *

(b) * * *

(1) Skilled nursing care consists of those services that must, under State law, be performed by a registered nurse, or practical (vocational) nurse, as defined in § 484.4 of this chapter, meet the criteria for skilled nursing services specified in § 409.32, and meet the qualifications for coverage of skilled services specified in § 409.42(c). See § 409.33(a) and (b) for a description of skilled nursing services and examples of them.

* * * * *

PART 424—CONDITIONS FOR MEDICARE PAYMENT

5. The authority citation for part 424 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

6. Section 424.22 is amended as follows:

A. Revising paragraph (a)(1)(i);

B. Revising paragraph (b)(2).

§ 424.22 Requirements for home health services.

(a) * * *

(1) * * *

(i) The individual needs or needed intermittent skilled nursing care, or physical or speech therapy, or (for the period from July through November 30, 1981) occupational therapy. If a patient's underlying condition or complication requires a registered nurse to ensure that essential non-skilled care is achieving its purpose, and necessitates a registered nurse be involved in the development, management, and evaluation of a patient's care plan, the physician will include a written narrative describing the clinical justification of this need.

* * * * *

(b) * * *

(2) *Content and basis of recertification.* The recertification statement must indicate the continuing need for services and estimate how much longer the services will be required. Need for occupational therapy may be the basis for continuing services that were initiated because the individual needed skilled nursing care or physical therapy or speech therapy. If a patient's underlying condition or complication requires a registered nurse to ensure that essential non-skilled care is achieving its purpose, and necessitates a registered nurse be involved in the development, management, and evaluation of a patient's care plan, the physician will include a written narrative describing the clinical justification of this need.

* * * * *

7. Section 424.530 is amended by adding paragraph (a)(8) to read as follows:

§ 424.530 Denial of enrollment in the Medicare program.

(a) * * *

(8) A prospective HHA is determined, under 42 CFR § 489.19, to be sharing, leasing, or subleasing its practice location or base of operations identified in Section 4 of its Medicare provider enrollment application with or to another Medicare-enrolled HHA or supplier.

* * * * *

8. Section 424.535 is amended by adding paragraph (a)(11) to read as follows:

§ 424.535 Revocation of enrollment and billing privileges in the Medicare program.

(a) * * *

(11) An HHA is determined, under 42 CFR § 489.19, to be sharing, leasing, or subleasing its practice location or base of operations identified in Section 4 of its Medicare provider enrollment application with or to another Medicare-enrolled HHA or supplier.

* * * * *

9. Section 424.540 is amended by revising paragraph (b)(3) to read as follows:

§ 424.540 Deactivation of Medicare billing privileges.

* * * * *

(b) * * *

(3) With the exception of home health agencies, reactivation of Medicare billing privileges does not require a new certification of the provider or supplier by the State survey agency or the establishment of a new provider agreement.

(i) An HHA whose Medicare billing privileges are deactivated under the provisions found at 42 CFR 424.540(a) must obtain an initial State survey or accreditation by an approved accreditation organization before its Medicare billing privileges can be reactivated.

(ii) [Reserved]

* * * * *

10. Section 424.550 is amended by adding paragraphs (b)(1) and (2) to read as follows:

§ 424.550 Prohibitions on the sale or transfer of billing privileges.

* * * * *

(b) * * *

(1) If an owner of a home health agency sells (including asset sales or stock transfers), transfers or relinquishes ownership of the HHA within 36 months after the effective date of the HHA's enrollment in Medicare, the provider agreement and Medicare billing privileges do not convey to the new owner. The prospective provider/owner of the HHA must instead:

(i) Enroll in the Medicare program as a new HHA under the provisions of § 424.510, and

(ii) Obtain a State survey or an accreditation from an approved accreditation organization.

(2) [Reserved]

* * * * *

PART 484—HOME HEALTH SERVICES

11. The authority citation for part 484 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C.1302 and 1395(hh)).

Subpart C—Furnishing of Services

12. Section 484.55 is amended by revising paragraph (d)(1)(ii) to read as follows:

§ 484.55 Condition of participation: Comprehensive assessment of patients.

* * * * *

(d) * * *

(1) * * *

(ii) Significant change in condition; or

* * * * *

Subpart E—Prospective Payment System for Home Health Agencies

13. Section 484.210 is amended by revising paragraph (e) to read as follows:

§ 484.210 Data used for the calculation of the national prospective 60-day episode payment.

* * * * *

(e) OASIS assessment data and other data that account for the relative resource utilization for different HHA Medicare patient case-mix. An HHA must submit to CMS the OASIS data described at § 484.55(b)(1) and (d)(1) in order for CMS to administer the payment rate methodologies described in §§ 484.215, 484.230 and 484.235.

14. Revising § 484.250 to read as follows:

§ 484.250 Patient assessment data.

An HHA must submit to CMS the OASIS data described at § 484.55(b)(1) and (d)(1) in order for CMS to administer the payment rate methodologies described in §§ 484.215, 484.230, and 484.235.

PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL

15. The authority citation for part 489 continues to read as follows:

Authority: Secs. 1102, 1819, 1820(e), 1861, 1864(m), 1866, 1869, and 1871 of the Social Security Act (42 U.S.C. 1302, 1395i–3, 1395x, 1395aa(m), 1395cc, 1395ff, and 1395hh).

16. Section 489.12 is amended by adding paragraph (a)(5) to read as follows:

§ 489.12 Decision to deny an agreement.

(a) * * *

(5) A prospective HHA is determined to be sharing, leasing, or subleasing its practice location or base of operations identified in Section 4 of its Medicare provider enrollment application with or to another Medicare enrolled HHA or supplier in violation of the HHA space sharing prohibition set forth in § 489.19.

* * * * *

17. Adding a new § 489.19 to read as follows:

§ 489.19 Prohibition on space sharing.

An HHA is prohibited from engaging in the following space sharing and/or leasing arrangements:

(a) Sharing its practice location or base of operations identified in Section 4 of its Medicare provider enrollment application with another Medicare-enrolled HHA or supplier; or

(b) Leasing or subleasing its practice location or base of operations identified in Section 4 of its Medicare provider enrollment application to another Medicare-enrolled HHA or supplier.

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: May 28, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: July 17, 2009.

Kathleen Sebelius,

Secretary.

Note: The following addenda will not be published in the Code of Federal Regulations.

BILLING CODE 4120–01–P

TABLE 1 - INPATIENT REHABILITATION FACILITY WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2009 THROUGH SEPTEMBER 30, 2010

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8097
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3399
10420	Akron, OH Portage County, OH Summit County, OH	0.8917
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.8703
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8707
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9210
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8130
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9499
11020	Altoona, PA Blair County, PA	0.8521
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8927
11180	Ames, IA Story County, IA	0.9487
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.1931
11300	Anderson, IN Madison County, IN	0.8760
11340	Anderson, SC Anderson County, SC	0.9570
11460	Ann Arbor, MI Washtenaw County, MI	1.0445
11500	Anniston-Oxford, AL Calhoun County, AL	0.7927
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9440

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9754
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1973
12220	Auburn-Opelika, AL Lee County, AL	0.7544
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9142
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9591

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9615
12420	Austin-Round Rock, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9536
12540	Bakersfield, CA Kern County, CA	1.1189
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0055
12620	Bangor, ME Penobscot County, ME	1.0174
12700	Barnstable Town, MA Barnstable County, MA	1.2643
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8163
12980	Battle Creek, MI Calhoun County, MI	1.0120
13020	Bay City, MI Bay County, MI	0.9248
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8479
13380	Bellingham, WA Whatcom County, WA	1.1640
13460	Bend, OR Deschutes County, OR	1.1375
13644	Bethesda-Frederick-Gaithersburg, MD Frederick County, MD Montgomery County, MD	1.0548
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8805
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8574

CBSA Code	Urban Area (Constituent Counties)	Wage Index
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8792
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7148
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8155
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.8979
14060	Bloomington-Normal, IL McLean County, IL	0.9323
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9268
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.1897
14500	Boulder, CO Boulder County, CO	1.0302
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8388
14600	Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	0.9900
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0770
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2868
15180	Brownsville-Harlingen, TX Cameron County, TX	0.8916
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9567
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9537
15500	Burlington, NC Alamance County, NC	0.8736
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9254
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1086
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0346
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8841

CBSA Code	Urban Area (Constituent Counties)	Wage Index
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9396
16180	Carson City, NV Carson City, NV	1.0128
16220	Casper, WY Natrona County, WY	0.9579
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8919
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	0.9461
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8275
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9209
16740	Charlotte-Gastonia-Concord, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9595
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9816
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.8878
16940	Cheyenne, WY Laramie County, WY	0.9276
16974	Chicago-Naperville-Joliet, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0399
17020	Chico, CA Butte County, CA	1.0897

CBSA Code	Urban Area (Constituent Counties)	Wage Index
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9687
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.8298
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.8010
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.9241
17660	Coeur d'Alene, ID Kootenai County, ID	0.9322
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9346
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9977
17860	Columbia, MO Boone County, MO Howard County, MO	0.8540
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8933
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.8739
18020	Columbus, IN Bartholomew County, IN	0.9739
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	0.9943

CBSA Code	Urban Area (Constituent Counties)	Wage Index
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8598
18700	Corvallis, OR Benton County, OR	1.1304
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.7816
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9945
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8705
19180	Danville, IL Vermilion County, IL	0.9374
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8395
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8435
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9203
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7803
19500	Decatur, IL Macon County, IL	0.8145
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8890
19740	Denver-Aurora, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0818
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9535
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9958
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7613

CBSA Code	Urban Area (Constituent Counties)	Wage Index
20100	Dover, DE Kent County, DE	1.0325
20220	Dubuque, IA Dubuque County, IA	0.8380
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0363
20500	Durham, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9732
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9668
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1283
20940	El Centro, CA Imperial County, CA	0.8746
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8525
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9568
21300	Elmira, NY Chemung County, NY	0.8247
21340	El Paso, TX El Paso County, TX	0.8694
21500	Erie, PA Erie County, PA	0.8713
21660	Eugene-Springfield, OR Lane County, OR	1.1061
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8690
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1297
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.4061
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8166
22140	Farmington, NM San Juan County, NM	0.8051
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9340
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8970
22380	Flagstaff, AZ Coconino County, AZ	1.1743
22420	Flint, MI Genesee County, MI	1.1425
22500	Florence, SC Darlington County, SC Florence County, SC	0.8130

CBSA Code	Urban Area (Constituent Counties)	Wage Index
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.7871
22540	Fond du Lac, WI Fond du Lac County, WI	0.9293
22660	Fort Collins-Loveland, CO Larimer County, CO	0.9867
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	0.9946
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7697
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.8769
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9176
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9709
23420	Fresno, CA Fresno County, CA	1.1009
23460	Gadsden, AL Etowah County, AL	0.7983
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9312
23580	Gainesville, GA Hall County, GA	0.9109
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9250
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8473
24140	Goldsboro, NC Wayne County, NC	0.9143
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7565
24300	Grand Junction, CO Mesa County, CO	0.9812
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9184
24500	Great Falls, MT Cascade County, MT	0.8784
24540	Greeley, CO Weld County, CO	0.9684
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9709
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9011
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9448

CBSA Code	Urban Area (Constituent Counties)	Wage Index
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9961
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3249
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.9029
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.8997
25260	Hanford-Corcoran, CA Kings County, CA	1.0870
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9153
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.8894
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1069
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7337
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.8976
25980	Hinesville-Fort Stewart, GA[1] Liberty County, GA Long County, GA	0.9110
26100	Holland-Grand Haven, MI Ottawa County, MI	0.9008
26180	Honolulu, HI Honolulu County, HI	1.1811
26300	Hot Springs, AR Garland County, AR	0.9113
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7758
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9838
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9254
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9082

CBSA Code	Urban Area (Constituent Counties)	Wage Index
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9080
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9908
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9483
27060	Ithaca, NY Tompkins County, NY	0.9614
27100	Jackson, MI Jackson County, MI	0.9309
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8067
27180	Jackson, TN Chester County, TN Madison County, TN	0.8523
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.8999
27340	Jacksonville, NC Onslow County, NC	0.8177
27500	Janesville, WI Rock County, WI	0.9662
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8775
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.7971
27780	Johnstown, PA Cambria County, PA	0.7920
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7916
27900	Joplin, MO Jasper County, MO Newton County, MO	0.9406
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0801
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0485

CBSA Code	Urban Area (Constituent Counties)	Wage Index
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9610
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	0.9911
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8765
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7743
28740	Kingston, NY Ulster County, NY	0.9375
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7881
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9349
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9758
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9221
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8374
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.7556
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0389
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	0.9797
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8530
29540	Lancaster, PA Lancaster County, PA	0.9363
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	0.9931

CBSA Code	Urban Area (Constituent Counties)	Wage Index
29700	Laredo, TX Webb County, TX	0.8366
29740	Las Cruces, NM Dona Ana County, NM	0.8929
29820	Las Vegas-Paradise, NV Clark County, NV	1.1971
29940	Lawrence, KS Douglas County, KS	0.8343
30020	Lawton, OK Comanche County, OK	0.8211
30140	Lebanon, PA Lebanon County, PA	0.8954
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9465
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9200
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.9110
30620	Lima, OH Allen County, OH	0.9427
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9759
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8672
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.8765
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8370
31020	Longview, WA Cowlitz County, WA	1.1207
31084	Los Angeles-Long Beach-Santa Ana, CA Los Angeles County, CA	1.2208
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.9249
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8731

CBSA Code	Urban Area (Constituent Counties)	Wage Index
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8774
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9570
31460	Madera, CA Madera County, CA	0.7939
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.0967
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0359
31900	Mansfield, OH Richland County, OH	0.9330
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3940
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.9009
32780	Medford, OR Jackson County, OR	1.0244
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9232
32900	Merced, CA Merced County, CA	1.2243
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	0.9830
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9159
33260	Midland, TX Midland County, TX	0.9827
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0080

CBSA Code	Urban Area (Constituent Counties)	Wage Index
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1150
33540	Missoula, MT Missoula County, MT	0.8973
33660	Mobile, AL Mobile County, AL	0.7908
33700	Modesto, CA Stanislaus County, CA	1.2194
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7900
33780	Monroe, MI Monroe County, MI	0.8941
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8283
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8528
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7254
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0292
34620	Muncie, IN Delaware County, IN	0.8489
34740	Muskegon-Norton Shores, MI Muskegon County, MI	1.0055
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8652
34900	Napa, CA Napa County, CA	1.4520
34940	Naples-Marco Island, FL Collier County, FL	0.9672
34980	Nashville-Davidson--Murfreesboro--Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9504
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2453

CBSA Code	Urban Area (Constituent Counties)	Wage Index
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1731
35300	New Haven-Milford, CT New Haven County, CT	1.1742
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9103
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.2885
35660	Niles-Benton Harbor, MI Berrien County, MI	0.9066
35980	Norwich-New London, CT New London County, CT	1.1398
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6092
36100	Ocala, FL Marion County, FL	0.8512
36140	Ocean City, NJ Cape May County, NJ	1.1496
36220	Odessa, TX Ector County, TX	0.9475
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9153
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8724
36500	Olympia, WA Thurston County, WA	1.1537
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9441

CBSA Code	Urban Area (Constituent Counties)	Wage Index
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9111
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9474
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8685
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.1951
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9332
37380	Palm Coast, FL Flagler County, FL	0.8963
37460	Panama City-Lynn Haven, FL Bay County, FL	0.8360
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7867
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8102
37764	Peabody, MA Essex County, MA	1.0747
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8242
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9038
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.0979
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0379
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.7926
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8678
38340	Pittsfield, MA Berkshire County, MA	1.0445
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9343

CBSA Code	Urban Area (Constituent Counties)	Wage Index
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4289
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	0.9942
38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1456
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	0.9870
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.0920
39140	Prescott, AZ Yavapai County, AZ	1.0221
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0696
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9381
39380	Pueblo, CO Pueblo County, CO	0.8713
39460	Punta Gorda, FL Charlotte County, FL	0.8976
39540	Racine, WI Racine County, WI	0.9054
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9817
39660	Rapid City, SD Meade County, SD Pennington County, SD	0.9598
39740	Reading, PA Berks County, PA	0.9242
39820	Redding, CA Shasta County, CA	1.3731
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0317

CBSA Code	Urban Area (Constituent Counties)	Wage Index
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9363
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1468
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8660
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1214
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8811
40420	Rockford, IL Boone County, IL Winnebago County, IL	0.9835
40484	Rockingham County, NH Rockingham County, NH Strafford County, NH	0.9926
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9031
40660	Rome, GA Floyd County, GA	0.9134
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.3572
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.8702
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.0976
41100	St. George, UT Washington County, UT	0.9021
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0380

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9006
41420	Salem, OR Marion County, OR Polk County, OR	1.0884
41500	Salinas, CA Monterey County, CA	1.4987
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9246
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9158
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.8424
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8856
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1538
41780	Sandusky, OH Erie County, OH	0.8870
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5529
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4756
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6141

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.4393

CBSA Code	Urban Area (Constituent Counties)	Wage Index
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2441
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.1993
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.1909
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6429
42140	Santa Fe, NM Santa Fe County, NM	1.0610
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.5528
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9152
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8333
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1755
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9217
43100	Sheboygan, WI Sheboygan County, WI	0.8920
43300	Sherman-Denison, TX Grayson County, TX	0.9024
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8442

CBSA Code	Urban Area (Constituent Counties)	Wage Index
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.8915
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9354
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9761
43900	Spartanburg, SC Spartanburg County, SC	0.9025
44060	Spokane, WA Spokane County, WA	1.0559
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9102
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0405
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8424
44220	Springfield, OH Clark County, OH	0.8876
44300	State College, PA Centre County, PA	0.8937
44700	Stockton, CA San Joaquin County, CA	1.2015
44940	Sumter, SC Sumter County, SC	0.8257
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9787
45104	Tacoma, WA Pierce County, WA	1.1241
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8964
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.8852
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9085
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8144
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9407

CBSA Code	Urban Area (Constituent Counties)	Wage Index
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8756
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0604
46060	Tucson, AZ Pima County, AZ	0.9229
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8445
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8496
46340	Tyler, TX Smith County, TX	0.8804
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8404
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.8027
46700	Vallejo-Fairfield, CA Solano County, CA	1.4359
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8124
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0366
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8884
47300	Visalia-Porterville, CA Tulare County, CA	1.0144
47380	Waco, TX McLennan County, TX	0.8596
47580	Warner Robins, GA Houston County, GA	0.8989
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9904

CBSA Code	Urban Area (Constituent Counties)	Wage Index
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0827
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8490
48140	Wausau, WI Marathon County, WI	0.9615
48260	Weirton-Steubenville, WV-OH Jefferson County, OH Brooke County, WV Hancock County, WV	0.8079
48300	Wenatchee, WA Chelan County, WA Douglas County, WA	0.9544
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9757
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6955
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.9069
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.8832
48700	Williamsport, PA Lycoming County, PA	0.8096
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0696
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9089
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	0.9801
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.9016

CBSA Code	Urban Area (Constituent Counties)	Wage Index
49340	Worcester, MA Worcester County, MA	1.0836
49420	Yakima, WA Yakima County, WA	0.9948
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3432
49620	York-Hanover, PA York County, PA	0.9518
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8915
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1137
49740	Yuma, AZ Yuma County, AZ	0.9281

[1] At this time, there are no hospitals located in this urban area on which to base a wage index. We use the average wage index of all of the urban areas within the State to serve as a reasonable proxy.

Table 2 - INPATIENT REHABILITATION FACILITY WAGE INDEX FOR RURAL AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2009 THROUGH SEPTEMBER 30, 2010

State Code	Nonurban Area	Wage Index
1	Alabama	0.7587
2	Alaska	1.1898
3	Arizona	0.8453
4	Arkansas	0.7473
5	California	1.2275
6	Colorado	0.9570
7	Connecticut	1.1016
8	Delaware	0.9962
10	Florida	0.8504
11	Georgia	0.7612
12	Hawaii	1.0999
13	Idaho	0.7651
14	Illinois	0.8386
15	Indiana	0.8473
16	Iowa	0.8804
17	Kansas	0.8052
18	Kentucky	0.7803
19	Louisiana	0.7447
20	Maine	0.8644
21	Maryland	0.8883
22	Massachusetts[1]	1.1670
23	Michigan	0.8887
24	Minnesota	0.9059
25	Mississippi	0.7584
26	Missouri	0.7982
27	Montana	0.8658
28	Nebraska	0.8730
29	Nevada	0.9382

State Code	Nonurban Area	Wage Index
30	New Hampshire	1.0219
31	New Jersey[1]	-----
32	New Mexico	0.8812
33	New York	0.8145
34	North Carolina	0.8576
35	North Dakota	0.7205
36	Ohio	0.8588
37	Oklahoma	0.7732
38	Oregon	1.0218
39	Pennsylvania	0.8365
40	Puerto Rico[1]	0.4047
41	Rhode Island[1]	-----
42	South Carolina	0.8538
43	South Dakota	0.8603
44	Tennessee	0.7789
45	Texas	0.7894
46	Utah	0.8267
47	Vermont	1.0079
48	Virgin Islands	0.6971
49	Virginia	0.7861
50	Washington	1.0181
51	West Virginia	0.7503
52	Wisconsin	0.9373
53	Wyoming	0.9315
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2010. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2009.

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Federal Register

Thursday,
August 6, 2009

Part IV

Department of Education

34 CFR Parts 600 and 602

Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies; Proposed Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 600 and 602

RIN 1840–AD00

[Docket ID ED–2009–OPE–0009]

Institutional Eligibility Under the Higher Education Act of 1965, as Amended, and the Secretary's Recognition of Accrediting Agencies

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Secretary proposes to amend the regulations in 34 CFR part 600, governing institutional eligibility, and part 602, governing the Secretary's recognition of accrediting agencies. The Secretary is amending these regulations to implement changes to the Higher Education Act of 1965, as amended (HEA), resulting from enactment of the Higher Education Reconciliation Act of 2005 (HERA), Public Law 109–171, and the Higher Education Opportunity Act (HEOA), Public Law 110–315, and to clarify, improve, and update the current regulations.

DATES: We must receive your comments on or before September 8, 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 *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 Ann Clough, U.S. Department of Education, 1990 K Street, NW., room 8043, Washington, DC 20006–8542.

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 *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: Ann Clough. *Telephone:* (202) 502–7484 or via the *Internet at: ann.clough@ed.gov*

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

Individuals with disabilities may obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION:

Invitation To Comment

We invite you to submit comments regarding these proposed regulations. 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 and its overall requirement of reducing regulatory burden that might result from these proposed regulations. 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 program.

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 8043, 1990 K Street, NW., Washington, DC, between the hours of 8:30 a.m. and 4 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 the person 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 (title IV, HEA programs), to obtain public involvement in the development of the proposed regulations. After obtaining advice and recommendations from individuals and representatives of groups involved in, or affected by, the Federal recognition of accrediting agencies, the Secretary must subject the proposed regulations for the title IV, HEA programs to a negotiated rulemaking process. All proposed regulations that the Department publishes must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants in that process stating why the Secretary has decided to depart from the agreements. Further information on the negotiated rulemaking process may be found at: *www.ed.gov/policy/highered/leg/hea08/index.html.*

On September 8, 2008, the Department published a notice in the **Federal Register** (73 FR 51990) announcing our intent to establish negotiated rulemaking committees to develop proposed regulations to (1) implement the changes made to the HEA by the HEOA, and (2) possibly address the provision added to section 207(c) of the HEA by the HEOA that requires the Secretary to submit to a negotiated rulemaking process any regulations the Secretary chooses to develop under amended section 207(b)(2) of the HEA, regarding the prohibition on a teacher preparation program from which the State has withdrawn approval or terminated financial support from accepting or enrolling any student who received title IV aid.

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. The notice indicated that no requests from the public were received to negotiate the provision added to section 207(c) of the HEA. The five committees that were established were: (1) A committee on lender and general loan issues (Loans Team I); (2) a committee on school-based loan issues (Loans Team II); (3) a committee on accreditation issues; (4) a committee on discretionary grant programs; and (5) a committee on general and non-loan programmatic issues. The notice informed the public that, due to the large volume of changes made by the HEOA that needed to be implemented through negotiated rulemaking, not all provisions would be addressed during this round of committee meetings. The notice requested nominations of individuals

for membership on the committees who could represent the interests significantly affected by the proposed regulations and had demonstrated expertise or experience in the relevant subjects under negotiation. The Accreditation Committee (''the Committee'') met in three sessions to develop proposed regulations: session 1, March 4–6, 2009; session 2, April 21–23, 2009; and session 3, May 18–19, 2009. This notice of proposed rulemaking (NPRM) proposes regulations relating to accreditation that were discussed by the Committee.

The Department developed a list of proposed regulatory changes from advice and recommendations submitted by individuals and organizations in 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 the 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.
- October 15, 2008, at Cuyahoga Community College in Warrensville Heights, Ohio.

In addition, the Department accepted written comments on possible regulatory changes submitted directly to the Department by interested parties and organizations. All regional meetings and a summary of all comments received orally and in writing are posted as background material in the docket and may also be accessed at www.ed.gov/HEOA. Staff within the Department also identified issues for discussion and negotiation.

The Accreditation Committee was made up of the following members:

- Michale McComis, Accrediting Commission of Career Schools and Colleges of Technology, and Roger Williams (alternate), Accrediting Council for Continuing Education and Training.
- Ralph Wolff, Accrediting Commission for Senior Colleges and Universities, Western Association of Schools and Colleges, and Belle Wheelan (alternate), Commission on Colleges, Southern Association of Colleges and Schools.
- Sharon Tanner, The National League for Nursing Accrediting Commission, and Betty Horton (alternate), Association of Specialized and Professional Accreditors.
- Marshall Hill, Nebraska Coordinating Commission for Postsecondary Education, and Kathryn Dodge (alternate), New Hampshire Postsecondary Education Commission.
- Alan Mabe, University of North Carolina, and Mary Anne Hanner (alternate), Eastern Illinois University.
- Sonia Jacobson, Georgetown University, and Susan Hattan (alternate), National Association of Independent Colleges and Universities.
- Ronald Blumenthal, Kaplan Higher Education, and William Clohan (alternate), DeVry Inc.
- Linda Michalowski, California Community Colleges, and Jim Hermes (alternate), American Association of Community Colleges.
- Michael Offerman, Capella Education Company, and Muriel Oaks (alternate), Washington State University.
- Phyllis Worthy Dawkins, Johnson C. Smith University, and José Jaime Rivera (alternate), University of the Sacred Heart.
- Kendal Nystedt, University of Arizona, and Jacob Littler (alternate), Mesabi Range College.
- Terry Hartle, American Council on Education, and Becky Timmons (alternate), American Council on Education.
- Kay Gilcher, U.S. Department of Education.

The Committee's protocols provided that the Committee would operate by consensus, meaning there must be no dissent by any member in order for the Committee to be considered to have reached agreement. Under the protocols, if the Committee reaches final consensus on all issues, the Department will use the consensus-based language in the proposed regulations and members of the Committee and the organizations whom they represent will refrain from commenting negatively on the package, except where permitted by the agreed-upon protocols.

During its meetings, the Committee reviewed and discussed drafts of proposed regulations. At the final meeting in May 2009, the Committee reached consensus on all of the proposed regulations in this NPRM. More information on the work of this committee may be found at: *www.ed.gov/policy/highered/reg/hearulemaking/2009/accreditation.html.*

Summary of Proposed Changes

This NPRM reflects the Department's proposals to revise current regulations and adopt new regulations governing the recognition of accrediting agencies as a result of the following changes made to the HEA by the HERA and the HEOA:

- The addition of a definition of ''distance education'' and separate references to distance education and correspondence education. (*See* section 103 of the HEA).
- The addition of an eligible program under title IV of the HEA—an instructional program that uses direct assessment of a student's learning in lieu of credit or clock hours. (*See* section 418(b)(4) of the HEA).
- The addition of a definition of a ''teach-out plan'' and a new provision that agencies must require the institutions they accredit to submit a teach-out plan to the agency under certain circumstances. (*See* sections 487(f)(2) and 496(c)(3) of the HEA).
- The addition of several new provisions pertaining to distance education and correspondence education. (*See* sections 496(a)(4)(B) and 496(q) of the HEA).
- Expanded due process requirements for agencies. (*See* section 496(a)(6) of the HEA).
- The addition of a requirement that accrediting agencies confirm that institutions have transfer of credit policies. (*See* section 496(c)(9) of the HEA).
- The addition of a requirement that accreditation team members be well-trained and knowledgeable about their responsibilities regarding distance education. (*See* section 496(c)(1) of the HEA).
- The addition of requirements that agencies monitor enrollment growth at institutions. (*See* sections 496(c)(2) and 496(q) of the HEA).
- Changes to agency disclosure requirements. (*See* section 496(c)(7) of the HEA).

The NPRM also reflects changes to existing regulations governing institutional eligibility by revising the definition of ''correspondence course'' to be compatible with the new definition of ''correspondence education'' in the accrediting agency recognition regulations.

Further, the NPRM reflects changes to existing regulations governing the process for recognizing accrediting agencies, including the following:

- The addition of a definition of ''recognition''.
- Modifications to record-keeping and confidentiality requirements.
- Combining current subparts C and D into one subpart in order to streamline procedures for agency review; establishing the senior Department official as the deciding official, with appeal to the Secretary;

and providing a list of the various laws regarding public requests for information with which the Secretary must comply.

• Additions and modifications to existing requirements related to substantive change.

Significant Proposed Regulations

We group major issues according to subject, with appropriate sections of the proposed regulations referenced in parentheses.

Definitions

Correspondence Course (§ 600.2)

Statute: There is no definition of ''correspondence course'' in the HEA. Institutional eligibility requirements in section 102(a)(3) of the HEA generally provide that institutions offering more than 50 percent of their courses by correspondence, or enrolling 50 percent or more of their students in correspondence courses, are ineligible for title IV, HEA program assistance.

Current Regulations: Current § 600.2 contains a definition of ''correspondence course''. The definition describes how a correspondence course is delivered to students who are not physically attending classes at the institution. It does not address the nature of the pedagogy.

Proposed Regulations: The proposed regulations would amend the definition of ''correspondence course'' in § 600.2 to draw a clearer contrast with distance education, defined in section 103 of the HEA. The proposed definition addresses pedagogy by noting that the interaction between the instructor and the student in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student. The proposed definition also notes that a correspondence course is typically designed so that a student proceeds through the course at the student's own pace.

Reasons: Because of the different statutory treatment of distance education and correspondence courses, it is critical to differentiate between the two delivery modes. A definition of correspondence course that focuses exclusively on the exchange of materials between the institution and a student does not draw a useful distinction because both distance education and correspondence courses are delivered to students who are separated from the instructor. Given that the primary distinguishing factor between the two is the nature of the interaction between the instructor and the student, the definition must include information about this characteristic of the pedagogy, or instructional model.

Distance Education (§§ 600.2; 602.3)

Statute: Section 103 of the HEA defines ''distance education'' as education that uses one or more technologies to deliver education to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The definition contains a list of technologies.

Current Regulations: Current regulations in § 600.2 do not include a definition of ''distance education''. However, current regulations in § 600.2 include a definition of ''telecommunications course'', which was previously used in the HEA and corresponding regulations. This definition of ''telecommunications course'' is essentially the same as the new definition of ''distance education'' in the HEA, as amended by the HEOA.

Current regulations in § 602.3 include a definition of ''distance education'' that encompasses correspondence study.

Proposed Regulations: The proposed regulations would add the statutory definition of ''distance education'' in both §§ 600.2 and 602.3. The definition would state that ''distance education'' means education that uses one or more technologies to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include the internet; one-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices; audio conferencing; or video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the other technologies listed.

Reasons: The proposed regulations reflect changes made by the HEOA.

Compliance Report (§ 602.3)

Statute: There is no definition of ''compliance report'' in the HEA. Under section 496(l) of the HEA, to continue to be recognized by the Secretary, an agency that has been determined by the Secretary to be out of compliance with any of the criteria for recognition, or to have failed to apply those criteria effectively, may be given no more than 12 months to come into compliance, except upon grant of an extension for good cause shown.

Current Regulations: ''Compliance report'' is not used in the current regulations in part 602 governing the Secretary's recognition of accrediting agencies.

Proposed Regulations: The proposed regulations would add a definition of ''compliance report'' in § 602.3. A ''compliance report'' would be defined as a written report that the Department requires an agency to file to demonstrate that the agency has addressed deficiencies specified in a decision letter from the senior Department official or the Secretary.

Reasons: The proposed regulations would combine former subparts C and D, which detail the Secretary's process for recognizing accrediting agencies, and the process whereby an accrediting agency's recognition could be limited, suspended, or terminated, into a single subpart C. The proposed regulations in subpart C would allow agencies to be out of compliance for no more than 12 months, after which time a decision on recognition would be made on the basis of a compliance report. The proposed definition of ''compliance report'' in § 602.3 describes this key component of the recognition process.

Correspondence Education (§ 602.3)

Statute: There is no definition of ''correspondence education'' in the HEA. Section 496(a)(4)(B) and (q) of the HEA includes references to correspondence education alongside references to distance education. Section 496(a)(4)(B) provides that if an agency has, or seeks to include, within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, it must meet various requirements, which are specified in that section. It further provides that a recognized agency may add distance education or correspondence education to its scope of recognition by providing written notice to the Secretary. Section 496(q) of the HEA provides that the Secretary must require a review at the next available National Advisory Committee on Institutional Quality and Integrity (''NACIQI'' or ''Advisory Committee'') meeting of a change in scope of an accrediting agency that expanded its scope of recognition to include distance education or correspondence education by written notice to the Secretary, if the enrollment of an institution accredited by that agency that offers distance education or correspondence education increases by 50 percent or more within any one institutional fiscal year.

Current Regulations: Current regulations in § 602.3 include a

definition of ''distance education'' that encompasses correspondence study as well as education delivered to students using one or more technologies specified in the definition.

Proposed Regulations: The proposed regulations would add a definition of ''correspondence education'' in § 602.3. The proposed definition would clearly distinguish between correspondence education and distance education, particularly with respect to the nature of the interaction between the instructor and the students. ''Correspondence education'' would be defined as education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. The proposed definition would specify that interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student and that correspondence courses are typically self-paced. The proposed definition would also specify that correspondence education is not distance education.

Reasons: Section 496 of the HEA refers several times to ''distance education or correspondence education''. For example, the HEA requires that an agency's standards ''effectively address the quality of an institution's distance education or correspondence education'' and that an agency require ''an institution that offers distance education or correspondence education to have processes through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the program and receives the academic credit.'' The separate references to these two types of education indicate that they are distinct from one another for HEA purposes.

The Department originally proposed a definition of ''correspondence education'', adapted from the definition of ''correspondence course'' in current § 600.2, that included ''home study'' and described how information is sent back and forth between the institution and the student. The non-Federal negotiators commented that the term ''home study'' is no longer in general use. In addition, they stated that the significant difference between distance education and correspondence education is that correspondence education generally is designed to be self-paced, with minimal interaction between the student and the instructor. The Department amended the proposed definition to remove the term ''home study'' and to include the concepts relating to pedagogy or instructional model.

Designated Federal Official (§ 602.3)

Statute: The HEA does not include a definition of ''Designated Federal Official''. Section 10(e) and (f) of the Federal Advisory Committee Act (FACA), 5 U.S.C. Appdx. 1, refers to a ''designated officer or employee of the Federal Government'' who has responsibilities under FACA related to advisory committee meetings.

Current Regulations: Current regulations do not include a definition of ''Designated Federal Official''.

Proposed Regulations: The proposed regulations in § 602.3 would define ''Designated Federal Official'' as the Federal officer designated under section 10(f) of FACA, 5 U.S.C. Appdx. 1.

Reasons: Section 114(d)(2)(A) of the HEA authorizes the Chairperson of the NACIQI to establish the agenda for Advisory Committee meetings. Prior to passage of the HEOA, the Chairperson of NACIQI did not have this role. FACA requires that a designated officer or employee of the Federal Government approve the agenda for an advisory committee meeting. The proposed definition of ''Designated Federal Official'', which specifies the role of the Federal officer under FACA, is needed to clarify that, although the HEA now authorizes the Chairperson of the Advisory Committee to establish the agenda, it must still be approved by the Federal official designated under FACA.

Direct Assessment Program (§ 602.3)

Statute: Section 481(b)(4) of the HEA stipulates that for purposes of title IV, HEA programs, ''eligible program'' includes an instructional program that uses direct assessment of student learning, or recognizes the direct assessment of student learning by others, in lieu of credit hours or clock hours as a measure of student learning. The assessment must be consistent with the institution's or program's accreditation. The HEA also provides that the Secretary will determine initially whether each program for which an institution proposes to use direct assessment is an eligible program.

Current Regulations: There are no current regulations in part 602 that reflect direct assessment programs. Regulations for Federal Student Aid Programs in 34 CFR 668.10 list the information an institution must provide to the Secretary in order to have a direct assessment program approved as an eligible program for title IV, HEA purposes. 34 CFR 668.10 includes a requirement that an accrediting agency review and approve the program for inclusion in the institution's grant of accreditation, and that the agency evaluate the institution's claim of the direct assessment program's equivalence in terms of credit or clock hours.

Proposed Regulations: The proposed regulations would add a definition of ''direct assessment program'' in § 602.3 that incorporates the language of the HEA and includes the accrediting agency role in approving a direct assessment program for title IV, HEA purposes, consistent with the requirements in 34 CFR 668.10. A ''direct assessment program'' would be defined as an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, and meets the conditions of 34 CFR 668.10. For title IV, HEA purposes, the institution must obtain approval for the direct assessment program from the Secretary under 34 CFR 668.10(g) or (h), as applicable. As part of that approval, the accrediting agency must evaluate the programs and include them in the institution's grant of accreditation or preaccreditation; and review and approve the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

Reasons: The proposed definition of ''direct assessment program'' would restate definitional language from the HEA, refer to the section of the Student Assistance General Provisions regulations that relate to direct assessment programs, and indicate the accrediting agency role in approving a direct assessment program. Some of the non-Federal negotiators indicated their unfamiliarity with direct assessment programs and asked for clarification of the term and of the phrase ''or recognizes the direct assessment of student learning by others.'' In particular, they asked whether prior learning assessment, where students demonstrate that they possess college-level knowledge of a subject that has been acquired outside of a traditional classroom setting, such as at work, through volunteer service, or through other experiences, would be covered by the proposed definition. In response, the Department explained that, because prior learning assessment is a process that results in a student being granted a certain number of academic credits (or credit hours), prior learning does not meet the definition of a direct assessment program.

A direct assessment program is one where the institution identifies a set of competencies that a student must demonstrate through successful performance on assessments in order to be awarded an academic credential. The skills and knowledge that a student has acquired outside of the institution may help the student to complete the assessments associated with one or more of the competencies more quickly than another student, and to accelerate completion of a full program. A student who is enrolled in a direct assessment program is not required to earn a certain number of credits, or to remain in the program for a specific length of time. The institution may develop the assessments, or it may rely upon assessments developed by others, to measure the student's learning.

The Department notes that ''direct assessment program'' has no fixed meaning outside the context of the title IV, HEA Federal student aid programs. The process that an institution has to go through to gain approval from the Secretary for a direct assessment program to be eligible for title IV, HEA program purposes under 34 CFR 668.10, which includes reviews and actions on the part of accrediting agencies, is sufficient to satisfy program eligibility requirements of the HEA.

Recognition (§ 602.3)

Statute: The HEA does not include a definition of ''recognition''.

Current Regulations: There is no definition of ''recognition'' in the current regulations.

Proposed Regulations: The proposed regulations would add a definition of ''recognition'' in § 602.3. Under the proposed definition, ''recognition'' would mean an unappealed determination by the senior Department official, or a determination by the Secretary on appeal, that an accrediting agency complies with the criteria for recognition and that the agency is effective in its application of those criteria. As a result of that determination of compliance, an accrediting agency that has been given a grant of recognition by the Secretary is regarded as a reliable authority regarding the quality of education or training offered by the institutions or programs it accredits. The proposed definition would specify that the grant remains in effect for the term specified except upon a determination made in accordance with subpart C, as revised in these proposed regulations, that the agency no longer complies with the criteria for recognition or that it is no longer effective in its application of those criteria.

Reasons: The proposed definition would clarify that, through proceedings conducted under subpart C of part 602, the Department may withdraw recognition before the period of recognition granted expires. The definition would also reflect that, although an agency that is recognized is deemed a reliable authority regarding the quality of education or training offered by the institutions or programs it accredits, recognition is based on a determination that the agency is in compliance with the statutory and regulatory criteria for recognition and is effective in its application of those criteria.

Scope of Recognition (§ 602.3)

Statute: The HEA does not include a definition of ''scope of recognition''. Section 496(a)(4)(B) of the HEA requires an accrediting agency that has or wants to include distance education or correspondence education in its scope of recognition to demonstrate that its standards effectively address the quality of an institution's distance education or correspondence education.

Current Regulations: Current regulations in § 602.3 define ''scope of recognition'' and identify five areas for which recognition may be granted.

Proposed Regulations: The proposed regulations would amend the definition of ''scope of recognition'' in § 602.3 by adding the phrase ''or correspondence education'' to paragraph (5), which addresses activities related to distance education.

Reasons: The proposed regulations reflect changes made by the HEOA.

Teach-Out Agreement (§ 602.3)

Statute: Section 496(c)(6) of the HEA requires that teach-out agreements between institutions be approved by the accrediting agency in accordance with its standards. The HEA does not provide a definition of ''teach-out agreement''.

Current Regulations: Current regulations in § 602.3 provide a definition of ''teach-out agreement'', which is a written agreement between institutions that provides for the equitable treatment of students. It applies in situations where an institution stops offering an educational program before all students enrolled in that program have completed their program of study. Under § 602.24(c) of the current regulations, if an agency is an institutional accrediting agency, and its accreditation or preaccreditation enables institutions to obtain eligibility to participate in title IV, HEA programs, the agency must require an institution that enters into a teach-out agreement with another institution to submit that teach-out agreement to the agency for approval.

Proposed Regulations: The proposed regulations would amend the definition of ''teach-out agreement'' by limiting its scope to situations where an institution, or a location of an institution that provides one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study. In addition, the definition would require that the agreement provide a reasonable opportunity for affected students to complete their program of study. The proposed changes to current regulations in § 602.24(c) are discussed under ''Teach-out Plans and Agreements.''

Reasons: The Department initially proposed amending the definition of ''teach-out agreement'' to make it clear that the agreement should provide for a reasonable opportunity for students to complete their program of study if an institution or an institutional location that provides one hundred percent of at least one program, stops offering one or more of its programs before all students have completed their program of study. There was consensus with adding the language about providing a reasonable opportunity for students to complete their program of study.

However, several of the non-Federal negotiators objected to the proposal that a teach-out agreement cover an institutional location that stops offering one or more of its programs. They noted that this is a common occurrence and that it is the responsibility of the institution to respond to the needs of its students when this happens. A teach-out agreement should only apply in situations where the institution or location providing one hundred percent of at least one program ceases to operate. The Department concurred.

Teach-Out Plan (§ 602.3)

Statute: Section 496(c)(3) of the HEA requires an institution to submit for approval to the accrediting agency a teach-out plan under specified conditions. Section 487(f)(2) of the HEA defines a ''teach-out plan'' as a written plan developed by an institution that provides for the equitable treatment of students if an institution ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

Current Regulations: Current regulations do not include a definition of ''teach-out plan''.

Proposed Regulations: The proposed regulations would add a definition of ''teach-out plan'' in § 602.3. The

proposed regulations would define a ''teach-out plan'' as a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

Reasons: The Department proposes a definition that incorporates the statutory definition and clarifies that the requirement for an institution to have a teach-out plan applies when an institutional location that provides one hundred percent of at least one program ceases to operate before all students have completed their program of study. This is consistent with the treatment of locations under the closed school discharge provisions in 34 CFR 682.402(d)(1)(ii)(C) and 685.214(a)(2)(ii). Under these provisions, a student's loan may be discharged if the student is not able to complete the program of study for which the loan was provided because the institution, or any location or branch the student attended, closed. The proposed language was acceptable to the non-Federal negotiators.

Other Major Issues

Accreditation Team Members (§ 602.15)

Statute: Section 496(c)(1) of the HEA stipulates that in order to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, the agency must perform, at regularly established intervals, on-site inspections and reviews of institutions of higher education (which may include unannounced site visits) with particular focus on educational quality and program effectiveness, and ensure that accreditation team members are well-trained and knowledgeable with respect to their responsibilities. The HEOA added a reference to distance education to the HEA's requirement that team members be well-trained and knowledgeable with respect to their responsibilities.

Current Regulations: Current regulations in § 602.15(a)(2) require individuals serving on agency review teams and decision-making bodies and establishing agency policies to be competent and knowledgeable, qualified by education and experience in their own right, and trained by the agency on its standards, policies, and procedures.

Proposed Regulations: Proposed § 602.15(a)(2) would clarify that an individual's qualifications and the agency's training of that individual on his or her responsibilities regarding the agency's standards, policies, and procedures, to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and preaccrediting decisions, should be appropriate for that individual's role. In addition, the proposed regulations would specify that if an agency's scope of recognition includes the evaluation of distance education and correspondence education, then the individuals must be trained in their responsibilities regarding distance education and correspondence education.

Reasons: The Department noted that the statutory language included the new reference to ''responsibilities regarding distance education'' and that in several other provisions of section 496 of the HEA, distance education is paired with correspondence education. The Department's initial proposal included a reference to ''correspondence education'' in this section but did not limit in any way the requirement that individuals be trained in their responsibilities regarding distance education and correspondence education. Some non-Federal negotiators asked that the requirement apply only to those agencies that have distance education and correspondence education in their scope of recognition. The Department agreed with this suggestion and also with the observation made during the negotiations that only those individuals who evaluate institutions that offer distance education or correspondence education would need to be qualified and trained accordingly.

A non-Federal negotiator presented a revised draft for consideration by the negotiators, which addressed this issue and further clarified the requirement. This language was acceptable to all the negotiators and is reflected in the proposed regulations.

Record Keeping and Confidentiality (§§ 602.15; 602.27)

Statute: Section 496(a) of the HEA requires the Secretary to establish recognition criteria by which the Secretary will determine, for the purposes of the HEA or other Federal purposes, if an agency or association is a reliable authority as to the quality of education or training offered by the institutions or programs it accredits. These criteria require that the agency adhere to sound administrative requirements. Section 496(a)(4) provides that the Secretary's recognition criteria must require that recognized agencies consistently apply and enforce their standards for the duration of the accreditation period. Section 496(o) requires the Secretary to promulgate regulations establishing procedures for recognition. Section 496(n) requires the Secretary to conduct a comprehensive evaluation of accrediting agencies seeking recognition, including an independent evaluation of the information provided by the agency. Section 487(a)(15) of the HEA requires, as part of the institution's Program Participation Agreement in title IV, HEA programs, that the institution acknowledge the authority of the Secretary, the institution's accrediting agency, and others to share information pertaining to the institution's eligibility to participate in title IV, HEA programs, and regarding any fraud and abuse on the part of the institution.

Current Regulations: Section 602.15(b)(1) of the current regulations requires an accrediting agency to maintain complete and accurate records of its last two full accreditation or preaccreditation reviews of each institution or program it accredits and provides a list of the various documents that must be included in those records. Section 602.27(e) of the current regulations requires agencies to disclose to the Department the name of any accredited institution or program that the agency has reason to believe is failing to meet title IV, HEA program responsibilities or is engaged in fraud or abuse, along with the agency's reasons for concern. Section 602.27(f) of the current regulations provides for the Secretary to ask the agency for information that may bear upon an institution's compliance with title IV, HEA program responsibilities and stipulates that the Secretary may ask for this information in order to assist the Department in resolving problems with the institution's participation in the title IV, HEA programs.

Proposed Regulations: The proposed regulations in § 602.15(b)(1) would require the accrediting agency to retain its records of its last full accreditation or preaccreditation review of each institution or program it accredits. Proposed § 602.15(b)(2) would require the agency to maintain records of all its decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of the institution or program, which would include the accrediting agency's decisions about substantive changes that affect the title IV, HEA program eligibility.

The Department proposes to restructure the regulations in § 602.27 to include a new paragraph (b) to address

the confidentiality of communications between the agency and the Department. Specifically, proposed § 602.27(b) would address situations in which an agency has a policy relating to notification to an accredited institution or program of communications that occur between the agency and the Department pursuant to proposed § 602.27(a)(6) and (7) (*i.e.,* current § 602.27(e) and (f)). Under the proposed regulations, these policies would need to provide for a case-by-case review by the agency of the contact with the Department and the circumstances surrounding it to assess whether that contact should remain confidential. The proposed regulation would further require that upon a specific request by the Department to keep the contact confidential, the agency must consider the contact confidential. Proposed § 602.27(a)(6) would remove the language in current § 602.27(e) acknowledging that the Secretary may ask for information to assist in resolving problems with title IV, HEA program participation.

Reasons: As reflected in section 496(m) of the HEA, the Department engages in recognition proceedings to ensure that accrediting agencies that serve as gatekeepers for Federal programs are reliable authorities as to the quality of postsecondary education provided by the institutions or programs they accredit. The Department has had some concern about accrediting agencies maintaining sufficient information relevant to an institution's accreditation, as is necessary for agencies to fulfill their gatekeeping roles. Additionally, there has been a significant increase over time in the number of substantive changes at institutions that affect an institution's title IV, HEA program eligibility.

Agencies have not always been able to provide the Department with information related to substantive changes. While needing to ensure that required documentation is retained by agencies, the Department does not want to overly burden agencies by requiring them to retain multiple cycles of information, which can be voluminous. Therefore, the proposed regulations in § 602.15(b)(1) would require that an agency retain all documentation of its last full accreditation or preaccreditation review of each institution or program. The proposed regulations in § 602.15(b)(2) would require agencies to retain all decisions made throughout an institution's affiliation with the agency and significantly related correspondence for substantive changes as well as for decisions regarding the accreditation or preaccreditation of an institution or program. Appropriate documentation must be retained with all decisions.

The non-Federal negotiators agreed with the proposed changes to § 602.15(b)(1) to reduce the number of review cycles of information to be retained. None of the negotiators objected to the proposed requirement that agencies retain information about substantive changes. Several non-Federal negotiators expressed concern about the proposed changes related to confidentiality. Issues of confidentiality regarding contact between the Department and accrediting agencies have long been a concern to the Department.

The Department respects the important role that collegiality and frank exchanges play in effective accrediting practice. However, the Department has found that agency policies providing for automatic disclosure to accredited institutions and programs of all departmental communications are at odds in some circumstances with both the gatekeeping role of recognized accreditors and the Department's fiduciary responsibilities to ensure that Federal programs are run efficiently and effectively and are protected against fraud and abuse. In trying to reach the proper balance, the Department has proposed changes to § 602.27(b), including a requirement for agencies with policies regarding notification to an institution or program of contact with the Department to review each contact on a case-by-case basis to properly assess whether confidentiality should be maintained. In addition, if the Department specifically requests that a contact it has with an agency remain confidential, then the agency is required to consider that contact confidential. The Department believes these provisions strike the appropriate balance, and are necessary to ensure that the Federal fiscal interest and the interests of students and institutions are fully protected. The sentence in current § 602.27(e) referring to the Secretary's authority to request information from accrediting agencies to resolve problems with title IV, HEA program participation would be removed as extraneous.

Non-Federal negotiators expressed concern about the Department's initial proposal in this area, which would have prohibited an agency from establishing a policy of providing notification to an institution regarding contact with the Department. The Department revised its proposed approach in response, to permit agencies to have policies within the limits described above, and the non-Federal negotiators did not object to the revised language.

Student Achievement (§ 602.16)

Statute: Section 496(a)(5)(A) of the HEA provides that an accrediting agency's standard by which it assesses an institution's success with respect to student achievement in relation to the institution's mission may include different standards for different institutions or programs, as established by the institution including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates. The phrase ''which may include different standards for different institutions or programs, as established by the institution'' was added by the HEOA.

The Rule of Construction in section 496(p) of the HEA, added by the HEOA, stipulates that an accrediting agency is not restricted from setting, with the involvement of its members, and applying, accreditation standards for or to institutions or programs that seek review by the agency. In addition, the Rule of Construction stipulates that an institution is not restricted from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

Current Regulations: Current regulations in § 602.16(a)(1)(i) replicate the statutory language in section 496(a)(5)(A) of the HEA, except that they do not include the phrase that was added by the HEOA.

Proposed Regulations: The proposed regulations in § 602.16(a)(1)(i) would replicate the new statutory language in section 496(a)(5)(A) of the HEA. The proposed regulations in § 602.16(e) would replicate the Rule of Construction in section 496(p).

Reasons: While section 496(g) of the HEA, as amended by the HEOA, prohibits the Secretary from establishing any criteria that specify, define, or prescribe the standards that accrediting agencies use to assess any institution's success with respect to student achievement, the Secretary is obligated to amend the current regulations that do not reflect the new language in the HEA regarding the kind of student achievement standards recognized agencies must have.

The Department's initial proposed regulations did not include the Rule of Construction from the statute. Several non-Federal negotiators asked that the Rule of Construction be incorporated into the regulations. The Department included in the proposed regulations

the Rule of Construction from the statute. The non-Federal negotiators agreed with the Department that an accrediting agency would need to make a judgment about whether an institution developed and used reasonable standards to show its success with respect to student achievement.

Distance Education and Correspondence Education (§§ 602.16; 602.17; 602.18; 602.27)

Statute: Section 496(a)(4)(B) of the HEA, as amended by the HEOA, specifies that if an agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, the agency must, in addition to meeting the other requirements, demonstrate that its standards effectively address the quality of an institution's distance education or correspondence education with respect to the standards specified in section 496(a)(5). However, the statute provides that the agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education in order to meet the requirements of section 496(a)(4)(B). Section 496(a)(4)(B) of the HEA, as amended by the HEOA, also provides that if an accrediting agency that accredits institutions is already recognized by the Secretary, it will not be required to obtain the approval of the Secretary to expand its scope of recognition to include distance education or correspondence education, provided that the agency notifies the Secretary in writing of the change in scope.

Section 496(a)(4)(B) further specifies that an agency must require an institution that offers distance education or correspondence education to have processes through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the program and receives the academic credit.

Section 496(q) of the HEA specifies that the Secretary shall require a review, at the next available Advisory Committee meeting, of any recognized accrediting agency that has included distance education or correspondence education in its scope of recognition through written notice to the Secretary, if the enrollment of an institution the agency accredits that offers distance education or correspondence education has increased by 50 percent or more within any one institutional fiscal year.

Current Regulations: Current regulations require an agency to submit to the Secretary any proposed change in its policies, procedures, or accreditation or preaccreditation standards that might alter its scope of recognition. Current regulations do not include any requirement for verifying the identity of students enrolled in distance education or correspondence education courses and programs.

Proposed Regulations: The Department proposes to restructure § 602.16 and add a new paragraph (c). The new paragraph would provide that if an agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs that offer distance education or correspondence education, the agency's standards must effectively address the quality of its institutions' distance education or correspondence education in the specified areas. The agency would not be required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education.

Section 602.17, which requires the application of accrediting standards in reaching an accrediting agency decision, would be amended by adding a new paragraph (g) to implement the new student verification requirements. The proposed regulations would provide that agencies require institutions that offer distance education or correspondence education to have processes in place through which the institution would establish that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. The agency would meet this requirement if it requires institutions to verify the identity of a student who participates in class or coursework by using methods such as a secure login and pass code or proctored examinations, and new or other technologies and practices that are effective in verifying student identity. The agency would also be required to make clear, in writing, that institutions must use processes that protect student privacy and must notify students at the time of registration or enrollment of any projected additional student charges associated with the verification of student identity.

Section 602.18 would be amended to reflect changes made by the HEOA to section 496(a)(4) regarding an institution's application and enforcement of standards that respect its stated mission, including religious mission.

As noted in the discussion of record-keeping and confidentiality, § 602.27 would be restructured. The proposed regulations would add a new paragraph (5) to redesignated paragraph (a) that would provide for notification to the Secretary that an agency is expanding its scope of recognition to include distance education or correspondence education as provided for in section 496(a)(4)(B)(i)(I) of the HEA, as amended by the HEOA. The proposed regulations would specify that the expansion of scope would be effective on the date the Department receives the notification.

Reasons: The proposed changes to the regulations reflect changes to the HEA made by the HEOA. The proposed regulations would require an agency's standards to address distance education and correspondence education effectively if the agency evaluates institutions offering distance education or correspondence education.

Some of the non-Federal negotiators asked whether an agency whose scope of recognition already includes distance education would be required to notify the Secretary if it wanted to expand its scope to include correspondence education, now that correspondence education is specified separately in the law. The Department's position is that, as the definition of distance education in the current regulations includes correspondence study, any previous grant of a scope of recognition that included distance education automatically encompassed correspondence education, and there is no need for further action on the part of agencies currently recognized for distance education by the Department. If the proposed regulations are finalized as drafted, the Department contemplates including on its Web site listing of recognized accrediting agencies a notation that agencies having a scope of recognition that included distance education as of the August 14, 2008, enactment of the HEOA are also recognized for correspondence education pending re-evaluation of each agency as it comes before the Department for renewal of recognition. Once the regulations become effective, agencies whose scope includes distance education that come up for renewal of their recognition would be expected to demonstrate how they evaluate both distance education and correspondence education in accordance with proposed § 602.16(c). An agency that accredits institutions and does not already include distance education or correspondence education in its scope of recognition but that desires to do so would need to either submit a

notification of expansion of scope (for distance education, correspondence education, or both), or request an expansion of scope to include these in applying for renewal of recognition, and in either event, in subsequent reviews for renewal of recognition, demonstrate how it evaluates these modes of education in accordance with proposed § 602.16(c). An agency that accredits only programs could not expand its scope by notification because section 496(q) of the HEA limits this option to institutional accreditors. Because of the limitation, programmatic accreditors would be required to apply for an expansion of scope to include distance education, correspondence education, or both. The Department proposes to include programmatic accreditors that accredit stand-alone institutions in the set of agencies that may expand their scope by notification.

In addition to the changes the Department initially proposed for § 602.27(a)(5) to reflect the substance of the new statutory provision for including distance education or correspondence education in an agency's scope of recognition upon written notice by a recognized agency to the Secretary, the non-Federal negotiators requested that the Department include the applicable statutory citation in the proposed regulation. The Department agreed. The Department also included a provision specifying the effective date of such a notification so it would be clear to both agencies and the Department when the change in scope was effective.

Much of the discussion regarding distance education at the negotiated rulemaking sessions centered on the new requirement to verify student identity. Some of the non-Federal negotiators expressed concern about the cost of implementing the new provisions, saying they wanted to ensure that the requirements would be affordable. They were reluctant to include requirements that would be considered ''forward-looking'' in that they would address new or emerging technologies for verifying student identity. The Department's initial position was that the concern about forward-looking requirements could be addressed by specifying that new identification technologies and practices would have to be adopted only as they become widely accepted, reasoning that a technology or practice would not become widely accepted and used unless it was affordable. Nevertheless, several non-Federal negotiators were concerned about including the ''widely accepted'' language and proposed revising the draft regulation to require instead use of ''new or other technologies and practices that are effective in verifying student identity,'' in addition to secure logins and pass codes and proctored examinations. As one of the non-Federal negotiators explained, peer reviewers conducting on-site reviews will assess an institution's use of technology and verification practices in relation to those technologies and practices that are widely used and are affordable, and if an institution is using ineffective methods of identification verification, they will note that finding. The non-Federal negotiators also wanted to make it explicit that the methods used to verify the identity of students would be determined by the institution. As the draft language provided that the methods chosen must be effective in verifying student identification, the Department accepted the changes proposed by the non-Federal negotiators.

The Department originally proposed specifying that institutions should not use or rely on technologies that interfere with student privacy. Several non-Federal negotiators recommended retaining this concept, but rephrasing the language to present the concept more positively. Non-Federal negotiators also suggested including language about processes or methods, which would be broader than referring to technologies. For these reasons, the proposed requirement related to student privacy was restated to require that institutions make clear in writing that institutions must use processes that protect student privacy. To address the concern of several non-Federal negotiators that students be made aware in advance of any additional charges associated with administering distance education or correspondence education examinations, the proposed regulations would require institutions to notify students at the time of registration or enrollment of any projected additional charges associated with verification of student identity.

Due Process (§§ 602.18; 602.23; 602.25)

Statute: The HEOA amended section 496(a)(6) of the HEA to include expanded due process requirements with which agencies must comply. The new provisions require that an agency establish and apply review procedures throughout the accrediting process, including evaluation and withdrawal proceedings, which comply with specified due process procedures. The agency must provide adequate written specification of requirements, including clear standards for an institution of higher education or program to be accredited, and clearly identify any deficiencies at the institution or program examined. In evaluation and withdrawal proceedings, the procedures must provide sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency and prior to final action.

Upon written request of an institution or program, the agency must provide an opportunity for the appeal of any adverse action, including denial, withdrawal, suspension, or termination of accreditation, taken against the institution or program, prior to such action becoming final at a hearing before an appeals panel. The appeals panel will not include current members of the agency's underlying decision-making body that made the adverse decision, and its members must be subject to a conflict of interest policy. The agency's due process procedures must provide for the right of an institution or program to representation and participation by counsel during an appeal of an adverse action.

The due process procedures must also provide for a process, in accordance with written procedures developed by the agency, through which an institution or program, before a final adverse action based solely upon a failure to meet a standard or criterion pertaining to finances, may on one occasion seek review of significant financial information that was unavailable to the institution or program prior to the determination of the adverse action, and that bears materially on the financial deficiencies identified by the agency. If the agency determines that the new financial information submitted by the institution or program meets the criteria of significance and materiality, the agency must consider the new financial information prior to the adverse action becoming final. Any determination by the agency with respect to the new financial information is not separately appealable by the institution or program.

Current Regulations: Current due process regulations in § 602.25 require that an agency have procedures that afford an institution or program a reasonable period of time to comply with an agency's requests for information and documents. An agency must notify an institution or program in writing of any adverse action or action to place the institution or program on probation or show cause and the basis for the action. Institutions or programs must be permitted to appeal an adverse action, and they have the right to be

represented by counsel during the appeal. The agency must notify the institution or program in writing of the result of its appeal and the basis for the decision.

Proposed Regulations: The proposed regulations would amend the due process provisions in § 602.25, and two other sections, §§ 602.18 and 602.23, that bear on due process requirements.

Section 602.18, ''Ensuring consistency in decision-making,'' would be amended to include a new paragraph (a) that would require an agency to have written specification of the requirements for accreditation and preaccreditation that includes clear standards for an institution or program to be accredited. The proposed regulations in § 602.18 would also include a new paragraph (e) that would require an agency to provide an institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with agency standards.

Section 602.23, ''Operating procedures all agencies must have,'' would be amended by removing the phrase ''upon request'' from the requirement in paragraph (a) that an agency must maintain and make available to the public certain written materials. The current regulations would also be changed by adding at the end of current paragraph (c)(1), which concerns the review of complaints, a stipulation that an agency may not complete its review and make a decision regarding a complaint against an institution unless, in accordance with published procedures, it ensures that the institution or program has sufficient opportunity to provide a response to the complaint.

The proposed regulations would restructure § 602.25 of the current regulations to accommodate the appropriate placement of several new statutory requirements by redesignating several current paragraphs, removing current paragraph (c) and adding several new paragraphs. New paragraph (a) would require an agency to provide adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited. New paragraph (c) would require an agency to provide written specification of any deficiencies identified at the institution or program examined. New paragraph (d) would require an agency to provide sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency and before any adverse action is taken.

Some of the information in current paragraph (c) would be included in a new paragraph (f), including the requirement that an agency provide an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final. New paragraph (f) would also provide that the appeal must take place before an appeals panel that may not include current members of the agency's decision-making body that took the initial adverse action and is subject to a conflict of interest policy. The appeals panel would affirm, amend, or reverse the adverse action. At the option of the agency, either the appeals panel or the original decision-making body would be responsible for implementing the decision of the appeals panel.

Under the proposed regulations in paragraph (f)(2), the agency would be required to recognize the right of the institution or program to employ counsel to represent the institution or program during its appeal, and this would include making any presentation that the agency permits the institution or program to make on its own during the appeal.

The proposed regulations in paragraph (h)(1) would require an agency to provide a process, in accordance with written procedures, through which an institution or program may seek review of new financial information if all of the following conditions are met: (1) The financial information was not available to the institution or program until after the decision that is subject to appeal was made; (2) the financial information provided is significant and bears materially on the financial deficiencies identified by the agency (the criteria of significance and materiality would be determined by the agency); and (3) the only remaining deficiency cited by the agency in support of a final adverse action decision is the institution's or program's failure to meet an agency standard pertaining to finances. Under proposed paragraph (h)(2), a review of new financial information would be permitted only one time, and a determination by the agency with respect to the new information provided would not provide the basis of an appeal.

Reasons: The Department proposes changes to all of the sections of the regulations that have a bearing on due process to implement the new HEA requirements contained in the HEOA. With respect to ensuring consistency in agency decisions, the Department initially proposed requiring that agencies provide institutions or programs with a written report that assessed the institution's or program's compliance with the agency's standards, including any deficiencies identified by the agency. Some of the non-Federal negotiators suggested changing the language to require that agencies provide institutions or programs with reports that clearly identify any deficiencies in the institution's or program's compliance with agency standards. The Department agreed to adopt the alternate language proposed by the non-Federal negotiators.

The additional provisions on an agency's handling of complaints were proposed to make it clear that institutions or programs must be given sufficient opportunity to provide a response to a complaint before the agency takes any action.

There was considerable discussion during the negotiated rulemaking sessions about the proposed new language in § 602.25. Some of the non-Federal negotiators described their current appeals process, and indicated that when an appeal is received, it is reviewed by a separate appeals panel that then makes a recommendation to the board or commission, which in turn makes the decision on the appeal. It became clear during the discussion that even though the appeals panel might have members who did not serve on the original decision-making body, the appeals panel made a recommendation, rather than a decision, and the original decision-making body was under no obligation to accept the recommendation. This is problematic because, if an appeals panel conclusion is not the final decision, the effect of a successful appeal may be negated.

The Department proposed requiring that the appeals panel be a decision-making body, noting that the statute calls for an opportunity to appeal an action ''prior to such action becoming final at a hearing before an appeals panel * * *.'' The Department also noted that the reference to the original decision being made by the agency's ''underlying decisionmaking body'' made clear that the appeals panel was a decision-making body. Otherwise, there would be no need to refer to the original body as the ''underlying'' decision-making body. This proposal generated a significant amount of discussion and concern. Several non-Federal negotiators expressed concern that if the appeals panel were a separate decision-making body that made an accreditation decision, it would need to comply with all the requirements for an agency decision-making body, including

having as one of its members a member of the public, and would result in a decision being made by a smaller and less diverse body than the board or commission.

Other non-Federal negotiators stated that, in some cases, an appeals panel might need additional information and need to solicit information from the original decision-making body. In other cases, an appeals panel might determine that the original decision did not take into account all the necessary information, and therefore should be reversed or amended. In some cases, a successful appeal would identify a procedural error made in earlier proceedings, but would not involve an inquiry into substantive issues for purposes of making the accreditation decision. In a circumstance where the appeals panel determined that some citations of deficiencies were supported and others were not, there would need to be a new decision on accreditation, but the appeals panel might not be in a position to make that decision. Upon consideration of these scenarios, the Department proposed having the appeals panel affirm, amend, or reverse the adverse action, but permitting either the appeals panel or the original decision-making body to implement the decision of the appeals panel. This would provide agencies with some flexibility. However, to make it clear that the original decision-making body could not disregard a decision made by the appeals panel, the proposed regulations include a provision that if the original decision-making body is responsible for implementing the decision, it must act in a manner consistent with the appeals panel's decision. The proposed regulations would not require agencies to provide institutions or programs with a continual opportunity to appeal.

There was also discussion during negotiated rulemaking about whether the new financial information that may now be provided would have to be reviewed during an appeal, or whether it could be reviewed at an earlier time. The Department revised the proposed regulations to allow for flexibility in handling the new financial information. The new financial information could be reviewed during an appeal or at an earlier stage. In either case the agency could exercise discretion to designate in its procedures which group of people will conduct the review. Under the proposed provisions, it would be possible to stay an appeal while a separate body reviewed the financial information.

Finally, there was extensive discussion about the circumstances under which an agency should be deemed to be taking a final adverse action based solely on failure to comply with financial criteria. Some of the non-Federal negotiators expressed their belief that to trigger the new provision that allows for new financial information to be considered an institution or program must have been cited initially only on deficiencies related to financial criteria. The Department's position, reflecting the language in the statute, is that an institution or program could have been cited initially for multiple issues, but that if all of the issues involving non-financial criteria were resolved, new financial information could be brought forward for review before the adverse action became final. This position is reflected in the proposed regulations.

Monitoring and Reevaluation of Accredited Institutions and Programs (§ 602.19)

Statute: Section 496(c)(1) of the HEA requires accrediting agencies to perform on-site inspections and reviews of institutions of higher education at regularly established intervals. Section 496(c)(2) of the HEA includes a requirement that accrediting agencies monitor the growth of programs at institutions experiencing significant enrollment growth. Section 496(a)(4)(A) requires agencies to consistently apply and enforce standards that ensure that the courses or programs offered are of sufficient quality to achieve their stated objectives for the duration of the accreditation period.

Section 496(a)(4)(B)(i)(II) of the HEA permits a recognized agency to expand its scope of recognition to include distance education or correspondence education by notifying the Secretary of that change in writing. This eliminates the need for a recognized agency to obtain separate approval from the Secretary for the change. However, section 496(q) of the HEA requires review by the NACIQI of an agency that changed its scope through written notice to the Secretary if the enrollment of an institution that offers distance education or correspondence education that is accredited by that agency increases by 50 percent or more within any one institutional fiscal year.

Current Regulations: Current regulations in § 602.19 require an accrediting agency to evaluate, at regularly established intervals, the institutions or programs it has accredited or preaccredited. The agency is required to monitor institutions or programs throughout their accreditation or preaccreditation period to ensure that they remain in compliance with agency standards. Current regulations require agencies to conduct special evaluations or site visits as necessary.

Proposed Regulations: The proposed regulations would amend § 602.19(b) by requiring that an agency demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables the agency to identify problems with an institution's or program's compliance with agency standards, and that takes into account institutional program strengths and stability. Proposed § 602.19(b) would require that these approaches to monitoring include periodic reports, and collection and analysis of key data and indicators identified by the agency, including, but not limited to, fiscal information and measures of student achievement. This section of the proposed regulations would include a cross-reference to § 602.16(f) to clarify that an agency is not precluded from setting and applying its own accreditation standards; nor are institutions of higher education precluded from developing and using institutional standards to show their success with respect to student achievement.

The proposed regulations would add new paragraphs (c) through (e) to this section. Section 602.19(c) of the proposed regulations would require an agency to monitor the overall growth of the institutions or programs it accredits and to collect information on headcount enrollment at least annually. Section 602.19(d) of the proposed regulations would add a requirement for institutional accrediting agencies to monitor the growth of programs at institutions experiencing significant enrollment growth and would provide that the determination of what is significant growth would be made by the agency. Finally, the proposed regulations, in § 602.19(e), would require an agency that has notified the Secretary in writing of an expanded scope, as provided in section 496(a)(4)(B)(i)(II) of the HEA, to monitor the headcount enrollment of each institution it has accredited that offers distance education or correspondence education. If any of those institutions experiences an increase in headcount enrollment of 50 percent or more within one institutional fiscal year, the agency would be required to report that information to the Secretary within 30 days of acquiring that information.

Reasons: Many of the proposed regulations would implement changes required by the HEOA. These changes include the requirements that agencies monitor growth of programs at institutions experiencing significant

enrollment growth and monitor headcount enrollment at institutions the agency accredits that offer distance or correspondence education. Other changes to the current regulations are being proposed, as a result of discussions both during the negotiated rulemaking process and within the Department, in an effort to ensure that the regulations properly reflect statutory requirements and provide for greater consistency while accommodating differences across institutions. The Department believes the current regulatory requirement regarding an agency's monitoring to ensure compliance with all of an agency's standards is too broad in scope and too limiting in method. Therefore the proposed regulations would stipulate that an agency monitor an institution to identify specific problems with the institution's or program's compliance with accrediting agency standards and provide more flexibility for agencies as to how they manage the review.

The Department's initial proposal for this section of the regulations would have required an agency to collect and analyze key data and performance indicators, and included an illustrative list of the data an agency might collect and analyze when monitoring institutions or programs. Some non-Federal negotiators expressed concerns about the illustrative list in the proposed regulations. Some stated their belief that certain items on that list encroached on areas where the Secretary is prohibited from regulating, while others wanted the list eliminated altogether because it could be interpreted as a requirement that agencies collect all the information included on the list and, thus, could increase institutional burdens. It was also noted that programmatic accrediting agencies do not collect specific financial data, such as audits. A few non-Federal negotiators objected to the use of the term ''performance indicators'' because they stated that this could lead to a requirement that an agency establish ''bright lines'' for assessing these indicators. Still other negotiators indicated that they had no objections to including an illustrative list in the regulations.

The Department clarified that the goal was not to be prescriptive, and that the list was intended to be illustrative, as shown by the use of the words ''these may include but are not limited to.'' The Department also reminded the non-Federal negotiators that much of the proposed language was already in the standards section of the statute and current regulations. In addition, the Department noted that this section of the regulations concerns monitoring—the agency's application and enforcement of its standards, policies, and procedures—rather than the substance of agency accrediting standards, as to which the Secretary is prohibited from regulating.

Based on the discussions with negotiators and among Department staff, as well as a shared goal of all participants to ensure proper monitoring of institutions and programs, the proposed language in § 602.19(b) was modified. The modifications reflect a proposal made by the non-Federal negotiators to combine some of the paragraphs from the initial proposal and to eliminate redundancy.

The proposed language would provide accrediting agencies with flexibility regarding their monitoring of institutions and programs and at the same time ensure they will review and analyze key data and indicators, including fiscal information and measures of student achievement. The Department expects agencies to examine and take appropriate action based on the fiscal, student achievement, and other data collected through the monitoring process. The Department noted that this is an area of great importance and that the Department's responsibility to ensure effective and efficient monitoring takes place is fundamental. The Department made clear that it accepted the proposals by the non-Federal negotiators because the proposals adequately reflect these principles.

Substantive Change (§ 602.22)

Statute: Section 496(a) of the HEA requires the Secretary to establish recognition criteria to determine if an accrediting agency is a reliable authority as to the quality of education or training offered by an institution or program it accredits.

Section 496(a)(1) of the HEA requires an agency to demonstrate the ability and experience to operate as an accrediting agency. Section 496(a)(4) of the HEA requires an agency to consistently apply and enforce standards that ensure courses or programs are of sufficient quality to achieve the stated objectives for which they are offered throughout the duration of the accreditation period. Section 496(a)(5) of the HEA requires the agency to have standards that address the quality of an institution or program in a number of areas. The first area is an institution's or program's success with respect to student achievement in relation to an institution's mission, including, as appropriate, consideration of course completion, consideration of State licensing examinations, and job placement rates. In addition, standards must address an institution's or program's curricula; faculty; facilities, equipment, and supplies; fiscal and administrative capacity; recruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising; measures of program length and the objectives of the degrees or credentials offered; record of student complaints; and record of compliance with an institution's program responsibilities under title IV of the HEA. Finally, section 496(c) of the HEA requires the agency to follow various operating procedures, including, but not limited to, conducting regular on-site visits to institutions it accredits, monitoring the growth of programs at institutions with significant enrollment growth, reviewing an institution's plans for the addition of new branch campuses, and conducting visits to new branch campuses and to institutions following a change of ownership.

Current Regulations: Section 602.22 of the current regulations requires an agency to maintain an adequate substantive change policy that ensures any substantive change to the educational mission or program or programs of an institution after it has been accredited does not adversely affect the capacity of the institution to continue to meet the agency's standards. Section 602.22(a)(2) lists seven types of changes that, at the least, must be included in the agency's definition of substantive change. Section 602.22(b) of the current regulations allows the agency to establish procedures to grant prior approval of a substantive change. Section 602.22(c) provides that if the agency's accreditation of an institution enables the institution to participate in title IV, HEA programs, the agency's procedures for approval of an additional location must include certain processes.

Proposed Regulations: The proposed regulations would amend the list of events that would constitute a substantive change. Proposed § 602.22(a)(2)(iii) would include the addition of courses or programs that represent a significant departure ''from the existing offerings of educational programs,'' in place of the current language regarding a significant departure ''in content.'' Proposed § 602.22(a)(2)(iv) would be amended to clarify that the addition of programs of study at a degree or credential level different from, rather than only those above the level already included in the institution's accreditation, would be considered a substantive change. (The meaning of ''program of study'' is elaborated on further within this

preamble in the discussion of § 602.24, teach-out plans and agreements.)

The proposed regulations would add to the list of substantive changes, a provision to implement the requirement in 34 CFR 668.5(c)(3)(ii)(C) that an eligible institution's accrediting agency determine that an institution's arrangement to contract out more than 25 percent of an educational program to entities that are not eligible on their own to participate in title IV, HEA programs meets the agency's standards for the contracting out of educational services.

The proposed regulations would further modify § 602.22(a)(2) by adding a new paragraph (viii) to provide greater flexibility to accrediting agencies in granting prior approval of additional locations where at least 50 percent of an educational program is offered. The new flexibility would apply to institutions that, according to agency criteria, have demonstrated sufficient capacity to add locations, and no longer need prior agency approval for each addition. These criteria would require an institution to provide satisfactory evidence that it has: A system to ensure quality across a distributed enterprise that includes clearly identified academic control; regular evaluation of the locations; adequate faculty, facilities, resources and academic and student support systems; financial stability; and long-range planning for expansion. To qualify for these preapprovals, an institution must also have successfully completed at least one cycle of accreditation of maximum length offered by the agency and one renewal, or been accredited for at least ten years, and already have at least three additional locations that the agency has approved. The agency must require timely reporting by the institution to the agency of each additional location established under the agency's approval and the agency's preapproval may not extend longer than five years. The proposed regulations would not allow the agency to preapprove an institution's addition of locations under this process after the institution undergoes a change in ownership until and unless the institution demonstrates it meets the conditions outlined in this section of the proposed regulations under its new ownership. Further, agencies would be required to have an effective mechanism for visiting a representative sample of additional locations approved under paragraph (a)(2)(viii) at reasonable intervals.

The proposed regulations in new paragraphs § 602.22(a)(2)(ix) and (x) would also require that agencies include as substantive changes the acquisition of any other institution or program or location of another institution, and the addition of a permanent location at the site of a teach-out the institution is conducting.

The proposed changes to § 602.22(a) also would include the addition of a new paragraph (3) requiring an agency to define, as part of its substantive change policy, when changes made at or proposed by an institution are considered sufficiently extensive to require the agency to conduct a new comprehensive review of that institution.

Proposed changes to § 602.22(b) would retain the agency's ability to determine its own procedures for granting prior approval of a substantive change. However, those procedures must specify an effective date on which the change would be included in the program's or institution's accreditation. The proposed regulations would require that the effective date not be retroactive, with a limited exception for changes of ownership.

Finally, a proposed addition to § 602.22(c) would clarify the requirement that an agency have an effective mechanism for conducting visits to additional locations of institutions that operate more than three additional locations. The proposed regulations specify that the agency must visit a representative sample of those locations at reasonable intervals.

Reasons: In recognition of the pace at which change is occurring within the higher education community, including the addition of new locations of institutions, the development of new curricula, and ownership changes, the Department believed that it was important to bring these issues to the negotiators for discussion. The Department sought to ensure continued effective compliance with the statute in developing regulations that recognize the changing nature of higher education, while maintaining fiduciary responsibility.

Many institutions now operate as distributed enterprises. That business model is one that encompasses the establishment of multiple locations operated within the context of a single administrative system. The current regulations pertaining to substantive change do not accommodate this type of innovative model, because an accrediting agency must focus on individual additional locations of an institution. The current regulations do not allow an agency to determine if an institution has a system to ensure quality across a distributed enterprise and to consider the unit of analysis to be the system as a whole rather than each individual location.

The Department's approach to address new types of institutional organizational structures was to use the substantive change provisions to modify and clarify the additional location approval requirements that apply to traditional institutions, and those that apply to institutions that operate on a model where the establishment of locations is a standard practice that is carried out in a manner that ensures quality across all of the individual locations. Initial language proposed by the Department to the negotiators did not, in the opinion of some non-Federal negotiators, provide the appropriate clarity, and some non-Federal negotiators questioned the proposed use of the phrase ''addition of multiple locations'' rather than simply using ''the addition of locations'' noting that a change in the phrasing may lead to some confusion. Some non-Federal negotiators stated that the Department's proposed restructuring of the regulations was difficult to follow and that the two headings the Department initially proposed to add in order to draw a distinction between types of institutions were misleading. The Department agreed to review the language and redrafted the proposed regulations by further restructuring the language, and removing the headings. However, the Department retained use of the phrase ''distributed enterprise'' because it describes the concept intended without unduly limiting the business models covered.

Some non-Federal negotiators raised a concern about the language initially proposed in § 602.22(a)(2)(iii) regarding a change in academic content, while appreciating the intent of the language, and asked the Department to amend the language to provide clarity. The revised language discussed with and agreed to by the negotiators would provide for a substantive change to include the addition of courses or programs that represent a significant departure from the existing offerings of educational programs, or methods of delivery, from those that were offered when the agency last evaluated the institution. There was further discussion about what constituted a ''significant departure'' from existing offerings. Several non-Federal negotiators raised examples such as changing individual courses within a program, altering the syllabus from one year to the next, or changing text books for a course or program, and asked the Department if those would constitute a significant departure in existing offerings of educational programs, or method of delivery. The

Department clarified that a significant departure from the existing offerings of educational programs, while determined by the agency, would not result from an individual course or text book change, or from the change in some faculty members. However, an agency might consider it significant if an entire department of faculty members left an institution or, as one non-Federal negotiator pointed out as an example, if an institution or program began delivering courses through distance education that were not previously available at the institution.

Teach-out Plans and Agreements (§ 602.24)

Statute: Section 496(c)(3) of the HEA, added by the HEOA, specifies that, among other requirements, to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, an accrediting agency must require an institution it accredits to submit a teach-out plan for approval by the accrediting agency if any of three events occurs: (1) The Department notifies the accrediting agency of an action against the institution pursuant to section 487(f) of the HEA; (2) the accrediting agency acts to withdraw, terminate or suspend the accreditation of an institution; or (3) the institution notifies the accrediting agency that the institution intends to cease operations.

Section 487(f) of the HEA defines ''teach-out plan'' and adds an institutional requirement that in the event the Secretary initiates a limitation, suspension, or termination of the participation of an institution of higher education in any program under title IV under the authority of section 487(c)(1)(F) of the HEA, or initiates an emergency action under the authority of section 487(c)(1)(G) of the HEA, and its prescribed regulations, the institution is required to prepare a teach-out plan for submission to the institution's accrediting agency in compliance with section 496(c) of the HEA, the Secretary's regulations on teach-out plans, and the standards of the institution's accrediting agency.

Current Regulations: The current regulations specify that if an agency's accreditation enables an institution to obtain eligibility to participate in the title IV, HEA programs, the agency must require the institution to submit any teach-out agreement the institution enters into with another institution for agency approval. ''Teach-out agreement'' is defined in the current regulations in § 602.3.

Proposed Regulations: The proposed regulations would restructure § 602.24(c) of the current regulations to include teach-out plans as well as teach-out agreements. The proposed regulations would expand accrediting agency responsibilities by providing that agencies require the institutions they accredit or preaccredit to submit a teach-out plan to the agency for approval upon the occurrence of any of four events: (1) The Secretary notifies the agency that the Secretary has initiated an emergency action against an institution in accordance with section 487(c)(1)(G) of the HEA, or has initiated a limitation, suspension, or termination of the participation of an institution of higher education in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required; (2) the agency acts to withdraw, terminate or suspend the accreditation or preaccreditation of the institution; (3) the institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or (4) a State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked.

The proposed regulations would require an agency to evaluate each teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency, specifies additional charges, if any, and provides for notification to the students of any additional charges. An agency that approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency would be required to notify that accrediting agency of its approval. The proposed regulations would also specify that an agency may require an institution it accredits or preaccredits to enter into a teach-out agreement with another institution of higher education as part of its teach-out plan.

The proposed regulations would also amend the current requirement with respect to the submission of any teach-out agreement by an institution to an agency to clarify that the agreement must be submitted for agency approval whether it was entered into at the institution's own volition or at the request of the agency.

Current regulations would also be amended to add additional specificity to the requirement that the agency approve a teach-out agreement only if it provides for the equitable treatment of students. Under the proposed regulations, the agency's obligation would pertain to circumstances in which either an entire institution, or one of its locations at which it provides one hundred percent of at least one program offered, ceased operations, and would include requiring that the teach-out institution have the necessary experience, resources, and support services to remain stable, carry out its mission, and meet all obligations to existing students. The proposed regulations would also require that a teach-out institution provide students with information about additional charges, if any.

The proposed regulations would also amend paragraph (d) in the current regulations in § 602.24 to specify that if an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

Reasons: The Department proposes to specify that a teach-out plan would be required in the three circumstances specified in the statute: The Department initiates an emergency action or an action to limit, suspend or terminate an institution's participation in the title IV, HEA programs; the accrediting agency acts to withdraw, terminate or suspend the institution; or the institution indicates it intends to cease operations. The Department initially proposed referencing the subpart of the Student Assistance General Provisions regulations that contain the regulations governing limitation, suspension, termination, and emergency actions. Some of the non-Federal negotiators stated that requiring a teach-out plan if the Secretary initiates an emergency action, or an action to limit, suspend, or terminate an institution in accordance with subpart G of 34 CFR part 668, might result in confusion and application of the teach-out requirements beyond the intent of the statute, because subpart G is broad and refers to requirements such as posting of surety. They stated that requiring teach-out plans when the Department requires letters of credit or places an institution on heightened cash monitoring is not mandated under the statute and should be avoided. The Department agrees that a requirement that an institution post a letter of credit, or be subject to heightened cash monitoring, imposed outside of a subpart G proceeding, should not, on its own, trigger a requirement that the institution submit a teach-out plan to its accrediting agency for approval. The Department agreed to modify the language it

originally proposed by adding a reference to the statutory provisions governing emergency actions and actions to limit, suspend, or terminate the participation of an institution in the title IV, HEA programs. In addition, to reduce any confusion over when agency action is required, the proposed regulation was further revised to specify that when the Department notifies an institution and its accrediting agency that the Department is initiating an emergency, limitation, suspension, or termination action, it will also indicate in the notice that a teach-out plan is required.

The proposed regulations also provide that an accrediting agency must require submission of a teach-out plan when a State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. This provision was added because loss of State licensing leads directly to the loss of accreditation and institutional eligibility, and may well be followed by closure. There was support from the non-Federal negotiators for including this provision.

The addition of a provision in proposed § 602.24(c)(3) that, if an agency approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency, it must notify that agency of its approval, was made to ensure appropriate sharing of important information. The new provision in proposed § 602.24(c)(4) that an agency may require an institution to enter into a teach-out agreement as part of its teach-out plan was added to reflect new statutory language in section 487(f) of the HEA. In view of this new language, the proposed regulations would also modify the requirement for submission of teach-out agreements for agency approval (found in proposed § 602.24(c)(5) as restructured), to clarify that the agreements must be submitted for approval regardless of whether the institution enters into the agreement on its own, or at the request of the agency.

There was extensive discussion about what the statutory definition of ''teach-out plan'' in section 487(f)(2) of the HEA means in requiring a teach-out plan or agreement when an institution ceases to operate before all students complete their ''program of study.'' Whereas ''program'' is defined in the regulations in § 602.3 to mean a postsecondary educational program that leads to an academic or professional degree, certificate, or other recognized educational credential, there is no definition of ''program of study.'' In order to implement a teach-out plan or agreement, however, it is necessary to understand the concept of a ''program of study.'' The Department understands a program of study to be the specific area of study, or major, within the context of a degree or certificate program. Thus, to characterize an English major at a four-year institution, the student would be enrolled in a baccalaureate program with English as the program of study. What is important, and the reason for the distinction between ''program'' and ''program of study'' with respect to teach-outs, is that students need to be provided with the opportunity to complete their specific program of study when an institution or location offering 100 percent of at least one program ceases to operate. Thus, a student in a baccalaureate degree program who is preparing to become a teacher must be able to complete all the teacher education courses needed for a degree in that major.

The Department initially proposed that agencies evaluate a teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency and does not result in duplicative or increased costs. The Department was concerned that students not be charged additional money for a program for which they had already paid tuition and fees. Moreover, the concept of accrediting agencies working with the Department and the State licensing agency, to the extent feasible, to ensure that students whose institution has closed have reasonable opportunities to complete their programs without additional charges is included in the current regulations.

Some of the non-Federal negotiators noted that institutions that take on responsibility for teach-outs often lose substantial money to ensure that students are taught out properly. Sometimes, the closing institution did not provide its students with an adequate education, and the students being taught out need additional education or training to enable them to complete their program and be successful. Sometimes this involves students re-taking a course. Hence, prohibiting ''duplicative charges'' through teach-out approval requirements cannot be presumed to be in students' best interests. The institution conducting a teach-out must have flexibility, and placing too many prohibitions or prescriptions on the teach-out plan may preclude the establishment of appropriate teach-out arrangements. The non-Federal negotiators agreed that it would be better to require that the teach-out plan ensure students are notified of any additional charges that the teach-out will entail. The Department agreed with the non-Federal negotiators. It should be noted that the Department's expectations are that students will not incur additional or duplicative charges for participating in a teach-out to complete their programs of study. If, as the exception, and not the rule, an institution serving as a teach-out institution must charge the students, it should ensure that any charges are reasonable, taking into consideration the impact on the student. Further, the Department believes it is important for a teach-out plan to specify if there are additional charges. To be approved, a teach-out plan must provide for notification to the students of any additional charges.

Several non-Federal negotiators raised a question about what constitutes closure of an institution or location. They noted that there have been situations in which an institution or location moved, and did not close, but the Department deemed the institution to have closed. During the discussion, the Department clarified that normally a move of an institution or location across the street would be viewed as a change of address, and would not constitute closure. However if, for example, an institution or location moved 20 miles, there would have to be an examination of the circumstances. A 20-mile move in a rural area might not have a major impact on the majority of an institution's students, whereas a 20-mile move in an urban area could disadvantage an institution's students to the point where they could no longer attend the institution. In ascertaining whether an institution or location has closed or moved, key considerations are whether the institution's faculty, staff and students move with the institution or location.

Under the proposed regulations, the requirement that agencies work with the Department regarding closed schools would apply to those schools that close without a teach-out plan or agreement. The Department proposed to require that students be given reasonable opportunities to complete their education ''without duplicative or increased charges.'' Several negotiators presented various points of view on the proposal regarding closed institutions and locations when there is no teach-out plan or agreement. Some non-Federal negotiators suggested focusing on what was being done to protect the students and noted that what is best for the students must be evaluated on a case-by-case basis. Other non-Federal negotiators expressed concern that the proposed language could be read to imply that the accrediting agency would

be required to assume a financial obligation for teaching out the students in such circumstances. However, a non-Federal negotiator stated a belief that, while it is understandable that accrediting agencies do not want the regulations to imply that they have any liability for the educational expenses of students when an institution or location closes without a teach-out plan or agreement in place, it is likely that accrediting agencies will incur ordinary in-kind expenses, such as some expenditure of staff time, in complying with the recognition criteria pertaining to teach-outs and school closures.

The Department agrees that it expects agencies to expend staff time and make other ordinary and customary commitments of agency resources in the course of assisting students in finding reasonable opportunities to complete their programs of study, but that agencies are not expected to pay for the educational expenses of students in this situation. In addition, to avoid the appearance that the Department is creating any new or unusual financial obligations for agencies, the Department agreed to remove the references to ''ensuring'' that students do not incur ''additional or duplicative charges'' in favor of language simply requiring that agencies ''assist students'' in finding reasonable opportunities to complete their programs ''without additional charge.''

Transfer of Credit (§ 602.24)

Statute: As amended by the HEOA, section 496(c)(9) of the HEA specifies, among other requirements, that to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, an accrediting agency must confirm, as part of the agency's review for initial or renewal of accreditation, that an institution has transfer of credit policies that are publicly disclosed and that include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education.

Section 485(h) of the HEA contains a new HEOA requirement that institutions publicly disclose their transfer of credit policies in a readable and comprehensible manner. This section also specifies that neither the Secretary nor the NACIQI is authorized to require particular policies, procedures, or practices by institutions with respect to transfer of credit.

Current Regulations: There are no current regulations addressing transfer of credit.

Proposed Regulations: Proposed § 602.24(e) would incorporate the provisions of the HEA regarding the new requirement in the HEOA that accrediting agencies confirm that institutions have transfer of credit policies that are publicly disclosed and include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education. The proposed regulations include a cross-reference to the paragraph in 34 CFR 668.43 that the Department plans to include in a final rule to reflect the HEOA's new institutional disclosure requirement regarding transfer of credit policies. In the final regulations governing accrediting agencies, the complete cross-reference will be inserted in § 602.24.

Reasons: The new paragraph would implement the new statutory provisions contained in the HEOA. Some of the non-Federal negotiators expressed concern about a perceived lack of clarity regarding availability of information and were interested in having a definition of ''publicly disclosed'' to make it clear that the information must be readily available to students and their advisors. To address this concern, the proposed regulations provide a reference to the new institutional disclosure requirement that will require institutions to disclose the information specified regarding transfer of credit in a readable and comprehensible manner.

Some non-Federal negotiators wanted to add language requiring that the criteria established by the institution regarding the transfer of credit earned at another institution of higher education be fair. These negotiators stated that the issue of transfer of credit is a serious one and that full disclosure of this kind of information is needed so students can assess the fairness of an institution's policies and can decide whether to apply to the institution. Other non-Federal negotiators said there was a problem with expanding the statutory language, noting the Rule of Construction in section 485 of the HEA that constrains the Secretary from elaborating on the requirement. In addition, the regulations governing accrediting agencies require only that the agencies confirm that institutions being reviewed publicly disclose their transfer of credit policies. The more specific requirements on transfer of credit in section 485 of the HEA govern institutions, not accrediting agencies. The proposed regulations reflect the statutory language, but include a cross-reference to the institutional transfer of credit provisions to address some of the non-Federal negotiators' concerns.

Summary of Agency Actions (§ 602.26)

Statute: Section 496(c)(7) of the HEA specifies that, among other requirements, to be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in title IV, HEA programs, an accrediting agency must make available to the public and the State licensing or authorizing agency, and submit to the Secretary, a summary of agency actions including the accreditation or renewal of accreditation of an institution; the final denial, withdrawal, suspension, or termination of accreditation of an institution; any findings made in connection with the action taken, together with the official comments of the affected institution; and any other adverse action taken with respect to an institution or placement on probation of an institution.

Current Regulations: Section 602.26(b) of the current regulations requires an agency to provide written notice of (1) a final decision to place an institution or program on probation or an equivalent status, and (2) a final decision to deny, withdraw, suspend, revoke, or terminate the accreditation or preaccreditation of an institution or program. The notice must be provided to the Secretary, the appropriate State licensing or authorizing agency, and appropriate accrediting agencies at the same time the accrediting agency notifies the institution, but no later than 30 days after the decision.

Section 602.26(c) of the current regulations requires an accrediting agency to provide written notice to the public of the decisions identified in § 602.26(b)(1) and (b)(2) within 24 hours of its notice to the institution or program.

Section 602.26(d) of the current regulations requires that with respect to any decision listed in § 602.26(b)(2), the agency must make available to the Secretary, the appropriate State licensing or authorizing agency, and the public upon request, no later than 60 days after the decision, a brief statement summarizing the reasons for the agency's decision and the comments, if any, that the affected institution or program might wish to make with regard to that decision.

Proposed Regulations: The proposed regulations regarding disclosure of accrediting agency actions would require accrediting agencies to provide written notice of a final decision to take any other adverse action not listed in § 602.26(b)(2), as defined by the agency, to the Secretary and the State licensing or authorizing agency. The proposed

regulations would also add a cross-reference to require agencies to provide written notice to the public within 24 hours of their notice to the institution or program of any other adverse action.

Finally, the proposed regulations would specify in new paragraph (d) that the accrediting agency, in addition to providing to the public a brief statement summarizing the reasons for the agency's decision, must provide the official comments of the affected institution or program, or evidence that the institution or program was offered the opportunity to provide official comments. The information must be provided to the public whether or not the agency receives a request for the information.

Reasons: Many of the new provisions in the HEA are already addressed by current regulations. During negotiated rulemaking, the non-Federal negotiators requested that the accrediting agencies be permitted to define the other adverse actions, not specified in the regulations, about which the agencies would be required to provide information. The non-Federal negotiators also requested that the regulations clarify that agencies need provide only official comments of an institution or program or, if there are no official comments, evidence that the institution or program was offered an opportunity to provide official comments. The Department agreed with the non-Federal negotiators.

Recognition of Agencies by the Secretary (Subpart C)

Statute: Section 496(o) of the HEA authorizes the Secretary to develop regulations that provide procedures for the recognition of accrediting agencies and for administrative appeals. Section 496(l)(1)(B) of the HEA specifies the 12-month timeframe by which noncompliant agencies must take appropriate action to come into compliance, absent an extension of the timeframe by the Secretary upon good cause shown. Section 496(d) of the HEA stipulates that the period of recognition not exceed five years. Section 114 of the HEA, as amended by the HEOA, restructures the NACIQI and provides for the establishment of the NACIQI meeting agenda by the Chairperson of NACIQI; under the FACA, 5 U.S.C. Appdx. 1, approval of the meeting agenda by the Secretary's designated Federal official is also required. Section 496(q) of the HEA requires a review, at the next available NACIQI meeting, of an agency that has included distance education or correspondence education in its scope of recognition through written notice to the Secretary, if the enrollment of an accredited institution that offers distance education or correspondence education has increased by 50 percent or more within any one institutional fiscal year. Section 496(a) and (c) of the HEA describes various kinds of institutional and agency information that must be made available to the public, the Secretary or the State licensing or authorizing agency, as applicable. Along with HEA requirements, the Department must comply with requirements in the Freedom of Information Act, 5 U.S.C. § 552; the Trade Secrets Act, 18 U.S.C. § 1905; the Privacy Act of 1974, as amended, 5 U.S.C. § 552a; the FACA, 5 U.S.C. Appdx. 1; and all other applicable laws, in considering whether and when information obtained from accrediting agencies may, or must, be disclosed to the public.

Current Regulations: There are two sets of recognition procedures in the current regulations. Subpart C provides review procedures only for an agency's application for initial or continued recognition, and does not stipulate procedures for other types of Departmental review pertaining to recognition proceedings. Subpart D provides procedures for limitation, suspension, or termination of recognition. Under subparts C and D, the Secretary has the authority to make a decision regarding an accrediting agency's recognition, as well as for any appeal the accrediting agency may bring related to that decision.

Section 602.30(c) of the current regulations states that the Secretary does not make available to the public any confidential agency materials Department staff review during the evaluation of an agency's application for recognition or compliance with the criteria for recognition.

Proposed Regulations: The proposed regulations would reflect changes made by the HEOA regarding the review of distance education and correspondence education, and the role of the Chairperson of the Advisory Committee in establishing the meeting agenda. Under the FACA, approval of the meeting agenda by the Secretary's designated Federal official is also required; ''Designated Federal Official'' is defined in proposed § 602.3.

The proposed regulations would combine subparts C and D, thereby streamlining agency review and establishing procedures for the following activities: Applications for an expansion of scope; submission and review of compliance reports, as defined in proposed § 602.3; reviews of increases in headcount enrollment described in proposed § 602.19(e); and staff analyses based on reviews of agencies during their period of recognition. The proposed regulations would establish the senior Department official as the decision-maker on recognition proceedings and the Secretary as the decision-maker on appeals. Proposed subpart C would also make explicit the authority of the senior Department official to make a decision in a recognition proceeding in the event that the statutory authority or appropriations for the Advisory Committee ends or that there are fewer duly appointed Advisory Committee members than needed to constitute a quorum, and under extraordinary circumstances when there are serious questions about an agency's compliance that require prompt attention. Proposed subpart C would clarify that an agency may be given no more than 12 months to address identified deficiencies, after which time a decision on recognition would be made on the basis of a compliance report, unless the senior Department official (or Secretary, on appeal), on review of the report, determines good cause exists to extend that timeframe.

Proposed § 602.31 would identify laws governing the Secretary's processing and decision-making on requests for public disclosure of information obtained during agency recognition proceedings. Proposed § 602.31 would also provide procedures that an agency may follow in seeking to protect the confidentiality of trade secrets and commercial or financial information that is privileged or confidential in documents submitted to the Department in recognition proceedings. Section 602.31(f)(1) of the proposed regulations would provide the citations of the various laws to which the Secretary's release of information is subject, including the Freedom of Information Act (FOIA); the Trade Secrets Act; the Privacy Act of 1974, as amended; and the Federal Advisory Committee Act.

The proposed regulations would add a set of procedures an agency may follow when submitting documents to the Department for recognition proceedings in order to assist the Department in its efforts to avoid disclosing those materials that are entitled to protection from disclosure under applicable law. These procedures include: Allowing the agency to redact information that would identify individuals or institutions and is not essential to the Department's review of the agency; specifying that the agency make a good faith effort to designate all business information within the submission that the agency believes would be exempt from disclosure under

exemption 4 of FOIA; identifying any other material the agency believes would be exempt from public disclosure, the factual basis for the request, and any legal basis the agency has identified for withholding the document from disclosure; and ensuring that the documents submitted are only those required for Department review or as specifically requested by the Department. The proposed regulations would also make clear that a blanket designation of material submitted as meeting the exemptions in FOIA will not be considered to be in good faith and will be disregarded. Finally, the proposed regulations would clarify that the Secretary processes all FOIA requests in accordance with 34 CFR part 5 and that all documents provided to the Advisory Committee are available to the public.

Reasons: The Department proposes to combine subparts C and D to establish consistent procedures that govern the recognition process. The intent behind current regulations in subpart D—which establishes a separate process that involves subcommittees of the Advisory Committee for all limitation, suspension and termination actions—was to expedite these types of actions. However, in practice, scheduling and logistical issues have made it cumbersome for Department staff and the Advisory Committee to manage two processes.

Proposed subpart C would make clear the parallel processes by which the Department staff and the Advisory Committee make recommendations on recognition that are forwarded, along with the complete record, to the senior Department official for a decision. The Department clarified during negotiated rulemaking that the NACIQI is, by definition, an advisory committee that makes recommendations and is not a decision-making body. Current regulations in § 602.33 that provide procedures for appealing NACIQI's recommendation are confusing given that an appeal suggests that a decision has been made, whereas in fact, NACIQI is only making a recommendation.

In lieu of current § 602.33, proposed § 602.35 would provide a process by which the agency and Department staff may respond to the Advisory Committee's recommendation before the senior Department official makes his or her recognition decision. Under the proposed regulations, decision-making authority would reside with the senior Department official, whose decisions would be appealable by the agency to the Secretary under proposed § 602.37. The proposed changes to establish the senior Department official as the decision-maker on recognition and the Secretary as the decision-maker on appeals would strengthen due process by ensuring that the appeal is not adjudicated by the initial decision-maker. Under the current regulations, the decision-making authority on both recognition and appeals resides with the Secretary.

The proposed regulations in §§ 602.32, 602.34, and 602.36 would increase transparency and efficiency, and implement HEOA provisions regarding distance and correspondence education. These proposed regulations would detail proceedings for staff and Advisory Committee review of applications for recognition or renewal of recognition, expansions of scope, compliance reports, and reviews of increases in headcount enrollment described in proposed § 602.19(e). Proposed § 602.33 would provide procedures for reviews of agencies during the period of recognition. Timeframes for various stages of the review process would be specified to strengthen due process for agencies.

The Department's initial proposed language in subpart C incorporated the concept that an agency's compliance with the criteria for recognition includes the requirement that an agency ''is effective in its performance with respect to those criteria.'' Some non-Federal negotiators expressed concern regarding the word ''performance'' because they believed that term is difficult to define. They suggested that the language be amended to incorporate the statutory concept of ''effective application'' of the criteria. The Department agreed to replace the language regarding ''performance'' with the phrase ''effectively applies those criteria.'' While addressing non-Federal negotiators' concerns regarding the word ''performance,'' the proposed language would retain the statutory concept of ''effectiveness'' and the judgment associated with how an agency applies its standards.

During the discussions regarding proposed § 602.37, which would specify procedures for appealing the senior Department official's decision to the Secretary, some non-Federal negotiators expressed concerns regarding provisions for the consideration by the Secretary of additional information not contained in the record. In response, the Department added language specifying that the information be ''relevant and material'' and ''pertaining to an agency's compliance with recognition criteria.'' A parallel change was made to proposed § 602.36 which outlines procedures for review and decision by the senior Department official. Current regulations are silent about procedures in instances when new and relevant information becomes available after the NACIQI meeting but prior to the decision being made. In the interest of transparency and due process, the Department decided to make explicit in the proposed regulations the senior Department official's and the Secretary's authority to review all relevant information prior to making a decision on recognition. Proposed §§ 602.36 and 602.37 would outline procedures by which the senior Department official and the Secretary, respectively, may proceed in such cases.

Proposed § 602.33 would establish a procedure for review of agencies during the period of recognition so that the Department may ensure an agency's continued compliance with subpart B, and initiate action as necessary. Some non-Federal negotiators expressed concern that the Department not act arbitrarily and provide adequate notice to and communication with the agency when conducting a review during an agency's period of recognition. In response to concerns expressed by non-Federal negotiators, the Department added language to reflect the consultation between Department staff and the agency, and the provision to the agency of the documentation concerning the inquiry.

Proposed § 602.36(b) would make explicit the senior Department official's authority to make a decision in a recognition proceeding in the event that statutory authority or appropriations for the Advisory Committee ends, or there are fewer duly appointed Advisory Committee members than needed to constitute a quorum. The intent behind proposed § 602.36(b) is to allow the Department to act expeditiously and responsibly in the absence of an Advisory Committee when the Department has concerns regarding an agency's continued compliance with subpart B. Some non-Federal negotiators suggested that the senior Department official only exercise this authority in extraordinary circumstances. In response to non-Federal negotiators' concerns, the Department added language to proposed § 602.36(b), which would specify that the senior Department official would make a decision in the absence of an Advisory Committee only in extraordinary circumstances when the Department has serious concerns regarding an agency's compliance with subpart B that require prompt attention.

One non-Federal negotiator expressed concern that the Secretary could withhold appointments to NACIQI in order to prevent the constitution of a

quorum so that the senior Department official could exercise the authority to make a decision without NACIQI review of the matter. The Department clarified that this was not the intent of the provision and further stated that the withholding of appointments by the Secretary alone would not prevent a quorum.

The Secretary is obligated to comply with the HEA and other applicable statutes, including FOIA and FACA. Current regulations do not accurately reflect the Secretary's disclosure obligations under FOIA and other statutes and must be revised to reflect the applicable law. In revising the regulations, the Department is attempting to spell out the options available to agencies when submitting material that the agencies view as confidential to the Department for review in recognition proceedings.

There was extensive discussion among the negotiators about what material is to be considered confidential. Several non-Federal negotiators expressed concern about how to safeguard confidentiality, ensure the integrity of the process, and preserve the relationship between the agency and the institution. In particular, they expressed concern that if the agency were unable to provide guarantees of confidentiality to its institutions, this would undermine the relationship between the agency and its accredited institutions or programs and indeed the entire accreditation process.

The Department acknowledged the importance of confidentiality for agencies and institutions, but at the same time, wanted to make the agencies and institutions fully aware of the requirements with which the Secretary must comply in the event a request for disclosure is made under FOIA or FACA. The Department also clarified that should the Inspector General or any other Federal entity seek to review an agency or an institution, proposed procedures under subpart C for redacting information and marking documents confidential will not apply, as these proposed regulations pertain only to the recognition process.

Several non-Federal negotiators suggested that the Department could review required documents on a secure Web site and thereby not take possession of them. Others suggested the Department send staff to the agency to review documents, but leave them in the agency's possession. The Department explained that it needed to have a complete and accurate record of the documents in its possession to substantiate the Department's review, and would, therefore, not be able to utilize a secure Web site or an on-site review of documents. The Department's control of the documents reviewed further protects the integrity of the review process. For example, if the Department needed to retrieve a reviewed document in the future, and had to rely on obtaining the document from a Web site, it would have no way to ensure that the document on the Web site was the same document it had originally reviewed.

Another non-Federal negotiator raised concerns about complaints being released to the public before they could be substantiated. The Department clarified that FOIA pertains to all documents submitted to the Department and other Federal Government agencies.

Finally, some non-Federal negotiators expressed concerns about the conduct of unannounced site visits by Department staff to an institution or program as part of the review of an agency. This provision exists in both current § 602.31(b)(1) and proposed § 602.31(e)(1). Some non-Federal negotiators stated that this was in conflict with their responsibilities under the Health Insurance Portability and Accountability Act (HIPAA). The Department reviewed HIPAA materials and found nothing that precludes the Department from performing unannounced site visits. Nevertheless, the Department will cooperate with health care providers and their business associates with respect to applicable procedures required by HIPAA.

Executive Order 12866

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 Office of Management and Budget (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 that this proposed regulatory action would not have an annual effect on the economy of more than $100 million. Therefore, this action is not ''economically significant'' and not 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

As discussed in this NPRM, these proposed regulations are needed to implement the provisions of the HEA, as amended. In particular, these proposed regulations address the provisions related to the recognition of accrediting agencies by the Secretary.

In addition, these proposed regulations are needed to ensure that the Department fulfills its fiduciary responsibility regarding the appropriate use of Federal funds made available by the Department to institutions of higher education under title IV of the HEA. The Secretary grants recognition to accrediting agencies that are considered by the Department to be reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit. Congress requires that an institution of higher education be accredited by an accrediting agency recognized by the Secretary in order to receive Federal funds authorized under title IV, HEA programs.

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 individuals and representatives from relevant constituent groups, the Secretary must subject the proposed regulations for the title IV, HEA programs to a negotiated rulemaking process. All proposed regulations that the Department publishes must conform to final agreements resulting from that process unless the Secretary reopens the process or provides a written explanation to the participants in that process stating why the Secretary has decided to depart from the agreements. The 2009 negotiated rulemaking committee for accreditation reached consensus on the proposed regulatory language contained in this

NPRM. A summary of the proposed regulatory language agreed upon by negotiators is available in the *Significant Proposed Regulations* section.

Regulatory Alternatives Considered

The following section addresses the alternatives that the Department considered in implementing the discretionary portions of the HEOA provisions. These alternatives are also discussed in more detail in the *Reasons* sections of this NPRM related to the specific proposed regulatory provisions.

A broad range of alternatives to these proposed regulations was considered as part of the negotiated rulemaking process. These alternatives were reviewed in detail in the preamble to this NPRM under both the *Regulatory Impact Analysis* and the *Reasons* sections accompanying the discussion of each proposed regulatory provision. However, the Department is interested in receiving comments related to other alternatives to the proposed regulations. To send any comments that concern alternatives to these proposed regulations, see the instructions in the **ADDRESSES** section of this NPRM.

Benefit-Cost Analysis

Benefits

The benefits of these proposed regulations would include: Ensuring that accrediting agencies are reliable authorities as to the quality of education or training offered by an institution or program they accredit; ensuring that the Department fulfills its fiduciary responsibility for institutional funding under title IV, HEA programs; and establishing consistency between statutory language and regulatory language. An additional benefit of the proposed regulations would be providing accrediting agencies with greater clarity on regulations regarding the following: Distance and correspondence education; accreditation team members; transfer of credit; teach-out plan approval; definition of recognition; demonstration of compliance; recognition procedures, including procedures for NACIQI; direct assessment programs; monitoring; substantive change; record keeping and confidentiality; and due process and appeals. However, it is difficult to quantify benefits related to the proposed regulations. The Department is interested in receiving comments or data that would support a more rigorous analysis of the benefits of these provisions.

Costs

Many of the statutory provisions implemented through this NPRM would not require accrediting agencies and institutions to develop new disclosures, materials, or accompanying dissemination processes. Other proposed regulations generally would require discrete changes in specific parameters associated with existing guidance rather than wholly new requirements. Accordingly, accrediting agencies wishing to continue to be recognized by the Secretary and institutions wishing to continue to participate in title IV, HEA programs are estimated to have already absorbed most of the administrative costs related to implementing these proposed regulations.

In assessing the potential impact of these proposed regulations, the Department recognizes that certain provisions are likely to increase workload for some program participants. 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 particularly interested in comments and supporting information related to possible administrative burden to accrediting agencies and institutions stemming from the proposed regulations. Estimates included in this notice will be reevaluated based on any information received during the public comment period.

Two new statutory concepts reflected in proposed § 602.25 do not exist in current regulations: (1) An institution's or program's right to appeal adverse accrediting agency actions to an appeals panel that is subject to a conflict of interest policy and that does not contain members of the underlying decision-making body; and (2) an institution's or program's right to review of new financial information, if the institution or agency meets certain conditions, before the accrediting agency takes a final adverse action.

Although accrediting agencies must be prepared to respond to appeals and to requests for review of new financial information, institutions or programs decide whether to undertake these appeals and make these requests. We do not expect the new provisions to affect the number of institutions or programs that appeal an accrediting agency adverse action; therefore, there would be no additional costs to institutions or programs. Based on the discussion on this issue at negotiated rulemaking and historical data on appeals, it is likely that no more than five institutions per year will be able to meet the qualifications to be considered under the new provision for review of new financial information and will seek such a review. The proposed regulations would also require that an accrediting agency confirm, as part of the agency's review for initial or renewal of accreditation, that institutions that participate in title IV, HEA programs have transfer of credit policies that are publicly disclosed and that include statements of the criteria established by the institutions regarding the transfer of credit earned at another institution of higher education. As accrediting agencies are already required to review various policies and procedures at the institutions they accredit, we expect the addition of this provision will add a few minutes to an accreditation review. We do not have the data to provide a more refined estimate at this time. As indicated above, we will adjust the estimate based on any comments received.

In addition, the proposed regulations would require an agency that has or seeks to include the evaluation of distance education or correspondence education within its scope of recognition to require participating institutions that offer distance education or correspondence education to have processes in place through which the institutions establish that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. It is standard practice for institutions that offer distance or correspondence education to have processes that verify the identity of students; therefore, this provision will not have an impact on institutions. Some accrediting agencies that evaluate distance education or correspondence already review those processes when they conduct accreditation reviews. For those agencies that will have to add a step to their evaluation process, the time added to the review process is expected to minimal. We will refine our estimate if we receive comments that would enable us calculate any additional costs associated with this provision.

Finally, the proposed regulations would require participating institutions to submit a teach-out plan to their accrediting agency upon the occurrence of any of the following: An emergency

action of the Secretary against an institution, or an action by the Secretary to limit, suspend, or terminate an institution's participation in any title IV, HEA program; an agency action to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution; the institution notifies the accrediting agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or a State licensing or authorizing agency notifies the accrediting agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. As indicated in the *Paperwork Reduction Act* section, we expect the average time needed to develop a teach-out plan is four hours. Based on historical data that show the number of institutions that are subject to Department action, lose institutional eligibility, or close, and an estimate of the number of locations that offer one hundred percent of a program, we estimate that approximately 70 institutions per year will be required to submit a teach-out plan to their accrediting agency. Most of the institutions and locations that close offer only one or two programs. For some institutions, the plan will be very simple: the institution will teach out its students. For other institutions, preparing a plan may involve doing research to determine what nearby schools offer similar programs; in most cases, the institution will already know, as the nearby schools will have been their competitors. In a few cases, more work may be needed to develop the teach-out plan. This is likely to occur when the affected institution or location has offered several different programs. Given the wide variety of situations, our best estimate is that the average amount of time needed to complete a teach-out plan is four hours. Using May 2009 Bureau of Labor information that the average hourly wage for private, non-agricultural workers is $18.54, the total estimated cost for carrying out this provision is $5,191 (70 institutions × 4 hours/institution × $18.54/hour).

Net Budget Impacts

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.

The net budget impact of these proposed regulations on accrediting agencies and institutions of higher education is estimated to be minimal. As previously mentioned, many of the statutory provisions implemented through this NPRM will not require accrediting agencies and institutions to develop new disclosures, materials, or accompanying dissemination processes. In addition, the Department takes steps in these proposed regulations to limit the administrative burden on accrediting agencies and institutions. The Department believes that most of the administrative costs related to implementing these proposed regulations have already been absorbed by accrediting agencies and institutions. As noted in the chart in the *Paperwork Reduction Act* section of the preamble, the net effect on the work of accrediting agencies and institutions is estimated to be 3,212 hours. Assuming that the employee cost of implementing the new requirements is $18.54/hour (based on average wage information from the Bureau of Labor Statistics), the net budget impact of these proposed regulations is estimated to be $59,550. The net budget impact of these proposed regulations on the Department is also estimated to be minimal. Primary additional costs would be incurred for administering these regulations should NACIQI decide to convene more than two national meetings annually. Because the HEOA provisions afford the NACIQI chair the authority to set the agenda for NACIQI meetings with the approval of the designated Federal official, it is conceivable that NACIQI may choose to meet more often than twice a year. Should this occur, the Department would incur additional administrative costs resulting from convening one or more additional meetings. The estimated cost to the Department of convening another NACIQI meeting is $55,300. No additional costs to the Department resulting from these proposed regulations are anticipated.

In analyzing the net budget impacts of these proposed regulations, feedback was received from non-Federal negotiators during negotiated rulemaking and from Department staff. However, data on administrative burden at participating accrediting agencies and institutions are extremely limited; accordingly, as noted above, the Department is particularly interested in 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**.

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. 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.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum ''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, § 600.2.)
- 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 directly affect accrediting agencies and institutions of higher education that

participate in title IV, HEA programs. The U.S. Small Business Administration Size Standards define organizations as ''small entities'' if they are for-profit or nonprofit organizations with total annual revenue below $5,000,000 or if they are organizations controlled by governmental entities with populations below 50,000.

A significant percentage of the accrediting agencies and institutions participating in title IV, HEA programs meet the definition of ''small entities''. The Department estimates that approximately 40 accrediting agencies and 2,310 postsecondary institutions meet the definition of ''small entity''.

The proposed regulatory action would not substantively change regulations governing institutional eligibility and the Secretary's recognition of accrediting agencies in a way that would result in a material increase or decrease in the number of institutions participating in title IV of the HEA or in the number of accrediting agencies recognized by the Secretary. For these accrediting agencies and institutions, the new requirements under the proposed regulations are not expected to impose significant new costs. Although the proposed regulations contain some new requirements, many agencies and institutions have policies in place that are similar to the new requirements. The Department estimates that costs attributable to complying with the new requirements are likely to be small.

As noted in the Paperwork Reduction Act section of this NPRM, the net effect on the work of accrediting agencies and institutions is estimated to be 3,212 hours. For the approximately 2,350 small entities covered by the proposed regulations, the net budget impact is estimated to be 1,851 hours. Using the May 2009 Bureau of Labor data for the average hourly wage of private, non-agricultural workers, $18.54 per hour, the estimated cost of the new provisions to small entities is $34,318.

The impact of the proposed regulations on individuals is not subject to the Regulatory Flexibility Act.

The Secretary invites comments from small accrediting agencies and institutions 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.

Paperwork Reduction Act of 1995

Proposed §§ 602.15, 602.19, 602.24, 602.25, 602.26, 602.27, 602.31, and 602.32 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 OMB for its review.

Section 602.15—Administrative and Fiscal Responsibilities

Proposed § 602.15 would require accrediting agencies to demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution from the last full accreditation or preaccreditation review. Under the current regulations, agencies are required to maintain this documentation for the previous two accreditation or preaccreditation reviews. Accrediting agencies must maintain documents regarding substantive change decisions under this requirement in the current regulations. The proposed regulation would reduce the administrative burden to maintenance of only one full accreditation or preaccreditation review. Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, the reduced hours for maintaining only one complete review cycle are negligible because the agencies already collect the information.

Section 602.19—Monitoring and Reevaluation of Accredited Institutions and Programs

Proposed § 602.19(b) would require agencies to collect data to ensure that the institutions they accredit remain in compliance with their regulations. This proposed regulation would clarify the language in the current regulation regarding the data that agencies must collect to ensure that institutions and programs remain in compliance with their accrediting standards. Because the current regulation requires agencies to collect this information, the proposed regulatory language change would not represent any additional reporting burden under OMB Control Number 1840–0788.

Proposed § 602.19(c) would require agencies to monitor the enrollment growth of institutions or programs they accredit each year. This proposed regulation would represent a change in the information that accrediting agencies must collect currently. It would require that agencies collect information to monitor enrollment growth for the institutions or programs that they accredit. The Department believes that institutions already collect enrollment data, but estimates that this regulation would increase the burden to each of the 61 recognized accrediting agencies by a total of 122 hours under OMB Control Number 1840–0788.

Proposed § 602.19(e) would require accrediting agencies that expanded their scope to include distance education or correspondence education by notice to the Secretary to monitor enrollment growth of the institutions they accredit that offer distance education or correspondence education. These agencies must report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. The content of the report is described in § 602.31(d).

Proposed § 602.19(e) would represent a change in the information that some accrediting agencies must collect. The proposed regulation would only affect institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Department staff review of currently recognized accrediting agencies shows that 27 agencies would not be affected by this proposed regulation. However 15 of the remaining recognized agencies may be affected if any decide to include distance education in their scope of recognition in the future. The Department estimates that the additional reporting requirement would increase the burden to accrediting agencies by a total of 60 hours under OMB Control Number 1840–0788 if all 15 agencies decided to add distance education or correspondence education to their scope of recognition.

Section 602.24—Additional Procedures Certain Institutional Accreditors Must Have

Proposed § 602.24 would mandate that an accrediting agency require an institution it accredits to submit a teach-out plan for approval by the accrediting agency if any of following events occurs: The Department initiates an emergency action against an institution, or an action by the Secretary to limit, suspend, or terminate an institution participating in any title IV, HEA program; the accrediting agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution; the institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program; or a State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked. If the teach-out plan requires a teach-out agreement, proposed § 602.24 would also identify the components of the teach-out agreement. The

Department estimates that the proposed regulation would place an additional burden on 70 institutions each year for a total of 280 hours under OMB Control Number 1840–0788.

Section 602.25—-Due Process

Proposed § 602.25 would include two new statutory concepts. Proposed § 602.25(f) would provide for an institution's or program's right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body. Proposed § 602.25(h) would provide for an institution's or program's right for the review of new financial information, if it meets certain conditions, before the accrediting agency takes a final adverse action.

Although accrediting agencies must be prepared to respond to appeals and to requests for review of new financial information, the decision to undertake these actions is a voluntary one on the part of an institution. The new provisions are not expected to have any effect on the number of institutions that appeal an accrediting agency adverse action, and therefore, there would be not additional costs to institutions. Based on the discussion on this issue at negotiated rulemaking, and historical data on appeals, it is likely that no more than five institutions per year will be able to meet the qualifications to be considered under the new provision for review of new financial information and will seek such a review.

Agencies are already required to have an appeal process; the burden associated with revising existing procedures to conform with the new requirements is estimated to be 610 hours, which is based on 61 accrediting agencies × 10 hours. The estimated burden is associated primarily with implementing the regulation in the initial year as agencies establish new procedures. The burden is estimated to be 2,440 hours, based on 61 accrediting agencies × 40 hours. The burden for maintaining this process in subsequent years is expected to be minimal, given that we expect no more than five agencies will meet the requirements for such a review.

Section 602.26—Notification of Accrediting Decisions

Proposed § 602.26(b) would require agencies to provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action and of final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Proposed § 602.26(d) would require agencies to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include either comments from the affected institution or program regarding that decision or evidence that the affected institution or program was offered the opportunity to provide comments. The proposed change would clarify existing language and would require that the statement provide evidence that the affected institution or program was offered an opportunity to provide comments if no comments were received. The proposed changes do not constitute any new reporting requirements and, therefore, do not represent any additional burden on accrediting agencies under OMB Control Number 1840–0788.

Section 602.27—Other Information an Agency Must Provide the Department

Proposed § 602.27(a) would require an accrediting agency to provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes to its policies, procedures, or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, an agency must provide a summary of the major accrediting activities conducted during the year. The proposed regulation also would require an accrediting agency to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities.

Although the proposed changes would primarily clarify language in the current regulations, the changes would also affect the reporting requirement regarding adding distance education or correspondence education to an agency's scope of recognition. The proposed regulation would remove the requirement for institutional accrediting agencies, and programmatic accrediting agencies that accredit freestanding institutions, to submit an application to the Department if an agency wished to add distance education or correspondence education to its scope of recognition; the proposed changes would only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education. Therefore, the proposed changes to the regulation would not impose any new burden on accrediting agencies and, in the case of adding distance education or correspondence education to a scope of recognition, it would reduce the burden on agencies. Department staff estimates the burden on the 15 agencies that would be affected by the proposed regulation would be reduced by 300 hours under OMB Control Number 1840–0788 if all the agencies decided to add distance education or correspondence education to their scope of recognition.

Section 602.31—Agency Submissions to the Department

Proposed § 602.31(a) would require accrediting agencies to submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years. The application would be required to demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 part 602. The proposed regulation would clarify what documents should be provided with an agency's application for recognition. The language of the proposed regulation would not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Proposed § 602.31(b) would require accrediting agencies that wish to expand their scope of recognition to submit an application to the Secretary. The proposed language would not place any additional reporting burden on accrediting agencies because the current regulations also require the submission of an application when an agency seeks to expand its scope of recognition. The language of the proposed regulation would not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Proposed § 602.31(c) would require that agencies provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered by their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602, subpart B. Therefore, while no requirement to submit a compliance report exists in the current regulations, the proposed language reflects the existing practice of the Department. The proposed changes to the regulation

would not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Proposed § 602.31(d) would require agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education to annually monitor enrollment growth of the institutions they accredit that offer distance education. A report would be required to be sent to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. As noted in the discussion of proposed § 602.19(e), this section of the regulation would only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Based on the Department's previous experience with institutions that have experienced significant growth, this provision may affect no more than 3 institutions per year. Therefore, the proposed changes would increase the burden to the 15 affected accrediting agencies by 60 hours under OMB Control Number 1840–0788 if they all add distance education to their scope of recognition.

Section 602.32—Procedures for Department Review of Applications for Recognition or for Change in Scope, Compliance Reports, and Increases in Enrollment

Proposed § 602.32(f) would require the Department to forward to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency could then provide a written response to the draft staff analysis and the third-party comments. The proposed change would simplify the language of the current regulation in that it combines several paragraphs of the current regulation into a single paragraph. The current regulations also require that the Department invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department. Therefore, the proposed changes would not impose a new reporting burden on agencies under OMB Control Number 1840–0788.

Consistent with the discussion above, the following chart describes the sections of the proposed regulations involving information collection, the information being collected, and the collection that the Department will submit to the Office of Management and Budget for approval and public comment under the Paperwork Reduction Act.

Regulatory section	Information section	Collection
§ 602.15	Accrediting agencies must demonstrate certain administrative responsibilities, including maintenance of all accrediting documentation for each institution from the last full accreditation or preaccreditation review. Previously, agencies were required to maintain this information covering the previous two accreditation or preaccreditation reviews. Although the current regulation does not explicitly mention documents relating to substantive change decisions, the requirement for agencies to maintain these documents was covered under the current regulation's requirement to maintain all documents related to accrediting decisions and special reports. A substantive change request would be considered a special report that had to be submitted to the agency for a decision. Further, an agency's decision regarding the substantive change request was, in fact, an accreditation decision and was reflected in a decision letter that either allowed the substantive change to be covered under the agency's grant of accreditation or denied the request and did not allow the change to be covered under the agency's grant of accreditation. Section 496(c)(1)of the HEA.	OMB 1840–0788 Although this represents a reduction of the burden on agencies under OMB Control Number 1840–0788, since the agencies already collect the information, the reduced hours for maintaining only one complete review cycle is negligible.
§ 602.19(b)	Agencies must collect data to ensure that the institutions they accredit remain in compliance with their regulations. This proposed regulation would clarify the language in the current regulation regarding the data agencies should collect to ensure that institutions and programs remain in compliance with their accrediting standards. Section 496(a)(4)(A) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.19(c)	Agencies must monitor the enrollment growth of institutions each year. This proposed regulation would represent a change in the information that accrediting agencies must collect. It would require that agencies collect information to monitor enrollment growth for the institutions or programs that they accredit. Section 496(c)(2) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden to the 61 recognized accrediting agencies by 122 hours.
§ 602.19(e)	Accrediting agencies that expand their scope to include distance education or correspondence education by notice to the Secretary must monitor enrollment growth of institutions that offer distance education or correspondence education and report to the Department, within 30 days, any institution that experiences enrollment growth of 50 percent or more during a fiscal year. Section 496(q) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden for 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future.

Regulatory section	Information section	Collection
§ 602.24	Approximately 70 institutions per year will be required to submit a teach-out plan to their accrediting agency. Most of the institutions and locations that close offer only one or two programs. For some institutions, the plan will be very simple: The institution will teach out its students. For other institutions, preparing a plan may involve doing some research to determine what nearby schools offer similar programs but in most cases, the institution will already know, as the nearby schools will have been their competitors. In a few cases, more work may be needed to develop a plan. Given the wide variety of situations, our best estimate is that the average amount of time needed to complete a plan is 4 hours. Therefore, the total amount of time is 280 hours (70 institutions × 4 hours). Section 496(c)(3) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden on 70 institutions each year for a total of 280 hours.
§ 602.25(f)	Section 602.25(f) includes the new statutory concept of an institution's or program's right to appeal any adverse accrediting agency action before an appeals panel that is subject to a conflict of interest policy and does not contain members of the underlying decision-making body. Agencies are already required to have an appeal process; the negligible burden is estimated to be 610 hours, which is based on 61 accrediting agencies × 10 hours. Section 496(a)(6) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 610 hours.
§ 602.25(h)	Section 602.25(h) includes the new statutory concept of an institution's or program's right to review new financial information, if it meets current provisions, before the accrediting agency takes a final adverse action. The estimated burden is associated primarily with implementing the regulation in the initial year as agencies establish new procedures. The time is estimated to be 2440 hours, based on 61 accrediting agencies × 40 hours. Section 496(a)(6) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden on 61 accrediting agencies primarily in the first year of implementation for a total of 2440 hours.
§ 602.26(b)	Agencies must provide a written notice to the Secretary of any final decision that is considered by the agency to be an adverse action as well as final decisions withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. Section 496(c)(7) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.26(d)	Requires agencies to make available to the Secretary and the public a statement regarding the reasons for withdrawing, suspending, revoking, or terminating an institution's or program's accreditation or preaccreditation. The statement must include any comments that affected institutions or programs want to make with regard to that decision or evidence that the institution or program was offered the opportunity to provide comments. The proposed changes provide clarifying language and add that the statement must provide evidence that an institution or program was offered an opportunity to provide comments if no comments were received. Section 496(c)(7) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.27(a)	Requires agencies to provide to the Secretary a copy of any annual report it prepares, an updated directory of its accredited institutions and programs, any proposed changes in an agency's policies procedures or accreditation standards that might alter its scope of recognition or compliance with the Criteria for Recognition, and a notification if it is changing its scope of recognition to include distance education or correspondence education. Further, if requested by the Secretary, agencies must provide a summary of the major accrediting activities conducted during the year. It also would require agencies to provide to the Department, if the Secretary requests, any information regarding an institution's compliance with its title IV, HEA program responsibilities. Although the proposed changes to the regulation primarily clarify language that is in the current regulation, the changes would impact the reporting requirement regarding adding distance education or correspondence education to an agency's scope of recognition. The proposed regulation would remove the requirement for institutional accrediting agencies to submit an application to the Department if an agency wished to add distance education or correspondence education to its scope of recognition and only require agencies to notify the Department that its scope has been changed to include distance education or correspondence education. Sections 496(a)(4) and 487(a)(15) of the HEA.	OMB 1840–0788 It is estimated that burden on the 15 agencies that would be affected by the proposed regulation would be reduced by 300 hours if all the agencies decided to add distance education or correspondence education to their scope of recognition.
§ 602.31(a)	Requires accrediting agencies to submit an application for recognition or renewal of recognition at the end of the period of recognition granted by the Secretary, generally every five years. The application must demonstrate that the agency complies with the Department's Criteria for Recognition as defined in CFR 34 Part 602. The proposed regulation clarifies what documents should be provided with an agency's application for recognition. Section 496(d) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.

Regulatory section	Information section	Collection
§ 602.31(b)	Requires accrediting agencies that wish to expand their scope of recognition to submit an application to the Secretary. The proposed language would not place any additional reporting burden on accrediting agencies since the current regulations also require the submission of an application when an agency seeks to expand its scope of recognition. Section 496(a)(4)(B) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.31(c)	Requires agencies to provide a compliance report when it has been determined that they do not fully comply with the criteria for recognition or are ineffective in applying those criteria. In order for the Secretary to determine that agencies are reliable authorities regarding the quality of education or training offered through their accredited institutions or programs, agencies must demonstrate that they fully comply with 34 part 602 subpart B. Therefore, while the requirement to submit a compliance report is not identified in the current regulation, the proposed language would place in writing what has been the practice of the Department in order to comply with Higher Education Act, as amended. Sections 496(a) and (c) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.
§ 602.31(d)	Requires agencies that notify the Department that they are changing their scope of recognition to include distance education or correspondence education to annually monitor enrollment growth of the institutions they accredit that offer distance education. A report would be required to be sent to the Department for each institution that reports a 50 percent or higher increase of headcount enrollment during a fiscal year. The report must address the capacity of each institution to accommodate significant growth in enrollment and to maintain educational quality; the circumstances that led to the growth; and any other applicable information affecting compliance with the regulation. As noted in the discussion of proposed § 602.19(e) this section of the regulation would only affect the 15 institutional accrediting agencies and programmatic accrediting agencies that accredit freestanding institutions that currently do not have distance education in their scope of recognition. Section 496(a)(4)(B) and (q) of the HEA.	OMB 1840–0788 It is estimated that this regulation would increase the burden of 15 of the remaining recognized agencies by 60 hours if all decided to include distance education in their scope of recognition in the future. Based on prior experiences with institutions experiencing significant growth, the burden is estimated to apply to 3 institutions per year.
§ 602.32	Requires the Department to forward to the agency a draft analysis of an agency's application for recognition that includes any identified areas of non-compliance, the proposed recognition recommendation, and a copy of all third-party comments that the Department received. The agency could then provide a written response to the draft staff analysis and the third-party comments. The proposed change would simplify the language of the current regulation in that it combines several paragraphs of the current regulation into a single paragraph. The current regulations also require that the Department invite accrediting agencies to provide a written response to all draft analyses developed by Department staff as well as all third-party comments received by the Department. Section 496(o) of the HEA.	OMB 1840–0788 There is no additional paperwork burden associated with this section of the regulation.

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

This program is 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 Number does not apply.)

List of Subjects in 34 CFR 600 and 34 CFR 602

Colleges and universities, Education, Reporting and recordkeeping requirements.

Dated: July 28, 2009.

Arne Duncan,

Secretary of Education.

For the reasons discussed in the preamble, the Secretary proposes to amend parts 600 and 602 of title 34 of the Code of Federal Regulations as follows:

PART 600—INSTITUTIONAL ELIGIBILITY UNDER THE HIGHER EDUCATION ACT OF 1965, AS AMENDED.

1. The authority citation for part 600 continues to read as follows:

Authority: 20 U.S.C. 1001, 1002, 1003, 1088, 1091, 1094, 1099b, and 1099c, unless otherwise noted.

2. Section 600.2 is amended by:

A. Revising the definition of *Correspondence course.*

B. Adding in alphabetical order a new definition of *Distance education.*

C. Removing the definition of *Telecommunications course.*

The addition and revision read as follows:

§ 600.2 Definitions.

* * * * *

Correspondence course: (1) A course provided by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor. Interaction between the instructor and student is limited, is not regular and substantive, and is primarily initiated by the student. Correspondence courses are typically self-paced.

(2) If a course is part correspondence and part residential training, the Secretary considers the course to be a correspondence course.

(3) A correspondence course is not distance education.

* * * * *

Distance education means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

* * * * *

PART 602—THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

3. The authority citation for part 602 continues to read as follows:

Authority: 20 U.S.C. 1099b, unless otherwise noted.

4. Section 602.3 is amended by:

A. Adding in alphabetical order a new definition of *Compliance report.*

B. Adding in alphabetical order a new definition of *Correspondence education.*

C. Adding in alphabetical order a new definition of *Designated Federal Official.*

D. Adding in alphabetical order a new definition of *Direct assessment program.*

E. Revising the definition of *Distance education.*

F. Adding in alphabetical order a new definition of *Recognition.*

G. Revising paragraph (5) of the definition of *Scope of recognition.*

H. Revising the definition of *Teach-out agreement.*

I. Adding in alphabetical order a new definition of *Teach-out plan.*

The additions and revisions read as follows:

§ 602.3 What definitions apply to this part?

* * * * *

Compliance report means a written report that the Department requires an agency to file to demonstrate that the agency has addressed deficiencies specified in a decision letter from the senior Department official or the Secretary.

Correspondence education means:

(1) Education provided through one or more courses by an institution under which the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructor.

(2) Interaction between the instructor and the student is limited, is not regular and substantive, and is primarily initiated by the student.

(3) Correspondence courses are typically self-paced.

(4) Correspondence education is not distance education.

Designated Federal Official means the Federal officer designated under section 10(f) of the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1.

Direct assessment program means an instructional program that, in lieu of credit hours or clock hours as a measure of student learning, utilizes direct assessment of student learning, or recognizes the direct assessment of student learning by others, and meets the conditions of 34 CFR 668.10. For title IV, HEA purposes, the institution must obtain approval for the direct assessment program from the Secretary under 34 CFR 668.10(g) or (h) as applicable. As part of that approval, the accrediting agency must—

(1) Evaluate the program(s) and include them in the institution's grant of accreditation or preaccreditation; and

(2) Review and approve the institution's claim of each direct assessment program's equivalence in terms of credit or clock hours.

Distance education means education that uses one or more of the technologies listed in paragraphs (1) through (4) of this definition to deliver instruction to students who are separated from the instructor and to support regular and substantive interaction between the students and the instructor, either synchronously or asynchronously. The technologies may include—

(1) The internet;

(2) One-way and two-way transmissions through open broadcast, closed circuit, cable, microwave, broadband lines, fiber optics, satellite, or wireless communications devices;

(3) Audio conferencing; or

(4) Video cassettes, DVDs, and CD–ROMs, if the cassettes, DVDs, or CD–ROMs are used in a course in conjunction with any of the technologies listed in paragraphs (1) through (3) of this definition.

* * * * *

Recognition means an unappealed determination by the senior Department official under § 602.36, or a determination by the Secretary on appeal under § 602.37, that an accrediting agency complies with the criteria for recognition listed in subpart B of this part and that the agency is

effective in its application of those criteria. A grant of recognition to an agency as a reliable authority regarding the quality of education or training offered by institutions or programs it accredits remains in effect for the term granted except upon a determination made in accordance with subpart C of this part that the agency no longer complies with the subpart B criteria or that it has become ineffective in its application of those criteria.

* * * * *

Scope of recognition or *scope* * * *

(5) Coverage of accrediting activities related to distance education or correspondence education.

* * * * *

Teach-out agreement means a written agreement between institutions that provides for the equitable treatment of students and a reasonable opportunity for students to complete their program of study if an institution, or an institutional location that provides one hundred percent of at least one program offered, ceases to operate before all enrolled students have completed their program of study.

Teach-out plan means a written plan developed by an institution that provides for the equitable treatment of students if an institution, or an institutional location that provides one hundred percent of at least one program, ceases to operate before all students have completed their program of study, and may include, if required by the institution's accrediting agency, a teach-out agreement between institutions.

* * * * *

5. Section 602.15 is amended by:

A. Revising paragraph (a)(2).

B. In paragraph (b)(1), removing the word ''two'' and removing the letter ''s'' from the word ''reviews'' the first time it appears.

C. Revising paragraph (b)(2).

The revisions read as follows:

§ 602.15 Administrative and fiscal responsibilities.

* * * * *

(a) * * *

(2) Competent and knowledgeable individuals, qualified by education and experience in their own right and trained by the agency on their responsibilities, as appropriate for their roles, regarding the agency's standards, policies, and procedures, to conduct its on-site evaluations, apply or establish its policies, and make its accrediting and preaccrediting decisions, including, if applicable to the agency's scope, their responsibilities regarding distance education and correspondence education;

* * * * *

(b) * * *

(2) All decisions made throughout an institution's or program's affiliation with the agency regarding the accreditation and preaccreditation of any institution or program and substantive changes, including all correspondence that is significantly related to those decisions.

* * * * *

6. Section 602.16 by amended by:

A. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively.

B. Revising paragraph (a)(1)(i).

C. Adding new paragraphs (c) and (f).

The additions and revision read as follows:

§ 602.16 Accreditation and preaccreditation standards.

(a) * * *

(1) * * *

(i) Success with respect to student achievement in relation to the institution's mission, which may include different standards for different institutions or programs, as established by the institution, including, as appropriate, consideration of State licensing examinations, course completion, and job placement rates.

* * * * *

(c) If the agency has or seeks to include within its scope of recognition the evaluation of the quality of institutions or programs offering distance education or correspondence education, the agency's standards must effectively address the quality of an institution's distance education or correspondence education in the areas identified in paragraph (a)(1) of this section. The agency is not required to have separate standards, procedures, or policies for the evaluation of distance education or correspondence education.

* * * * *

(f) Nothing in paragraph (a) of this section restricts—

(1) An accrediting agency from setting, with the involvement of its members, and applying accreditation standards for or to institutions or programs that seek review by the agency; or

(2) An institution from developing and using institutional standards to show its success with respect to student achievement, which achievement may be considered as part of any accreditation review.

* * * * *

7. Section 602.17 is amended by:

A. In paragraph (e), removing the word ''and'' at the end of the paragraph.

B. In paragraph (f), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

C. Adding a new paragraph (g).

The addition reads as follows:

§ 602.17 Application of standards in reaching an accrediting decision.

* * * * *

(g) Requires institutions that offer distance education or correspondence education to have processes in place through which the institution establishes that the student who registers in a distance education or correspondence education course or program is the same student who participates in and completes the course or program and receives the academic credit. The agency meets this requirement if it—

(1) Requires institutions to verify the identity of a student who participates in class or coursework by using, at the option of the institution, methods such as—

(i) A secure login and pass code;

(ii) Proctored examinations; and

(iii) New or other technologies and practices that are effective in verifying student identification; and

(2) Makes clear in writing that institutions must use processes that protect student privacy and notify students of any projected additional student charges associated with the verification of student identity at the time of registration or enrollment.

* * * * *

8. Section 602.18 is amended by:

A. Revising the introductory text.

B. Redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d), respectively.

C. In newly redesignated paragraph (c), removing the word ''and'' at the end of the paragraph.

D. In newly redesignated paragraph (d), removing the punctuation ''.'' and adding, in its place, the words ''; and''.

E. Adding new paragraphs (a) and (e).

The additions and revision read as follows:

§ 602.18 Ensuring consistency in decision-making.

The agency must consistently apply and enforce standards that respect the stated mission of the institution, including religious mission, and that ensure that the education or training offered by an institution or program, including any offered through distance education or correspondence education, is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency. The agency meets this requirement if the agency—

(a) Has written specification of the requirements for accreditation and preaccreditation that include clear

standards for an institution or program to be accredited;

* * * * *

(e) Provides the institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards.

* * * * *

9. Section 602.19 is amended by:

A. Revising paragraph (b).

B. Adding new paragraphs (c), (d), and (e).

The revision and additions read as follows:

§ 602.19 Monitoring and reevaluation of accredited institutions and programs.

* * * * *

(b) The agency must demonstrate it has, and effectively applies, a set of monitoring and evaluation approaches that enables the agency to identify problems with an institution's or program's continued compliance with agency standards and that takes into account institutional or program strengths and stability. These approaches must include periodic reports, and collection and analysis of key data and indicators, identified by the agency, including, but not limited to, fiscal information and measures of student achievement, consistent with the provisions of § 602.16(f). This provision does not require institutions or programs to provide annual reports on each specific accreditation criterion.

(c) Each agency must monitor overall growth of the institutions or programs it accredits and, at least annually, collect headcount enrollment data from those institutions or programs.

(d) Institutional accrediting agencies must monitor the growth of programs at institutions experiencing significant enrollment growth, as reasonably defined by the agency.

(e) Any agency that has notified the Secretary of a change in its scope in accordance with § 602.27(a)(5) must monitor the headcount enrollment of each institution it has accredited that offers distance education or correspondence education. If any such institution has experienced an increase in headcount enrollment of 50 percent or more within one institutional fiscal year, the agency must report that information to the Secretary within 30 days of acquiring such data.

* * * * *

10. Section 602.22 is amended by:

A. In paragraph (a)(2)(iii), removing the words '', in either content'' and adding, in their place, the words ''from the existing offerings of educational programs,''.

B. In paragraph (a)(2)(iv), removing the words ''courses or'', adding the words ''of study'' after the word ''programs'' the first time it appears, and removing the word ''above'' and adding, in its place, the words ''different from''.

C. Revising paragraph (a)(2)(vii).

D. Adding new paragraphs (a)(2)(viii), (a)(2)(ix), and (a)(2)(x).

E. Adding a new paragraph (a)(3).

F. Revising paragraph (b).

G. Revising paragraph (c), introductory text.

H. In paragraph (c)(2), adding the words ''a representative sample of'' immediately after the words ''visits to''.

The additions and revisions read as follows:

§ 602.22 Substantive change.

(a) * * *

(2) * * *

(vii) If the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the entering into a contract under which an institution or organization not certified to participate in the title IV, HEA programs offers more than 25 percent of one or more of the accredited institution's educational programs.

(viii)(A) If the agency's accreditation of an institution enables it to seek eligibility to participate in title IV, HEA programs, the establishment of an additional location at which the institution offers at least 50 percent of an educational program. The addition of such a location must be approved by the agency in accordance with paragraph (c) of this section unless the accrediting agency determines, and issues a written determination stating that the institution has—

(*1*) Successfully completed at least one cycle of accreditation of maximum length offered by the agency and one renewal, or has been accredited for at least ten years;

(*2*) At least three additional locations that the agency has approved; and

(*3*) Met criteria established by the agency indicating sufficient capacity to add additional locations without individual prior approvals, including at a minimum satisfactory evidence of a system to ensure quality across a distributed enterprise that includes—

(*i*) Clearly identified academic control;

(*ii*) Regular evaluation of the locations;

(*iii*) Adequate faculty, facilities, resources, and academic and student support systems;

(*iv*) Financial stability; and

(*v*) Long-range planning for expansion.

(B) The agency's procedures for approval of an additional location, pursuant to paragraph (a)(2)(viii)(A) of this section, must require timely reporting to the agency of every additional location established under this approval.

(C) Each agency determination or redetermination to preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section may not exceed five years.

(D) The agency may not preapprove an institution's addition of locations under paragraph (a)(2)(viii)(A) of this section after the institution undergoes a change in ownership resulting in a change in control as defined in 34 CFR 600.31 until the institution demonstrates that it meets the conditions for the agency to preapprove additional locations described in this paragraph.

(E) The agency must have an effective mechanism for conducting, at reasonable intervals, visits to a representative sample of additional locations approved under paragraph (a)(2)(viii)(A) of this section.

(ix) The acquisition of any other institution or any program or location of another institution.

(x) The addition of a permanent location at a site at which the institution is conducting a teach-out for students of another institution that has ceased operating before all students have completed their program of study.

(3) The agency's substantive change policy must define when the changes made or proposed by an institution are or would be sufficiently extensive to require the agency to conduct a new comprehensive evaluation of that institution.

(b) The agency may determine the procedures it uses to grant prior approval of the substantive change. However, these procedures must specify an effective date, which is not retroactive, on which the change is included in the program's or institution's accreditation. An agency may designate the date of a change in ownership as the effective date of its approval of that substantive change if the accreditation decision is made within 30 days of the change in ownership. Except as provided in paragraph (c) of this section, these procedures may, but need not, require a visit by the agency.

(c) Except as provided in paragraph (a)(2)(viii)(A) of this section, if the agency's accreditation of an institution enables the institution to seek eligibility to participate in title IV, HEA programs, the agency's procedures for the approval of an additional location where at least

50 percent of an educational program is offered must provide for a determination of the institution's fiscal and administrative capacity to operate the additional location. In addition, the agency's procedures must include—

* * * * *

11. Section 602.23 is amended by:

A. Revising paragraph (a) introductory text.

B. Revising paragraph (c)(1).

The revisions read as follows:

§ 602.23 Operating procedures all agencies must have.

(a) The agency must maintain and make available to the public written materials describing—

* * * * *

(c) * * *

(1) Review in a timely, fair, and equitable manner any complaint it receives against an accredited institution or program that is related to the agency's standards or procedures. The agency may not complete its review and make a decision regarding a complaint unless, in accordance with published procedures, it ensures that the institution or program has sufficient opportunity to provide a response to the complaint;

* * * * *

12. Section 602.24 is amended by:

A. Revising paragraph (c).

B. Adding new paragraphs (d) and (e).

The addition and revision read as follows:

§ 602.24 Additional procedures certain institutional accreditors must have.

* * * * *

(c) *Teach-out plans and agreements.* (1) The agency must require an institution it accredits or preaccredits to submit a teach-out plan to the agency for approval upon the occurrence of any of the following events:

(i) The Secretary notifies the agency that the Secretary has initiated an emergency action against an institution, in accordance with section 487(c)(1)(G) of the HEA, or an action to limit, suspend, or terminate an institution participating in any title IV, HEA program, in accordance with section 487(c)(1)(F) of the HEA, and that a teach-out plan is required.

(ii) The agency acts to withdraw, terminate, or suspend the accreditation or preaccreditation of the institution.

(iii) The institution notifies the agency that it intends to cease operations entirely or close a location that provides one hundred percent of at least one program.

(iv) A State licensing or authorizing agency notifies the agency that an institution's license or legal authorization to provide an educational program has been or will be revoked.

(2) The agency must evaluate the teach-out plan to ensure it provides for the equitable treatment of students under criteria established by the agency, specifies additional charges, if any, and provides for notification to the students of any additional charges.

(3) If the agency approves a teach-out plan that includes a program that is accredited by another recognized accrediting agency, it must notify that accrediting agency of its approval.

(4) The agency may require an institution it accredits or preaccredits to enter into a teach-out agreement as part of its teach-out plan.

(5) The agency must require an institution it accredits or preaccredits that enters into a teach-out agreement, either on its own or at the request of the agency, to submit that teach-out agreement for approval. The agency may approve the teach-out agreement only if the agreement is between institutions that are accredited or preaccredited by a nationally recognized accrediting agency, is consistent with applicable standards and regulations, and provides for the equitable treatment of students by ensuring that—

(i) The teach-out institution has the necessary experience, resources, and support services to—

(A) Provide an educational program that is of acceptable quality and reasonably similar in content, structure, and scheduling to that provided by the institution that is ceasing operations either entirely or at one of its locations; and

(B) Remain stable, carry out its mission, and meet all obligations to existing students; and

(ii) The teach-out institution demonstrates that it can provide students access to the program and services without requiring them to move or travel substantial distances and that it will provide students with information about additional charges, if any.

(d) *Closed institution.* If an institution the agency accredits or preaccredits closes without a teach-out plan or agreement, the agency must work with the Department and the appropriate State agency, to the extent feasible, to assist students in finding reasonable opportunities to complete their education without additional charges.

(e) *Transfer of credit policies.* The accrediting agency must confirm, as part of its review for initial accreditation or preaccreditation, or renewal of accreditation, that the institution has transfer of credit policies that—

(1) Are publicly disclosed in accordance with § 668.43(x); and

(2) Include a statement of the criteria established by the institution regarding the transfer of credit earned at another institution of higher education.

* * * * *

13. Section 602.25 is revised to read as follows:

§ 602.25 Due process.

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. The agency meets this requirement if the agency does the following:

(a) Provides adequate written specification of its requirements, including clear standards, for an institution or program to be accredited or preaccredited.

(b) Uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.

(c) Provides written specification of any deficiencies identified at the institution or program examined.

(d) Provides sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken.

(e) Notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis for the action.

(f) Provides an opportunity, upon written request of an institution or program, for the institution or program to appeal any adverse action prior to the action becoming final.

(1) The appeal must take place at a hearing before an appeals panel that—

(i) May not include current members of the agency's decision-making body that took the initial adverse action;

(ii) Is subject to a conflict of interest policy; and

(iii) Affirms, amends, or reverses the adverse action, which will be implemented by the appeals panel or by the original decision-making body, at the agency's option. If the original decision-making body is responsible for implementing the appeals panel's decision, that body must act regarding the institution's or program's accreditation status in a manner consistent with the appeals panel's decision.

(2) The agency must recognize the right of the institution or program to employ counsel to represent the

institution or program during its appeal, including to make any presentation that the agency permits the institution or program to make on its own during the appeal.

(g) The agency notifies the institution or program in writing of the result of its appeal and the basis for that result.

(h)(1) The agency must provide for a process, in accordance with written procedures, through which an institution or program may, before the agency reaches a final adverse action decision, seek review of new financial information if all of the following conditions are met:

(i) The financial information was unavailable to the institution or program until after the decision subject to appeal was made.

(ii) The financial information is significant and bears materially on the financial deficiencies identified by the agency. The criteria of significance and materiality are determined by the agency.

(iii) The only remaining deficiency cited by the agency in support of a final adverse action decision is the institution's or program's failure to meet an agency standard pertaining to finances.

(2) An institution or program may seek the review of new financial information described in paragraph (h)(1) of this section only once and any determination by the agency made with respect to that review does not provide a basis for an appeal.

(Authority: 20 U.S.C. 1099b)

14. Section 602.26 is amended by:

A. In paragraph (b)(2), removing the punctuation ''; '' and adding, in its place, the punctuation ''.''.

B. Adding a new paragraph (b)(3).

C. In paragraph (c), removing the words ''(b)(1) and (b)(2)'' and adding, in their place, the words ''(b)(1), (b)(2), and (b)(3)''.

D. Revising paragraph (d).

The addition and revision read as follows:

§ 602.26 Notification of accrediting decisions.

* * * * *

(b) * * *

(3) A final decision to take any other adverse action, as defined by the agency, not listed in paragraph (b)(2) of this section;

* * * * *

(d) For any decision listed in paragraph (b)(2) of this section, makes available to the Secretary, the appropriate State licensing or authorizing agency, and the public, no later than 60 days after the decision, a brief statement summarizing the reasons for the agency's decision and the official comments that the affected institution or program may wish to make with regard to that decision, or evidence that the affected institution has been offered the opportunity to provide official comment;

* * * * *

15. Section 602.27 is revised to read as follows:

§ 602.27 Other information an agency must provide the Department.

(a) The agency must submit to the Department—

(1) A copy of any annual report it prepares;

(2) A copy, updated annually, of its directory of accredited and preaccredited institutions and programs;

(3) A summary of the agency's major accrediting activities during the previous year (an annual data summary), if requested by the Secretary to carry out the Secretary's responsibilities related to this part;

(4) Any proposed change in the agency's policies, procedures, or accreditation or preaccreditation standards that might alter its—

(i) Scope of recognition, except as provided in paragraph (a)(5) of this section; or

(ii) Compliance with the criteria for recognition;

(5) Notification that the agency has expanded its scope of recognition to include distance education or correspondence education as provided in section 496(a)(4)(B)(i)(I) of the HEA. Such an expansion of scope is effective on the date the Department receives the notification;

(6) The name of any institution or program it accredits that the agency has reason to believe is failing to meet its title IV, HEA program responsibilities or is engaged in fraud or abuse, along with the agency's reasons for concern about the institution or program; and

(7) If the Secretary requests, information that may bear upon an accredited or preaccredited institution's compliance with its title IV, HEA program responsibilities, including the eligibility of the institution or program to participate in title IV, HEA programs.

(b) If an agency has a policy regarding notification to an institution or program of contact with the Department in accordance with paragraph (a)(6) or (a)(7) of this section, it must provide for a case-by-case review of the circumstances surrounding the contact, and the need for the confidentiality of that contact. Upon a specific request by the Department, the agency must consider that contact confidential.

(Authority: 20 U.S.C. 1099b)

16. Subpart C is revised to read as follows:

Subpart C—The Recognition Process

Application and Review by Department Staff

Sec.

602.30 Activities covered by recognition procedures.
602.31 Agency submissions to the Department.
602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.
602.33 Procedures for review of agencies during the period of recognition.

Review by the National Advisory Committee on Institutional Quality and Integrity

602.34 Advisory Committee meetings.
602.35 Responding to the Advisory Committee's recommendation.

Review and Decision by the Senior Department Official

602.36 Senior Department official's decision.

Appeal Rights and Procedures

602.37 Appealing the senior Department official's decision to the Secretary.
602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.

Subpart C—The Recognition Process

Application and Review by Department Staff

§ 602.30 Activities covered by recognition procedures.

Recognition proceedings are administrative actions taken on any of the following matters:

(a) Applications for initial or continued recognition submitted under § 602.31(a).

(b) Applications for an expansion of scope submitted under § 602.31(b).

(c) Compliance reports submitted under § 602.31(c).

(d) Reviews of agencies that have expanded their scope of recognition by notice, following receipt by the Department of information of an increase in headcount enrollment described in § 602.19(e).

(e) Staff analyses identifying areas of non-compliance based on a review conducted under § 602.33. (Authority: 20 U.S.C. 1099b)

§ 602.31 Agency submissions to the Department.

(a) *Applications for recognition or renewal of recognition.* An accrediting agency seeking initial or continued recognition must submit a written application to the Secretary. Each accrediting agency must submit an application for continued recognition at

least once every five years, or within a shorter time period specified in the final recognition decision. The application must consist of—

(1) A statement of the agency's requested scope of recognition;

(2) Evidence, including documentation, that the agency complies with the criteria for recognition listed in subpart B of this part and effectively applies those criteria; and

(3) Evidence, including documentation, of how an agency that includes or seeks to include distance education or correspondence education in its scope of recognition applies its standards in evaluating programs and institutions it accredits that offer distance education or correspondence education.

(b) *Applications for expansions of scope.* An agency seeking an expansion of scope by application must submit a written application to the Secretary. The application must—

(1) Specify the scope requested;

(2) Include documentation of experience in accordance with § 602.12(b); and

(3) Provide copies of any relevant standards, policies, or procedures developed and applied by the agency and documentation of the application of these standards, policies, or procedures.

(c) *Compliance reports.* If an agency is required to submit a compliance report, it must do so within 30 days following the end of the period for achieving compliance as specified in the decision of the senior Department official or Secretary, as applicable.

(d) *Review following an increase in headcount enrollment.* If an agency that has notified the Secretary in writing of its change in scope to include distance education or correspondence education in accordance with § 602.27(a)(5) reports an increase in headcount enrollment in accordance with § 602.19(e) for an institution it accredits, or if the Department notifies the agency of such an increase at one of the agency's accredited institutions, the agency must, within 45 days of reporting the increase or receiving notice of the increase from the Department, as applicable, submit a report explaining—

(1) How the agency evaluates the capacity of the institutions or programs it accredits to accommodate significant growth in enrollment and to maintain educational quality;

(2) The specific circumstances regarding the growth at the institution(s) or programs(s) that triggered the review and the results of any evaluation conducted by the agency; and

(3) Any other information that the agency deems appropriate to demonstrate the effective application of the criteria for recognition or that the Department may require.

(e) *Consent to sharing of information.* By submitting an application for recognition, the agency authorizes Department staff throughout the application process and during any period of recognition—

(1) To observe its site visits to one or more of the institutions or programs it accredits or preaccredits, on an announced or unannounced basis;

(2) To visit locations where agency activities such as training, review and evaluation panel meetings, and decision meetings take place, on an announced or unannounced basis;

(3) To obtain copies of all documents the staff deems necessary to complete its review of the agency; and

(4) To gain access to agency records, personnel, and facilities.

(f) *Public availability of agency records obtained by the Department.* (1) The Secretary's processing and decision making on requests for public disclosure of agency materials reviewed under this part are governed by the Freedom of Information Act, 5 U.S.C. 552; the Trade Secrets Act, 18 U.S.C. 1905; the Privacy Act of 1974, as amended, 5 U.S.C 552a; the Federal Advisory Committee Act, 5 U.S.C. Appdx. 1; and all other applicable laws. In recognition proceedings, agencies may—

(i) Redact information that would identify individuals or institutions that is not essential to the Department's review of the agency;

(ii) Make a good faith effort to designate all business information within agency submissions that the agency believes would be exempt from disclosure under exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). A blanket designation of all information contained within a submission, or of a category of documents, as meeting this exemption will not be considered a good faith effort and will be disregarded;

(iii) Identify any other material the agency believes would be exempt from public disclosure under FOIA, the factual basis for the request, and any legal basis the agency has identified for withholding the document from disclosure; and

(iv) Ensure documents submitted are only those required for Department review or as requested by Department officials.

(2) The Secretary processes FOIA requests in accordance with 34 CFR part 5 and makes all documents provided to the Advisory Committee available to the public.

(Authority: 20 U.S.C. 1099b)

§ 602.32 Procedures for Department review of applications for recognition or for change in scope, compliance reports, and increases in enrollment.

(a) After receipt of an agency's application for initial or continued recognition, or change in scope, or an agency's compliance report, or an agency's report submitted under § 602.31(d), Department staff publishes a notice of the agency's application or report in the **Federal Register** inviting the public to comment on the agency's compliance with the criteria for recognition and establishing a deadline for receipt of public comment.

(b) The Department staff analyzes the agency's application for initial or renewal of recognition, compliance report, or report submitted under § 602.31(d) to determine whether the agency satisfies the criteria for recognition, taking into account all available relevant information concerning the compliance of the agency with those criteria and in the agency's effectiveness in applying the criteria. The analysis of an application for recognition and, as appropriate, of a compliance report, or of a report required under § 602.31(d), includes—

(1) Observations from site visit(s), on an announced or unannounced basis, to the agency or to a location where agency activities such as training, review and evaluation panel meetings, and decision meetings take place and to one or more of the institutions or programs it accredits or preaccredits;

(2) Review of the public comments and other third-party information the Department staff receives by the established deadline, and the agency's responses to the third-party comments, as appropriate, as well as any other information Department staff assembles for purposes of evaluating the agency under this part; and

(3) Review of complaints or legal actions involving the agency.

(c) The Department staff analyzes the materials submitted in support of an application for expansion of scope to ensure that the agency has the requisite experience, policies that comply with subpart B of this part, capacity, and performance record to support the request.

(d) Department staff's evaluation of an agency may also include a review of information directly related to institutions or programs accredited or preaccredited by the agency relative to their compliance with the agency's standards, the effectiveness of the

standards, and the agency's application of those standards.

(e) If, at any point in its evaluation of an agency seeking initial recognition, Department staff determines that the agency fails to demonstrate compliance with the basic eligibility requirements in §§ 602.10 through 602.13, the staff—

(1) Returns the agency's application and provides the agency with an explanation of the deficiencies that caused staff to take that action; and

(2) Recommends that the agency withdraw its application and reapply when the agency can demonstrate compliance.

(f) Except with respect to an application that has been returned or is withdrawn under paragraph (e) of this section, when Department staff completes its evaluation of the agency, the staff—

(1) Prepares a written draft analysis of the agency;

(2) Sends the draft analysis including any identified areas of non-compliance and a proposed recognition recommendation, and all supporting documentation, including all third-party comments the Department received by the established deadline, to the agency;

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation and third-party comments, specifying a deadline that provides at least 30 days for the agency's response;

(4) Reviews the response to the draft analysis the agency submits, if any, and prepares the written final analysis. The final analysis includes a recognition recommendation to the senior Department official, as the Department staff deems appropriate, including, but not limited to, a recommendation to approve, deny, limit, suspend, or terminate recognition, require the submission of a compliance report and continue recognition pending a final decision on compliance, approve or deny a request for expansion of scope, or revise or affirm the scope of the agency; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and any other available information provided to the Advisory Committee under § 602.34(c).

(g) The agency may request that the Advisory Committee defer acting on an application at that Advisory Committee meeting if Department staff fails to provide the agency with the materials described, and within the timeframes provided, in paragraphs (f)(3) and (f)(5) of this section. If the Department staff's failure to send the materials in accordance with the timeframe described in paragraph (f)(3) or (f)(5) of this section is due to the failure of the agency to submit reports to the Department, other information the Secretary requested, or its response to the draft analysis, by the deadline established by the Secretary, the agency forfeits its right to request a deferral of its application.

(Authority: 20 U.S.C. 1099b)

§ 602.33 Procedures for review of agencies during the period of recognition.

(a) Department staff may review the compliance of a recognized agency with the criteria for recognition at any time—

(1) At the request of the Advisory Committee; or

(2) Based on any information that, as determined by Department staff, appears credible and raises issues relevant to recognition.

(b) The review may include, but need not be limited to, any of the activities described in § 602.32(b) and (d).

(c) If, in the course of the review, and after provision to the agency of the documentation concerning the inquiry and consultation with the agency, Department staff notes that one or more deficiencies may exist in the agency's compliance with the criteria for recognition or in the agency's effective application of those criteria, it—

(1) Prepares a written draft analysis of the agency's compliance with the criteria of concern. The draft analysis reflects the results of the review, and includes a recommendation regarding what action to take with respect to recognition. Possible recommendations include, but are not limited to, a recommendation to limit, suspend, or terminate recognition, or require the submission of a compliance report and to continue recognition pending a final decision on compliance;

(2) Sends the draft analysis including any identified areas of non-compliance, and a proposed recognition recommendation, and all supporting documentation to the agency; and

(3) Invites the agency to provide a written response to the draft analysis and proposed recognition recommendation, specifying a deadline that provides at least 30 days for the agency's response.

(d) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has demonstrated compliance with the criteria for recognition, the staff notifies the agency in writing of the results of the review. If the review was requested by the Advisory Committee, staff also provides the Advisory Committee with the results of the review.

(e) If, after review of the agency's response to the draft analysis, Department staff concludes that the agency has not demonstrated compliance, the staff—

(1) Notifies the agency that the draft analysis will be finalized for presentation to the Advisory Committee;

(2) Publishes a notice in the **Federal Register** including, if practicable, an invitation to the public to comment on the agency's compliance with the criteria in question and establishing a deadline for receipt of public comment;

(3) Provides the agency with a copy of all public comments received and, if practicable, invites a written response from the agency;

(4) Finalizes the staff analysis as necessary to reflect its review of any agency response and any public comment received; and

(5) Provides to the agency, no later than seven days before the Advisory Committee meeting, the final staff analysis and a recognition recommendation and any other information provided to the Advisory Committee under § 602.34(c).

(f) The Advisory Committee reviews the matter in accordance with § 602.34.

(Authority: 20 U.S.C. 1099b)

Review by the National Advisory Committee on Institutional Quality and Integrity

§ 602.34 Advisory Committee meetings.

(a) Department staff submits a proposed schedule to the Chairperson of the Advisory Committee based on anticipated completion of staff analyses.

(b) The Chairperson of the Advisory Committee establishes an agenda for the next meeting and, in accordance with the Federal Advisory Committee Act, presents it to the Designated Federal Official for approval.

(c) Before the Advisory Committee meeting, Department staff provides the Advisory Committee with—

(1) The agency's application for recognition or for expansion of scope, the agency's compliance report, or the agency's report submitted under § 602.31(d), and supporting documentation;

(2) The final Department staff analysis of the agency developed in accordance with § 602.32 or § 602.33, and any supporting documentation;

(3) At the request of the agency, the agency's response to the draft analysis;

(4) Any written third-party comments the Department received about the agency on or before the established deadline;

(5) Any agency response to third-party comments; and

(6) Any other information Department staff relied upon in developing its analysis.

(d) At least 30 days before the Advisory Committee meeting, the Department publishes a notice of the meeting in the **Federal Register** inviting interested parties, including those who submitted third-party comments concerning the agency's compliance with the criteria for recognition, to make oral presentations before the Advisory Committee.

(e) The Advisory Committee considers the materials provided under paragraph (c) of this section in a public meeting and invites Department staff, the agency, and other interested parties to make oral presentations during the meeting. A transcript is made of all Advisory Committee meetings.

(f) The written motion adopted by the Advisory Committee regarding each agency's recognition will be made available during the Advisory Committee meeting. The Department will provide each agency, upon request, with a copy of the motion on recognition at the meeting. Each agency that was reviewed will be sent an electronic copy of the motion relative to that agency as soon as practicable after the meeting.

(g) After each meeting of the Advisory Committee at which a review of agencies occurs, the Advisory Committee forwards to the senior Department official its recommendation with respect to each agency, which may include, but is not limited to, a recommendation to approve, deny, limit, suspend, or terminate recognition, to grant or deny a request for expansion of scope, to revise or affirm the scope of the agency, or to require the agency to submit a compliance report and to continue recognition pending a final decision on compliance.

(Authority: 20 U.S.C. 1099b)

§ 602.35 Responding to the Advisory Committee's recommendation.

(a) Within ten days following the Advisory Committee meeting, the agency and Department staff may submit written comments to the senior Department official on the Advisory Committee's recommendation. The agency must simultaneously submit a copy of its written comments, if any, to Department staff. Department staff must simultaneously submit a copy of its written comments, if any, to the agency.

(b) Comments must be limited to—

(1) Any Advisory Committee recommendation that the agency or Department staff believes is not supported by the record;

(2) Any incomplete Advisory Committee recommendation based on the agency's application; and

(3) The inclusion of any recommendation or draft proposed decision for the senior Department official's consideration.

(c)(1) Neither the Department staff nor the agency may submit additional documentary evidence with its comments unless the Advisory Committee's recognition recommendation proposes finding the agency noncompliant with, or ineffective in its application of, a criterion or criteria for recognition not identified in the final Department staff analysis provided to the Advisory Committee.

(2) Within ten days of receipt by the Department staff of an agency's comments or new evidence, if applicable, or of receipt by the agency of the Department staff's comments, Department staff, the agency, or both, as applicable, may submit a response to the senior Department official. Simultaneously with submission, the agency must provide a copy of any response to the Department staff. Simultaneously with submission, Department staff must provide a copy of any response to the agency.

(Authority: 20 U.S.C. 1099b)

Review and Decision by the Senior Department Official

§ 602.36 Senior Department official's decision.

(a) The senior Department official makes a decision regarding recognition of an agency based on the record compiled under §§ 602.32, 602.33, 602.34, and 602.35 including, as applicable, the following:

(1) The materials provided to the Advisory Committee under § 602.34(c).

(2) The transcript of the Advisory Committee meeting.

(3) The recommendation of the Advisory Committee.

(4) Written comments and responses submitted under § 602.35.

(5) New evidence submitted in accordance with § 602.35(c)(1).

(6) A communication from the Secretary referring an issue to the senior Department official's consideration under § 602.37(e).

(b) In the event that statutory authority or appropriations for the Advisory Committee ends, or there are fewer duly appointed Advisory Committee members than needed to constitute a quorum, and under extraordinary circumstances when there are serious concerns about an agency's compliance with subpart B of this part that require prompt attention, the senior Department official may make a decision in a recognition proceeding based on the record compiled under § 602.32 or § 602.33 after providing the agency with an opportunity to respond to the final staff analysis. Any decision made by the senior Department official absent a recommendation from the Advisory Committee may be appealed to the Secretary as provided in § 602.37.

(c) Following consideration of an agency's recognition under this section, the senior Department official issues a recognition decision.

(d) Except with respect to decisions made under paragraph (f) or (g) of this section and matters referred to the senior Department official under § 602.37(e) or (f), the senior Department official notifies the agency in writing of the senior Department official's decision regarding the agency's recognition within 90 days of the Advisory Committee meeting or conclusion of the review under paragraph (b) of this section.

(e) The senior Department official's decision may include, but is not limited to, approving, denying, limiting, suspending, or terminating recognition, granting or denying an application for an expansion of scope, revising or affirming the scope of the agency, or continuing recognition pending submission and review of a compliance report under §§ 602.32 and 602.34 and review of the report by the senior Department official under this section.

(1)(i) The senior Department official approves recognition if the agency complies with the criteria for recognition listed in subpart B of this part and if the agency effectively applies those criteria.

(ii) If the senior Department official approves recognition, the recognition decision defines the scope of recognition and the recognition period. The recognition period does not exceed five years, including any time during which recognition was continued to permit submission and review of a compliance report.

(iii) If the scope or period of recognition is less than that requested by the agency, the senior Department official explains the reasons for approving a lesser scope or recognition period.

(2)(i) Except as provided in paragraph (e)(3) of this section, if the agency either fails to comply with the criteria for recognition listed in subpart B of this part, or to apply those criteria effectively, the senior Department

official denies, limits, suspends, or terminates recognition.

(ii) If the senior Department official denies, limits, suspends, or terminates recognition, the senior Department official specifies the reasons for this decision, including all criteria the agency fails to meet and all criteria the agency has failed to apply effectively.

(3)(i) Except as provided in paragraph (e)(3)(ii) of this section, if a recognized agency fails to demonstrate compliance with or effective application of a criterion or criteria, but the senior Department official concludes that the agency will demonstrate or achieve compliance with the criteria for recognition and effective application of those criteria within 12 months or less, the senior Department official may continue the agency's recognition, pending submission by the agency of a compliance report, review of the report under §§ 602.32 and 602.34, and review of the report by the senior Department official under this section. In such a case, the senior Department official specifies the criteria the compliance report must address, and a time period, not longer than 12 months, during which the agency must achieve compliance and effectively apply the criteria. The compliance report documenting compliance and effective application of criteria is due not later than 30 days after the end of the period specified in the senior Department official's decision.

(ii) If the record includes a compliance report, and the senior Department official determines that an agency has not complied with the criteria for recognition, or has not effectively applied those criteria, during the time period specified by the senior Department official in accordance with paragraph (e)(3)(i) of this section, the senior Department official denies, limits, suspends, or terminates recognition, except, in extraordinary circumstances, upon a showing of good cause for an extension of time as determined by the senior Department official and detailed in the senior Department official's decision. If the senior Department official determines good cause for an extension has been shown, the senior Department official specifies the length of the extension and what the agency must do during it to merit a renewal of recognition.

(f) If the senior Department official determines, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application of, a criterion or criteria of recognition not identified earlier in the proceedings as an area of noncompliance, the senior Department official provides—

(1) The agency with an opportunity to submit a written response and documentary evidence addressing the finding; and

(2) The staff with an opportunity to present its analysis in writing.

(g) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the senior Department official's attention while a decision regarding the agency's recognition is pending before the senior Department official, and if the senior Department official concludes the recognition decision should not be made without consideration of the information, the senior Department official either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and consideration by the Advisory Committee under § 602.34; or

(2)(i) Provides the information to the agency and Department staff;

(ii) Permits the agency to respond to the senior Department official and the Department staff in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides Department staff with an opportunity to respond in writing to the agency's submission under paragraph (g)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on the record described in paragraph (a) of this section, as supplemented by the information provided under this paragraph.

(h) No agency may submit information to the senior Department official, or ask others to submit information on its behalf, for purposes of invoking paragraph (g) of this section. Before invoking paragraph (g) of this section, the senior Department official will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(i) If the senior Department official does not reach a final decision to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the senior Department official automatically extends the recognition period until a final decision is reached.

(j) Unless appealed in accordance with § 602.37, the senior Department official's decision is the final decision of the Secretary.

(Authority: 20 U.S.C. 1099b)

Appeal Rights and Procedures

§ 602.37 Appealing the senior Department official's decision to the Secretary.

(a) The agency may appeal the senior Department official's decision to the Secretary. Such appeal stays the decision of the senior Department official until final disposition of the appeal. If an agency wishes to appeal, the agency must—

(1) Notify the Secretary and the senior Department official in writing of its intent to appeal the decision of the senior Department official, no later than ten days after receipt of the decision;

(2) Submit its appeal to the Secretary in writing no later than 30 days after receipt of the decision; and

(3) Provide the senior Department official with a copy of the appeal at the same time it submits the appeal to the Secretary.

(b) The senior Department official may file a written response to the appeal. To do so, the senior Department official must—

(1) Submit a response to the Secretary no later than 30 days after receipt of a copy of the appeal; and

(2) Provide the agency with a copy of the senior Department official's response at the same time it is submitted to the Secretary.

(c) Neither the agency nor the senior Department official may include in its submission any new evidence it did not submit previously in the proceeding.

(d) On appeal, the Secretary makes a recognition decision, as described in § 602.36(e). If the decision requires a compliance report, the report is due within 30 days after the end of the period specified in the Secretary's decision. The Secretary renders a final decision after taking into account the senior Department official's decision, the agency's written submissions on appeal, the senior Department official's response to the appeal, if any, and the entire record before the senior Department official. The Secretary notifies the agency in writing of the Secretary's decision regarding the agency's recognition.

(e) The Secretary may determine, based on the record, that a decision to deny, limit, suspend, or terminate an agency's recognition may be warranted based on a finding that the agency is noncompliant with, or ineffective in its application with respect to, a criterion or criteria for recognition not identified as an area of noncompliance earlier in the proceedings. In that case, the

Secretary, without further consideration of the appeal, refers the matter to the senior Department official for consideration of the issue under § 602.36(f). After the senior Department official makes a decision, the agency may, if desired, appeal that decision to the Secretary.

(f) If relevant and material information pertaining to an agency's compliance with recognition criteria, but not contained in the record, comes to the Secretary's attention while a decision regarding the agency's recognition is pending before the Secretary, and if the Secretary concludes the recognition decision should not be made without consideration of the information, the Secretary either—

(1)(i) Does not make a decision regarding recognition of the agency; and

(ii) Refers the matter to Department staff for review and analysis under § 602.32 or § 602.33, as appropriate, and review by the Advisory Committee under § 602.34; and consideration by the senior Department official under § 602.36; or

(2)(i) Provides the information to the agency and the senior Department official;

(ii) Permits the agency to respond to the Secretary and the senior Department official in writing, and to include additional evidence relevant to the issue, and specifies a deadline;

(iii) Provides the senior Department official with an opportunity to respond in writing to the agency's submission under paragraph (f)(2)(ii) of this section, specifying a deadline; and

(iv) Issues a recognition decision based on all the materials described in paragraphs (d) and (f) of this section.

(g) No agency may submit information to the Secretary, or ask others to submit information on its behalf, for purposes of invoking paragraph (f) of this section. Before invoking paragraph (f) of this section, the Secretary will take into account whether the information, if submitted by a third party, could have been submitted in accordance with § 602.32(a) or § 602.33(e)(2).

(h) If the Secretary does not reach a final decision on appeal to approve, deny, limit, suspend, or terminate an agency's recognition before the expiration of its recognition period, the Secretary automatically extends the recognition period until a final decision is reached.

(Authority: 20 U.S.C. 1099b)

§ 602.38 Contesting the Secretary's final decision to deny, limit, suspend, or terminate an agency's recognition.

An agency may contest the Secretary's decision under this part in the Federal courts as a final decision in accordance with applicable Federal law. Unless otherwise directed by the court, a decision of the Secretary to deny, limit, suspend, or terminate the agency's recognition is not stayed during an appeal in the Federal courts.

(Authority: 20 U.S.C. 1099b)

17. Subpart D is removed in its entirety.

18. Subpart E is redesignated as subpart D.

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