

on SBA's proposed rulemaking. SBA requests that the comments focus on the proposed changes as stated in the NPRM. SBA requests that commentors do not raise issues pertaining to other SBA small business programs.

Presenters may provide a written copy of their testimony. SBA will accept written material that the presenter wishes to provide that further supplements his or her testimony. Electronic or digitized copies are encouraged.

SBA will also hold additional general public meetings before the close of the comment period for this rulemaking.

The tribal consultation meetings will be held for one day. The meeting in Seattle will begin at 9 a.m. and end at 4 p.m. (Pacific Standard Time), with a break from 12 p.m. to 1 p.m. The meeting in Albuquerque will begin at 9 a.m. and end at 4 p.m. (Mountain Standard Time), with a break from 12 p.m. to 1 p.m. SBA will adjourn early if all those scheduled have delivered their testimony.

### III. Registration

SBA respectfully requests that any elected or appointed representative of the tribal communities that are interested in attending please pre-register in advance and indicate whether you would like to testify at the hearing. Registration requests should be received by SBA by December 10, 2009 at 5 p.m. EST for the Seattle location, and by January 8, 2010 at 5 p.m. EST for the Albuquerque location. Please contact Ms. Carol Walker in SBA's Office of Native American Affairs in writing at [carol.y.walker@sba.gov](mailto:carol.y.walker@sba.gov) or by facsimile at (202) 481-0614.

If you are interested in testifying please include the following information relating to the person testifying: Name, Organization affiliation, Address, Telephone number, E-mail address and Fax number. SBA will attempt to accommodate all interested parties that wish to present testimony. Based on the number of registrants it may be necessary to impose time limits to ensure that everyone who wishes to testify has the opportunity to do so. SBA will confirm in writing the registration of presenters and attendees.

### IV. Information on Service for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the public meetings, contact Ms. Carol Walker at the telephone number or e-mail address indicated under the **FOR**

**FURTHER INFORMATION CONTACT** section of this notice.

**Authority:** 15 U.S.C. 632, 634(b)(6), 636(b), 637(a), 644 and 662(5); Pub. L. 105-135, sec. 401 *et seq.*, 111 Stat. 2592; and, E.O. 13175, 65 FR 67249.

Dated: December 2, 2009.

**Clara Pratte,**

*National Director for the Office of Native American Affairs.*

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1910

[Docket No. OSHA-2007-0031]

#### Nationally Recognized Testing Laboratories; Proposed Rule

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Proposed Rule.

**SUMMARY:** The Occupational Safety and Health Administration (OSHA) is proposing to adjust the approach it uses for calculating the fees the Agency charges Nationally Recognized Testing Laboratories (NRTLs) and to require prepayment of all of the fees. OSHA charges fees for specific types of services it provides to NRTLs. OSHA began charging these fees in 2000, and has revised its fee schedule only twice (in 2002 and 2007), mainly to account for cost of living adjustments. The proposed change in calculation approach would result in an increase of the current fees and the issuance of a revised fee schedule. However, for existing NRTLs and pending applicants, the Agency intends to phase in, over three years, any proposed fee increase that is greater than \$200.

**DATES:** You must submit information or comments by the following dates:

*Hard copy:* Postmarked or sent by January 21, 2010.

*Electronic transmission or facsimile:* Sent by January 21, 2010.

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

*Electronically:* You may submit comments and attachments electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

*Fax:* If your submissions, including attachments, are not longer than 10

pages, you may fax them to the OSHA Docket Office at (202) 693-1648.

*Mail, hand delivery, express mail, messenger or courier service:* You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA-2007-0031, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.-4:45 p.m., e.t.

*Instructions:* All submissions must include the Agency name and the OSHA docket number for this notice (OSHA Docket No. OSHA-2007-0031). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at <http://www.regulations.gov>.

*Docket:* To read or download submissions or other material in the docket, go to <http://www.regulations.gov> or the OSHA Docket Office at the address above. All documents in the docket are listed in the <http://www.regulations.gov> index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

*Extension of Comment Period:* Submit requests for extensions concerning this notice to the Office of Technical Programs and Coordination Activities, NRTL Program, Room N-3655, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; fax (202) 693-1644.

**FOR FURTHER INFORMATION CONTACT:** For press inquiries, contact Ms. Jennifer Ashley, Director, Office of Communications, Room N-3647, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693-1999. For technical inquiries, contact Ms. MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, NRTL Program, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N3655, Washington, DC 20210; telephone (202) 693-2110. Our Web page includes information about the NRTL Program (see <http://www.osha.gov/dts/otpca/nrtl/index.html> or see <http://www.osha.gov> and select "N" in the site index).

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## I. Introduction

The Occupational Safety and Health Administration (OSHA) is proposing to adjust the approach it uses to calculate the fees charged to Nationally Recognized Testing Laboratories (NRTLs). The proposed change will recoup a larger percentage of the cost of administering the NRTL Program. The adjusted approach would allow OSHA to continue to charge each NRTL for the core application processing and audit services provided to that NRTL while also recouping the shared costs of certain activities (referred to as “ancillary activities” in this notice) that benefit all NRTLs. These ancillary activities, which result in special benefits to NRTLs, currently represent a significant portion of OSHA’s costs of running the NRTL Program. We explain these special benefits later in this notice. The revised fee approach would also recognize that the cost of leave earned by all staff directly involved in the NRTL Program should be factored into the personnel cost component of the fees. The current fee structure only incorporates leave costs for some of the staff working on the program.

Because the proposed changes would result in a large increase to the fees for existing NRTLs and pending applicants, OSHA is proposing a three-year phase in of any fee increase that is greater than \$200. OSHA also is proposing to revise language in 29 CFR 1910.7(f) (the OSHA rule implementing the NRTL fee structure) to clarify the nature of the costs upon which the fees are based. In addition, OSHA proposes to require advance payment of all NRTL fees, which complies with instructions to Federal agencies issued by the Office of Management and Budget (OMB).

In section II, OSHA explains the NRTL Program and the existing fee structure for charging NRTLs for application processing and audits. In section III, OSHA explains the legal authority for recovering costs for ancillary activities and leave. The

Agency also explains the basis for advance collection of the fees. Section IV describes how OSHA is proposing to recoup the ancillary and leave costs and, in section V, shows the derivation of the fee amounts. Sections VI and VII present the proposed revised fee schedule and fee descriptions, respectively. Finally, in section IX, OSHA explains the change it is making to the regulatory text of 29 CFR 1910.7(f). The remaining sections address other matters necessary for this rulemaking.

## II. Background

Many of OSHA’s safety standards require that equipment or products used in the workplace be approved (i.e., tested and certified) to help ensure that they can be used safely. *See, e.g.*, 29 CFR Part 1910, Subpart S. In general, this approval must be performed by an NRTL. In order to ensure that the testing and certification are done appropriately, OSHA administers the NRTL Program.

The NRTL Program requirements are set forth in 29 CFR 1910.7, “Definition and requirements for a nationally recognized testing laboratory,” which specifies that to be recognized and to maintain recognition as an NRTL, an organization must: (1) Have the appropriate capability to test, evaluate, and approve products to assure their safe use in the workplace; (2) be completely independent of the manufacturers, vendors, and major users of the products for which OSHA requires certification; (3) have internal programs that ensure proper control of the testing and certification process; and (4) have effective reporting and complaint handling procedures. 29 CFR 1910.7(b).

OSHA requires that organizations seeking initial recognition as an NRTL provide detailed and comprehensive information about their programs, processes, and procedures in writing when they apply. To process these applications, OSHA reviews the written information for completeness and adequacy, and conducts an on-site assessment to determine whether the organization meets the requirements of 29 CFR 1910.7. OSHA uses a similar process when an NRTL (i.e., an organization already recognized) applies for expansion or renewal of its recognition. In addition, the Agency conducts annual audits primarily to ensure that each NRTL maintains its programs and continues to meet the recognition requirements. Currently, there are 15 NRTLs operating 49 recognized sites in the U.S., Canada, Europe, and the Far East. Application processing and audits are the core

functions that OSHA performs for the NRTL Program.

In order to perform these core functions, OSHA must also perform a number of ancillary activities that support these functions. OSHA investigates complaints filed against NRTLs to ensure that the laboratories are adequately performing their testing and certification functions. OSHA represents the NRTL Program in a variety of forums related to conformity assessment<sup>1</sup> of products used in the workplace. OSHA also maintains a detailed Web site that both explains the program, and, more importantly for the NRTLs, lists all the laboratories that are currently recognized, the products each can test, and their registered certification marks.

On August 30, 2000, OSHA established a schedule of fees for certain services rendered to NRTLs; specifically, the application processing and audit functions. In the **Federal Register** notice announcing the fee schedule (65 FR 46797, July 31, 2000), OSHA found that laboratories receive “special benefits” from the NRTL Program and that charging these laboratories was appropriate under the Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701), OMB Circular A–25 “User Charges,” and other legal authorities. 65 FR 46803. OSHA stated:

NRTLs accrue “special benefits” from the services that OSHA renders to them. These “special benefits” are the product of OSHA’s initial and continuing evaluation of their qualifications to test and certify products used in the workplace, e.g., the acknowledgement of their capability as an NRTL. The primary special benefits of NRTL recognition are the resulting business opportunities to test and certify products for manufacturers, the NRTL’s clients. These opportunities may be in the form of new, additional, or continuing revenue and clients. Once the NRTL has properly certified a product, a manufacturer may then sell this product to employers, enabling them to comply with product approval requirements in OSHA standards. 65 FR 46807.

Through this rulemaking, OSHA promulgated 29 CFR 1910.7(f). Paragraph (f) states that each applicant for NRTL recognition and each NRTL must pay fees for services provided by OSHA. 29 CFR 1910.7(f)(1). Specifically, the Agency assesses fees for the following: (1) Processing of applications for initial recognition, expansion of

<sup>1</sup> OSHA generally uses the term “approval” to describe the type of testing or certification activities performed by NRTLs. Conformity assessment is a term used internationally to describe such activities and is defined as “any activity concerned with determining directly or indirectly that requirements are fulfilled.”

recognition, or renewal of recognition, including on-site reviews; review and evaluation of the applications; and preparation of reports, evaluations and **Federal Register** notices; and (2) audits. The rule also sets forth that fees are based, in part, on the staff costs per hour of performing application processing and/or audit activities.

This proposed rule would adjust the approach that OSHA uses to calculate the fees it currently charges for the services it provides to NRTLs. OSHA is proposing this adjustment because the current fee schedule only recovers about half of the allowable reimbursable costs of the NRTL Program.<sup>2</sup> In particular, the current approach does not recover the costs of the ancillary activities that are necessary to the program's functioning. The proposed adjusted approach would also take into account the value of the leave earned by all of the personnel involved in the program, whereas, the current approach accounts for leave earned by only a few of these personnel.

### III. Legal Considerations

This proposed rule adjusts the approach that the Agency uses to calculate the fees it charges NRTLs for services performed to the benefit of the NRTLs by including the costs for benefits that are shared by all NRTLs. As described above, these include certain costs associated with ancillary activities and leave. Although OSHA would still not charge separate fees for the time spent on ancillary activities and leave, the rate charged for the fee-generating activities would be adjusted to account for the portion of the program costs attributable to ancillary activities and leave. This section describes the legal basis for OSHA recouping these costs from the NRTLs.

#### A. Legal Authority for Charging Fees

##### 1. Statutory Authority

In Title V of the IOAA, Congress set forth its mandate for executive agencies to collect fees for services and things of value that the agencies provide. Congress intended that the agency programs that provide benefits to specific individuals or companies be funded by these beneficiaries and not by taxpayers at large. "It is the sense of Congress that each service or thing of

value provided by an agency \* \* \* to a person \* \* \* is to be self-sustaining to the extent possible." 31 U.S.C. 9701(a). The Congressional Committee urging the measure indicated, "The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special beneficiaries." *Nat'l Cable Television Ass'n v. U.S.*, 415 U.S. 336 (1974) quoting H.R. Rep. No. 82-384, at 2-3 (1951).

In addition to establishing a source of funding, Congress also provided general guidance to agency heads on the establishment of fees. The fees are to be "fair" and based on:

- (A) The costs to the Government;
- (B) The value of the service or thing to the recipient;
- (C) Public policy or interest served; and
- (D) Other relevant facts.

31 U.S.C. 9701(b). The 1993 OMB Circular A-25 (discussed in greater detail below) embodies the authority of the IOAA and reflects interpretations from the related case law decisions.

Since 1997, in OSHA's yearly appropriations, Congress has specifically authorized the Secretary of Labor to collect and retain fees charged to sustain the NRTL Program. "[T]he Secretary of Labor is authorized \* \* \* to collect and retain fees for services provided to Nationally Recognized Testing Laboratories, and may utilize such sums \* \* \* to administer national and international laboratory recognition programs that ensure the safety of equipment and products used by workers in the workplace." See e.g., Consolidated Appropriations Act for FY 2000, Public Law No. 106-113 (113 Stat. 1501A-222) and Consolidated Appropriations Act, 2009, Public Law No. 111-8 (123 Stat. 524).

##### 2. Case Law

The Supreme Court and the Courts of Appeals have issued decisions addressing the application of the IOAA and its interpretation by Federal agencies. These cases provide guidance that is more specific as to the fee schedules and the methods of assessing fees that agencies may use. They make clear that agencies may recoup all of the Governmental costs associated with providing private entities with specific benefits.

In 1974, the Supreme Court decided the companion cases of *Nat'l Cable Television Ass'n*, 415 U.S. 336 and *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). In *Nat'l Cable*, the Court found that an agency may charge a fee for services but that the fee

should be based on "value to the recipient." *Nat'l Cable*, 415 U.S. at 342-43. In *New England Power Co.*, the Court held that pursuant to the IOAA and OMB Circular A-25, agencies can only recoup specific charges for specific services to specific individuals or companies. *Fed. Power Comm'n*, 415 U.S. at 349.

In *Nat'l Cable Television Ass'n, Inc. v. FCC*, 554 F.2d 1094 (DC Cir. 1976), the Court of Appeals also made clear that the fees must be for specific services. The court upheld charging both an application fee and an annual fee provided that the agency makes clear which activities are covered by each of the fees to prevent charging twice for the same service. *Nat'l Cable Television Ass'n*, 554 F.2d at 1105. Furthermore, the court agreed that fees based on reasonable approximations of costs for the services would be acceptable. "It is sufficient for the Commission to identify the specific items of direct or indirect cost incurred in providing each service or benefit for which it seeks to assess a fee, and then to divide that cost among the members of the recipient class \* \* \* in such a way as to assess each a fee which is roughly proportional to the 'value' which that member has thereby received." *Nat'l Cable Television Ass'n*, 554 F.2d at 1105-1106.

In *Elec. Indus. Ass'n v. FCC*, 554 F.2d 1109 (DC Cir. 1976), the Court of Appeals indicated that "expenses incurred to serve some independent public interest cannot \* \* \* be included in the cost basis for a fee, although the Commission is not prohibited from charging an applicant or grantee the full cost of services rendered \* \* \* which also result in some incidental public benefits." *Elec. Indus. Ass'n*, 554 F.2d at 1115. Moreover, the court held that the agency can only include, in the cost basis of the fees, expenses incurred to confer value upon the recipient. *Id.* Along similar lines, the Court of Appeals held in *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (DC Cir. 1976), that "the proper standard is not value derived by the recipient but rather value conferred on the recipient. In our view, this standard requires the fee assessed to bear a reasonable relationship to the cost of the services rendered to identifiable recipients." *Capital Cities Communications, Inc.*, 554 F.2d at 1138.

Lastly, in *Miss. Power and Light v. U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223 (5th Cir. 1979), the 5th Circuit Court of Appeals upheld the NRC's fee schedule methodology because the NRC did not seek to recover the entire cost of regulating. The NRC charged a fee

<sup>2</sup>In February 2007, OSHA issued a revision of its Fee Schedule to account for increases in program costs (see 72 FR 7468). This revision, however, did not alter OSHA's method for calculating fees. The increase in the February 2007 fees was based on cost of living and time adjustments, but employed the same calculation set forth in the initial **Federal Register** notice published in July 2000. OSHA had previously updated the initial fees in January 2002 (see 67 FR 5299).

based only on the costs of providing a specific benefit to identifiable private parties. *Miss. Power and Light*, 601 F.2d at 230.

### 3. OMB Circular No. A-25

Circular No. A-25 was issued by OMB pursuant to the IOAA, to establish "Federal policy regarding fees assessed for Government services and for sale or use of Government goods or resources \* \* \* [I]t provides guidance for agency implementation of charges and the disposition of collections." User Charges, Circular No. A-25, OMB (July 8, 1993).

In section 6 of the Circular, OMB directs agencies to assess user charges "against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public." Furthermore, user charges "will be sufficient to recover the full cost to the Federal Government \* \* \* of providing the service, resource, or good when the Government is acting in its capacity as sovereign." Finally, the Circular defines full cost to include "all direct and indirect costs to any part of the Federal Government of providing a good, resource, or service."

In order to fulfill the mandate of the IOAA that agency programs should be self-sustaining to the extent that they provide special benefits to identifiable recipients, the OMB Circular directs agencies to recoup the "full cost to the Federal Government" of providing a service. It further specifies that full costs "includes all direct and indirect costs" of providing this service. Examples of such costs provided by the Circular include personnel costs (including salaries and fringe benefits), physical overhead, management and supervisory costs, and costs of enforcement and research. Circular No. A-25, OMB 6(d)(1)(a)-(e).

The legal authorities described above establish several considerations for determining how agencies can assess certain fees for services rendered: (1) The fees must be based upon special benefits derived from Federal activities beyond those received by the general public; (2) the benefits must be conferred on identifiable recipients; and (3) the fees must bear a reasonable relationship to the cost of the services rendered. In addition, the OMB circular makes clear that agencies can recoup indirect costs of services rendered to special beneficiaries and that agencies should strive to make agency programs self-sustaining to the extent that they provide special benefits to identifiable recipients. Assessing NRTL fees that recover the cost of ancillary activities

and leave satisfies these considerations, which we further discuss below.

### B. Explanation for Charging Fees for Ancillary Activities

First, the proposed fee structure is based on special benefits. As noted earlier, NRTLs and applicants accrue special benefits from the services that OSHA renders for the fees. These special benefits are the product of OSHA's initial and continuing evaluation of an organization's qualifications to test and certify products used in the workplace. Primarily, these special benefits are the business opportunities that result from OSHA recognition of these organizations as NRTLs, which allows them to offer their testing and certification services to manufacturers whose products, when used in the workplace, must be tested and certified by an NRTL to comply with OSHA's requirement. These opportunities are "special benefits derived from Federal activities beyond those received by the general public," as described in OMB Circular A-25.

Ancillary activities performed OSHA under the NRTL Program result in identifiable costs from the provision of those specific services and benefits to NRTLs. Examples of ancillary activities include administration of the program, budgetary, and policy matters; training OSHA personnel to perform program activities; interagency and international coordination; responses to requests for information related to the program; handling complaints; Web site development and maintenance; and participation in meetings with stakeholders and outside interest groups.

OSHA is *required* to recover the costs of these activities because such costs are incurred solely for the administration of the NRTL Program, from which NRTLs derive special benefits. The absence of these necessary activities would severely reduce, if not eliminate, many of the benefits that NRTLs derive from recognition by OSHA. Two examples illustrate this point. Through application processing and audits, OSHA determines which organizations qualify as NRTLs and which products each individual NRTL is qualified to approve. By maintaining a Web site, OSHA shares this information with the public. This benefits NRTLs by making their current and potential clients, as well as employers, aware that the NRTLs are qualified to approve products. Complaint handling is a valuable tool that OSHA relies upon, especially between audits, to learn of inappropriate or questionable activities

by a particular NRTL. If, for example, OSHA receives a complaint that a lab is testing equipment that is to be used in very hazardous environments, but it is not recognized by OSHA to perform this testing, OSHA would investigate to determine whether the testing jeopardizes the safety of the equipment. If it does, OSHA could take steps to prevent an accident stemming from the use of this equipment. Thus, through complaint handling, OSHA reinforces the program's effectiveness, which maintains confidence in the program, and thus, the benefits derived by NRTLs from the program.

Second, the benefits are conferred on identifiable recipients. As with the prior schedules, OSHA is assessing fees to identifiable recipients of the NRTL Program benefits. The ancillary activities result in benefits shared among all NRTLs, in contrast to the benefits of the core application and auditing services, which are more easily identified with individual NRTLs. In order to share the costs of these benefits equitably, while still ensuring that the fees charged are specific charges for specific services to specific companies, OSHA is apportioning the costs of the shared benefits in accordance with the time OSHA spends on core services provided to each NRTL. This approach recognizes that an individual NRTL's portion of the shared benefits is directly related to the core benefits it receives. OSHA is, therefore, retaining its fee structure of charging the NRTLs fees when a core action is directed at or initiated by an NRTL, while adjusting the rate used to compute the fee in order to recoup a greater portion of the actual program costs.

OSHA will charge an NRTL a fee when the NRTL applies, for example, for an expansion of its recognition by OSHA. In this situation, the NRTL is asking OSHA to review its application for expansion so that the NRTL can expand its scope of recognition. The fee that OSHA would charge in this instance is directly related to the NRTL seeking the expansion. The converse is also true: If in any particular year an NRTL does not apply to expand its recognition, it will not be charged an expansion application fee. The proposed Fee Schedule would thus reimburse OSHA for ancillary activities but would do so by charging specifically identified laboratories only when they receive the core services of the program.

Third, the fees charged bear a reasonable relationship to the costs of the program. OSHA is basing the fee schedule on the average cost of certain activities performed to the benefit of the NRTLs. These costs are documented by

the Agency. Through this proposed revised fee schedule, OSHA would recover a large percentage of the costs of the program. To ensure that it does not overcharge, OSHA has targeted this proposal to capture approximately 95% of the costs of the program.

Finally, by including the costs of ancillary activities in the fees, OSHA would, for the first time, be fully compliant with the IOAA and OMB Circular A-25, both of which require Agency programs to be self-sustaining to the extent that they confer special benefits on identifiable recipients. In fact, until implementation of a revised fee schedule in February 2007 that allowed recovery of approximately 50% of program costs, OSHA had been recovering only about 30% of the costs of the NRTL Program. Taxpayers had been funding the remaining 70% through OSHA's annual appropriations. This does not comport with the IOAA and OMB Circular A-25, and OSHA is proposing to correct that with this proposed rule.

Therefore, as explained above, OSHA concludes that including the cost of ancillary activities in the fees fits squarely within the legal framework described in the preceding section. That is, the fees are based on special benefits to NRTLs; assessed to identifiable beneficiaries of the NRTL Program; and reasonably related to OSHA's costs of providing the services to NRTLs.

OSHA recognizes that this proposal differs from the position the Agency took in the 2000 rulemaking implementing the initial fee structure. In that rulemaking, OSHA stated that it would not seek to recover costs for certain types of ancillary activities such as training of compliance officers on the NRTL Program and Web site development. *See, e.g.*, 65 FR 46802. At the time of that rulemaking, however, OSHA believed those activities would utilize only a small portion of NRTL Program's resources. Recent workload reviews show that these activities have become a large part of the program and are now more critical in supporting the NRTL Program's core functions. It is, therefore, appropriate for OSHA to include these costs in the fees.

Because this work on ancillary activities has grown so much faster than program resources over the last several years, OSHA has less time available for application processing and audits. Moreover, because the existing fees only recoup the cost of time spent on core services, this means that OSHA is recovering a dwindling percentage of the NRTL Program costs. Thus, OSHA's ability to meet, on a timely basis, the needs of the NRTLs in application

processing and auditing, while recovering its costs for providing those services, has been severely challenged. OSHA intends to provide, through this rule, resources to improve the program's effectiveness in rendering these core services.

#### C. Explanation for Assessing Costs for Leave

Although the initial and current fee structures account for "personnel costs" for core NRTL activities, they do not actually represent all personnel costs. In fact, they do not even represent the total time spent on core activities. As Federal employees, Department of Labor/OSHA employees earn leave as part of their regular compensation. However, the initial fee structure failed to account for leave earned by OSHA employees, even though that leave is part of the personnel costs of rendering the services.<sup>3</sup> In this respect, the initial fee structure was not compliant with OMB Circular A-25 and the other legal authorities described above. Thus, in this proposed revised fee structure, OSHA is adjusting the personnel costs to include leave earned by all employees performing services in support of the NRTL Program.

#### D. Explanation for Advance Collection of the Fees

Currently, OSHA requires that NRTLs and applicants pay an application review fee when submitting their application, and, for initial applications, prepay the fee for the on-site assessment. The remainder of the fees is generally billed to the NRTLs or applicants after the services are rendered. When OSHA adopted this billing system in its final rule issued in 2000, it expected the system to "reduce collection activity of the Agency, since only one bill would need to be sent to the NRTL for an audit, rather than the two contemplated under the NPRM." 65 FR 46802 (July 31, 2000). It therefore predicted a "minimal financial burden" to the Agency by delaying collection. *Id.*

In practice, however, those predictions have not proven true. In recent years, the post-collection system has created problems and resulted in the loss of some funds. For example, to ensure that the Agency retained all fees that were due for audits conducted during a fiscal year, OSHA had to request that NRTLs pay fees in advance for any audits that were conducted during the last two months of the Federal Government fiscal year. OSHA

<sup>3</sup> A small portion of NRTL fees covers the costs of legal services performed by attorneys in the Office of the Solicitor of Labor. Leave costs are included in that portion of the fees.

requested advance payment because, to comply with federal mandates, it could not retain any of these fees if received after the end of a fiscal year, but would forfeit them to a general Federal Government fund. The current fee collection system has also made it difficult in practice to ensure that the Agency complies with OMB Circular A-25, described above. In addition to providing guidance regarding the collection and retention of user fees, OMB Circular A-25 generally requires agencies to collect user fees in advance. *See* OMB Circular A-25, Section 6.a.2.(c) ("User charges will be collected in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services."); *see also* OMB Circular A-11, "Preparation, Submission, And Execution Of The Budget" (June 2008), section 20.13.<sup>4</sup>

The program exists for the benefit of NRTLs, but OSHA is currently required to advance funds to cover the program costs until they are reimbursed by NRTLs or applicants. Given competing demands on the appropriations from which these funds must be drawn, the continued use of general operating funds to front fund the NRTL Program could adversely impact OSHA's ability to perform other aspects of its mission.

In summary, OSHA proposes to bill in advance for audits and fees to ensure compliance with the OMB guidance and to reduce any financial impact on OSHA's other activities caused by advancing funds to the NRTL Program. Where the fees are based on actual cost, the travel costs and other expenses would be estimated and billed in advance, with any difference between the actual cost and the estimate adjusted after the completion of the audit or other service. OSHA believes the advance collection may help NRTLs to schedule payments in that they will be made in advance of the mutually-agreed-upon date for OSHA's audits of the NRTLs.

#### IV. Explanation of Proposed Change in Approach for Calculating Fees

Under the proposed rule, OSHA will continue to calculate the fee for each of the service activities listed in the fee schedule by multiplying an *equivalent*

<sup>4</sup> Section 20.13(a) is a description of revolving funds that also provides that in the absence of a revolving fund "advance payments must accompany orders." Section 20.13(b) specifies that obligations by expenditure accounts may be covered in one of two ways: Through "advances collected up to the amount of accompanying orders" or by "[w]orking capital that is available for this purpose."

average cost per hour rate (ECR) by the time it takes to perform that activity: *Fee for activity = ECR x Time for activity.*

In the July 31, 2000, Federal Register notice, OSHA explained that the initial fee schedule's ECR was derived by dividing the *total estimated direct and indirect costs of the program, excluding travel, (TPC)*<sup>5</sup> by the *total available annual work hours of the NRTL Program and legal staff* that perform the services (TAW).<sup>6</sup> Although the derivation of the ECR was not illustrated as an equation in the 2000 notice, we do so here for clarification and refer to it as ECR2000 (to contrast it with the equation for ECR2009, which is explained later in this notice):  $ECR2000 = TPC2000 / TAW2000$ .<sup>7</sup> As discussed above, this resulted in fees that recouped the costs only of the time spent actually performing individualized audits and application processing, and did not recoup the other costs associated with running the program and providing other benefits that are shared among all NRTLs.

To properly account for the costs associated with these shared benefits, we have calculated the new ECR (ECR2009): dividing the new estimate of the total cost of the NRTL Program (TPC2009) by the *total annual service hours (TAS2009)*. This latter term is a new figure that equals the total estimated hours that the staff spend on the *core service activities for which NRTLs will be billed*. In terms of an equation:  $ECR2009 = TPC2009 / TAS2009$ . By way of comparison with the initial and current fee schedules, TAS equals TAW minus estimated hours spent on ancillary activities (AH) and leave (LH):  $TAS = TAW - AH - LH$ . By continuing to include the full program costs in the numerator, but including, in the denominator, only the amount of time spent on providing "billable" core services, the revised ECR is more accurately tied to the hours spent on those core activities, which are

<sup>5</sup> The TPC include personnel costs for the NRTL Program and legal staff (including support and management staff), equipment, contract, and other costs necessary for the operation of the program. Travel expenses are not included in the ECR because OSHA charges for the actual staff travel expenses of the on-site visits after they are completed.

<sup>6</sup> In discussing total hours in this notice, we often refer to FTEs, which stands for full-time equivalents and, for purposes of this notice, equals total work hours divided by 2,080, the total available annual work hours (TAW) for one full-time employee; that is, 1 FTE equals 2,080 hours.

<sup>7</sup> We will use the TPC abbreviation in discussing our calculations in this proposed rule, but the total amount shown in the July 2000 notice (i.e., TPC2000) will, of course, differ from the total shown now in this proposed rule (i.e., TPC2009) because total costs of the program have changed.

the hours for which OSHA bills the NRTLs.

OSHA could have achieved the same result by charging each NRTL separately for its share of the program resources used to produce the shared benefits. OSHA is not proposing this method primarily because the shared nature of these costs makes it impractical to calculate and track them separately for each NRTL and attribute them appropriately to individual NRTLs through separate fees. As explained above, the existing fee approach in which NRTLs are only charged for core services provides a more straightforward and manageable method of ensuring that OSHA recoups only "specific charges for specific services to specific individuals or companies." *Fed. Power Comm'n*, 415 U.S. at 349.

In addition to this methodological change, the proposed fee schedule presented in this notice also includes updated calculations of the total resources committed to the NRTL Program (TPC2009) and of the average time spent on some of the service activities for which fees are charged.

OSHA has estimated that TAS2009 = 3.5075 FTEs (7295.6 hours), which is 50.11% of total available annual work hours (TAW2009), 7.0 FTE.<sup>8</sup> Using the TPC2009 of \$1,079,090, shown in Figure 1, below, the new rate is:  $ECR2009 = \$1,079,090 / 7295.6 \text{ hours} = \$147.90$ .

The table below shows a summary of program costs and value of the revised ECR2009, which is later used to generate the proposed fee schedule in section VI, below.

FIGURE 1—NRTL PROGRAM ANNUAL COST ESTIMATES—PROPOSED NEW ECR2009 CALCULATION  
[Including ancillary costs and leave]

| Description  | Costs     |
|--|-----------|
| Direct Expenses .....  | \$512,342 |
| Indirect Expenses * .....                                    | 566,748   |
| Total Program Costs (excluding travel) (aka "TPC2009") ..... | 1,079,090 |
| Travel Expenses .....  | 72,600    |
| Overall Program Costs (includes travel) ** .....             | 1,151,690 |
| TAS2009 (3.5075 FTE x 2,080 hours per FTE) .....             | 7,295.6   |

<sup>8</sup> TAW2009 equals 7.0 FTE; AH2009 equals 2.6675 FTE; and LH2009 equals 0.825 FTE. As a result, TAS2009 equals 7.0 minus 2.6675 minus 0.825, which is equal to 3.5075 FTE. **Note:** We can also derive the ECR2009 from the ECR2007 (\$63.80) using a factor that takes into account the effects due to leave and ancillary activities and the use of TAS instead of TAW. We do not illustrate this here since the calculation is more involved and gives the same result as the simpler equation above.

FIGURE 1—NRTL PROGRAM ANNUAL COST ESTIMATES—PROPOSED NEW ECR2009 CALCULATION—Continued

[Including ancillary costs and leave]

| Description               | Costs  |
|---------------------------|--------|
| ECR2009 = TPC2009/TAS2009 | 147.90 |

\* This amount consists of \$441,408 for management, ancillary, and support costs; and \$125,340 for equipment and other costs. Note: These are costs incurred mostly by OSHA but also include applicable costs of a division of the Department of Labor's Office of the Solicitor.

\*\* The amount of fee collections is estimated to be approximately 95.2% of this total or \$1,096,000.

Finally, as mentioned above, the total cost of administering the program has increased since the last revision to the fee schedule published on February 15, 2007. This cost increase is due to two main reasons: The proposed increase in the program's staff resources and the annual salary adjustments for Federal employees. As a result of the increase to the TPC and the revised approach of calculating the ECR2009 proposed in this notice, OSHA's base rate (ECR) would increase almost 132%, from \$63.80 (in effect since February 15, 2007) to the \$147.90 shown above. Without the change in approach but with the increase in staffing, the rate and estimated total collections would have increased to \$73.72 and \$583,000, respectively.

For existing NRTLs and pending applicants, OSHA proposes to phase in, over three years, any proposed fee increase that is greater than \$200: a 33% increase for the first year's fees; a similar amount for the second year's fees; and the remainder in the third year. OSHA is proposing this \$200 threshold because it limits the number of fees that would increase 100% for the first year; the increase for the remaining fees would be phased in, thus reducing the financial impact the increase has on any NRTL. As evident from the comparison of fees shown in section VIII, only three fees are affected, which would increase by a combined total of \$510. OSHA seeks comment on the \$200 threshold and on the three-year phase-in period, which is intended to balance the need for a period of adjustment for some existing NRTLs against OSHA's responsibility to recoup the full costs of the NRTL Program as soon as possible. Commenters who support these approaches or who suggest alternatives are encouraged to include a rationale for their recommendations.

The entire increase would be effective immediately for any organization whose

application to become a new NRTL is received by OSHA after the effective date of the revised fee schedule in the final rule. Unlike currently recognized NRTLs and pending applicants, new applicants do not have a current stake in the program at the current fee schedule; new applicants are free to choose whether or not to participate in the program.

#### V. Basis and Derivation of Fee Amounts

Figures 2, 3, 4, and 5, below, present the proposed costs of the major activities for the various fees categories. In general, OSHA calculated the cost of these activities by multiplying the staff activity time<sup>9</sup> by ECR and adding any applicable average travel costs.

However, because OSHA charges for

actual travel, only the non-travel costs serve as the basis for the fees later shown in Tables A and B. In deriving the fee amounts shown in the fee schedule (Table A or B), OSHA has generally rounded the costs shown in Figures 2, 3, 4, and 5, up or down, to the nearest \$5 or \$10 amount.

FIGURE 2—INITIAL APPLICATION COST ESTIMATES

| Major activity   | Type of cost   | Average hours      | Average cost * |
|--|--|--------------------|----------------|
| Initial Application Review .....                                 | office and field staff time .....  | 120 .....          | \$17,749       |
| Additional Review Time .....                                     | office staff .....   | 16 .....           | 2,367          |
| Limited Review Time .....  | office staff .....   | 24 .....           | 3,550          |
| On-site Assessment—first day (per site, per assessor).           | field staff time (16 hours preparation, 6 hours travel documents processing, and 8 hours at site). | 30 .....           | 4,437          |
|  | field staff travel expense (\$700 airfare/other + \$100 per diem).                                 | not applicable ... | 800            |
|  | Total .....  |                    | 5,237          |
| On-site Assessment—each addnl. day** (per site, per assessor).   | field staff time (at site) .....   | 8 .....            | 1,183          |
|  | field staff travel expense (per diem only) .....   | not applicable ... | 100            |
|  | Total .....  |                    | 1,283          |
| On-site Assessment travel time—per day (per site, per assessor). | field staff .....  | 8 .....            | 1,183          |
| Review and Evaluation (10 test standards) .....                  | office staff time .....  | 2 .....            | 296            |
| Final Report & Federal Register notice .....                     | field and office staff time .....  | 132 .....          | 19,524         |
| Fees Invoice Processing .....                                    | office staff time .....  | 2 .....            | 296            |

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (\$147.90).

\*\* Note: 2 additional days are estimated if there are 2 assessors and 4 additional days are estimated if there is 1 assessor. See notes to Table A Fee Schedule for more information concerning the activities listed in this figure.

FIGURE 3—EXPANSION APPLICATION (ADDITIONAL SITE) COST ESTIMATES

| Major activity   | Type of cost   | Average hours      | Average cost * |
|--|--|--------------------|----------------|
| Application Review (expansion for site) .....                    | office and field staff time .....  | 56 .....           | \$8,283        |
| Additional Review Time .....                                     | office staff .....   | 8 .....            | 1,183          |
| On-site Assessment—first day (per site, per assessor).           | field staff time (12 hours preparation, 4 hours travel documents processing, and 8 hours at site). | 40 .....           | 5,916          |
|  | field staff travel time expense (700 airfare/other + 100 per diem).                                | not applicable ... | 800            |
|  | Total .....  |                    | 6,716          |
| On-site Assessment—additional day** (per site, per assessor).    | field staff time (at site) .....   | 8 .....            | 1,183          |
|  | field staff travel expense (per diem only) .....   | not applicable ... | 100            |
|  | Total .....  |                    | 1,283          |
| On-site Assessment travel time—per day (per site, per assessor). | field staff .....  | 8 .....            | 1,183          |
| Review and Evaluation Fee (10 test standards) .....              | office staff time .....  | 2 .....            | 296            |
| Final Report & Federal Register notice .....                     | field and office staff time .....  | 50 .....           | 7,396          |
| Fees Invoice Processing .....                                    | office staff time .....  | 2 .....            | 296            |

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (147.90).

\*\* Note: 2 additional days are estimated if there is 1 assessor.

See notes to Table A Fee Schedule for more information concerning the activities listed in this figure.

<sup>9</sup>The term “staff” encompasses federal employees as well as any contract employees retained by OSHA for work on the NRTL Program.

FIGURE 4—RENEWAL OR EXPANSION (OTHER THAN ADDITIONAL SITE) APPLICATION COST ESTIMATES

| Major activity  | Type of cost   | Average hours      | Average cost * |
|---|--|--------------------|----------------|
| Application Review (renewal or expansion other than additional site). | office and field staff time .....  | 2 .....            | \$296          |
| Additional Review Time .....  | office staff .....   | 8 .....            | 1,183          |
| Renewal Application—Information Review .....                          | office staff .....   | 40 .....           | 5,916          |
| On-site Assessment—first day (expansion) (per site, per assessor).    | field staff time (8 hours preparation, 4 hours travel documents processing, and 8 hours at site).  | 20 .....           | 2,958          |
|   | field staff travel expense (700 airfare/other + 100 per diem).                                     | not applicable ... | 800            |
|   | Total .....  | .....              | 3,758          |
| On-site Assessment—first day (renewal) (per site, per assessor).      | field staff time (16 hours preparation, 4 hours travel documents processing, and 8 hours at site). | 28 .....           | 4,141          |
|   | field staff travel expense (700 airfare/other + 100 per diem).                                     | not applicable ... | 800            |
|   | Total .....  | .....              | 4,941          |
| On-site Assessment—addnl. day** (per site, per assessor).             | field staff time (at site) .....   | 8 .....            | 1,183          |
|   | field staff travel expense (covers per diem only) .....  | not applicable ... | 100            |
|   | Total .....  | .....              | 1,283          |
| On-site Assessment travel time—per day (per site, per assessor).      | field staff .....  | 8 .....            | 1,183          |
| Review and Evaluation Fee (10 test standards) (expansion).            | office staff time .....  | 2 .....            | 296            |
| Final Report & Federal Register notice .....                          | office and field staff time (if there is an on-site assessment).                                   | 50 .....           | 7,396          |
| Final Report & Federal Register notice .....                          | office and field staff time (if there is NO on-site assessment).                                   | 30 .....           | 4,437          |
| Supplemental Program Review .....                                     | office and field staff time (per program requested incl. consultation and assessor's memo).        | 4 .....            | 592            |
| Fees Invoice Processing .....   | office staff time .....  | 2 .....            | 296            |

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (147.90).

\*\* Note: 2 additional days are estimated for renewal assessment; no additional days for expansion assessment. See notes to Table A Fee Schedule for more information concerning the activities listed in this figure.

FIGURE 5—ON-SITE AUDIT COST ESTIMATES

| Major activity   | Type of cost   | Average hours      | Average cost * |
|--|--|--------------------|----------------|
| On-site Audit—first day (per site, per auditor) .....      | field staff time (12 hours pre-site review preparation, 4 hours travel documents processing, and 8 hours at site). | 24 .....           | \$3,550        |
|  | prepare report/contact NRTL plus office review staff time (2 days for field staff and 2 hours for office staff).   | 26 .....           | 3,846          |
|  | Subtotal (first day) .....   | .....              | 7,396          |
|  | field staff travel expense (700 airfare/other + 100 per diem).   | not applicable ... | 800            |
|  | Total .....  | .....              | 8,196          |
| On-site Audit—addnl. day** (per site, per auditor)         | field staff time (at site) .....   | 8 .....            | 1,183          |
|  | travel expense (covers per diem only) .....  | not applicable ... | 100            |
|  | Total .....  | .....              | 1,283          |
| On-site Audit travel time—per day (per site, per auditor). | field staff .....  | 8 .....            | 1,183          |
| Fees Invoice Processing .....                              | office staff time .....  | 2 .....            | 296            |

\* Average cost for staff time = average hours × equivalent average direct staff cost/hr. (147.90)

\*\* Note: 1.0 additional day is estimated if there is 1 auditor.

See notes to Table A Fee Schedule for more information concerning the activities listed in this figure.

**VI. Proposed Fee Schedules**

*A. Proposed First Phase Fee Schedule*

OSHA proposes the adjusted fee schedules shown below as Tables A and B. If the revised fees were to go into effect as proposed, all existing NRTLs would be charged the fees set forth in Table A in the first year. New applicants would be charged the fees set forth in Table B.

The fees in Table A represent only the first phase of OSHA's fee increase. As explained above, for existing NRTLs and pending applicants, OSHA would phase in any increase in fees that is greater than \$200 over a period of three years: 33% of the increase in this current revision; another 33% in the second year; and the final 34% in the third year. The percentage increase in the next two years, however, would be

adjusted by any increase or decrease in fees calculated for each of those years when OSHA performs its annual review of the fees. During this review, OSHA would determine the amount of time we have actually charged for application processing and audits, and the actual indirect travel we performed, and adjust the amount in any proposed fee schedule by the amount over- or underestimated.

**TABLE A—FEE SCHEDULE NATIONALLY RECOGNIZED TESTING LABORATORY PROGRAM (NRTL PROGRAM): FEE SCHEDULE**  
 [Effective (to be provided in final notice published in the **Federal Register**)]<sup>12</sup>

| Type of service  | Activity or category<br>(fee charged per application unless noted otherwise)   | Fee amount                               |
|--|--|--|
| APPLICATION PROCESSING.  | Initial Application Review <sup>1, 8</sup> .....   | \$17,750.                                |
|  | Expansion Application Review (per additional site) <sup>1, 8</sup> .....   | \$3,420.                                 |
|  | Renewal or Expansion (other) Application Review <sup>1</sup> .....   | \$300.                                   |
|  | Renewal Information Review Fee <sup>7</sup> .....  | \$1,470.                                 |
|  | Additional Review—Initial Application (if the application is substantially revised, submit one-half Initial Application Review fee) <sup>7</sup> .....           | \$2,370.                                 |
|  | Additional Review—Renewal or Expansion Application <sup>7</sup> .....  | \$730.                                   |
|  | Limited Review—Initial Application <sup>7</sup> .....  | \$3,550.                                 |
|  | Assessment—Initial Application (per person, per site—first day) <sup>2, 10</sup> [\$2,740, if application is pending on effective date above].                   | \$4,440 + travel expenses.               |
|  | Assessment—Renewal Application (per person, per site—first day) <sup>3, 10</sup> .....   | \$2,570 + travel expenses.               |
|  | Assessment—Expansion Application (additional site) (per person, per site—first day) <sup>3</sup> .....   | \$2,200 + travel expenses.               |
|  | Assessment—Expansion Application (other) (per person, per site—first day) <sup>3</sup> ....  | \$1,830 + travel expenses.               |
|  | Assessment—each addnl. day or each day on travel (per person, per site) <sup>2, 3</sup> [\$1,180 for new applications; \$730 for pending or other applications]. | \$730 or \$1,180 + travel expenses.      |
|  | Review & Evaluation <sup>5</sup> (\$30 per standard if it is already recognized for NRTLs and requires minimal review; OR else \$296 per standard).              | \$30 per standard OR \$296 per standard. |
|  | Final Report/Register Notice—Initial Application <sup>5, 9</sup> [\$12,080, if application is pending on effective date above].                                  | \$19,520.                                |
|  | Final Report/Register Notice—Renewal or Expansion Application (if OSHA performs on-site assessment) <sup>5, 9</sup> .....  | \$4,580.                                 |
| Final Report/Register Notice—Renewal or Expansion Application (if OSHA performs NO on-site assessment) <sup>5, 9</sup> ..... | \$2,740.   |  |
| AUDITS .....   | On-site Audit (per person, per site, first day) <sup>6</sup> .....   | \$4,240 + travel expenses.               |
|  | On-site Audit—each addnl. day or each day on travel (per person, per site) <sup>6</sup> ....   | \$730 + travel expenses.                 |
|  | Office Audit (per person, per site) <sup>6</sup> .....   | \$730.                                   |
| MISCELLANEOUS  | Supplemental Travel (per site—for sites located outside the 48 contiguous States or the District of Columbia) <sup>4</sup> .....                                 | \$1,000.                                 |
|  | Supplemental Program Review (per program requested) <sup>4</sup> .....   | \$270.                                   |
|  | Fees Invoice Processing (per application or audit) <sup>4</sup> .....  | \$300.                                   |
|  | Travel Document Processing (6 hours, per application or audit) <sup>4</sup> .....  | \$890.                                   |
|  | Late Payment <sup>11</sup> .....   | \$150.                                   |
|  | Comp Time (per hour) <sup>10</sup> .....   | \$56.40.                                 |

NOTES TO TABLE A, OSHA FEE SCHEDULE FOR NRTLs:

<sup>1</sup> Must I pay the Application Review fees, and when must they be paid?

If you are applying for initial recognition as an NRTL, you must pay the Initial Application Review fee and include this fee with your initial application. If you are an NRTL and applying for an expansion or renewal of recognition, you must pay the Expansion Application Review fee or Renewal Application Review fee, as appropriate, and submit this fee concurrently with your expansion or renewal application. See note 7 if you amend or revise your initial or expansion application.

<sup>2</sup> What assessment fees do I pay for an initial application, and when must they be paid?

If you are applying for initial recognition as an NRTL, and we accept your application, we bill you for the assessment fee and you must pay it before we perform the assessment. The prepaid assessment fee will be based on estimated staff time and travel costs. After completing the actual assessment, we calculate the actual assessment fee based on the actual staff time and travel costs incurred in performing the assessment. We calculate this fee at the rate of \$4,440 for the first day at the site, \$1,180 for each additional day at the site, and \$1,180 for each day in travel, plus actual travel expenses, for each assessor [if pending, the rates are \$2,740, \$730, and \$730, respectively.]. (NOTE: Days charged for being in travel status are those allowed under government travel rules. This note applies to any assessment or audit.) Actual travel expenses are determined by government per diem and other travel rules. We bill or refund the difference between the amount you prepaid and the actual assessment fee. We reflect this difference in the final bill that we send to you for the application.

<sup>3</sup> What assessment fees do I submit for an expansion or renewal application, and when must they be paid?

If you are an NRTL and applying solely for an expansion or renewal of recognition, you do not submit any assessment fee with your application. If we need to perform an assessment for the expansion or renewal request, we bill you for this fee and you must pay it before we perform the assessment. The prepaid fee will be based on estimated staff time and travel costs. Following the assessment, we will calculate the actual fee based on the actual staff time and travel costs we incurred in performing the assessment. We calculate this fee at the rate of \$2,570, \$2,220, or \$1,830 for the first day at the site of a renewal, expansion (site), and expansion (other) assessment, respectively. We also include \$730 for each additional day at the site and \$730 for each day in travel, plus actual travel expenses, for each assessor. Actual travel expenses are determined by government per diem and other travel rules. When more than one site of the NRTL is visited during one trip, we charge the \$730 additional day fee, plus actual travel expenses, for each day at a site. We bill or refund the difference between the amount you prepaid and the actual assessment fee. We reflect this difference in the final bill that we send to you for the application.

<sup>4</sup>When do I pay the Supplemental Travel, the Supplemental Program Review, the Fees Invoice Processing fees, or the Travel Document Processing fee?

You must pay the Supplemental Travel fee when you submit an initial application for recognition and the site you wish to be recognized is located outside the 48 contiguous U.S. states or the District of Columbia. The current supplemental travel fee is \$1,000. We factor in this prepayment when we bill for the actual costs of the assessment, as described in our note 2, above. See note 8 for possible refund of application or assessment fees. You must pay the Supplemental Program Review fee when you apply for approval to use other qualified parties or facilities to perform specific activities. See Chapter 2 of the NRTL Program Directive for more information. We will include the Fees Invoice Processing fee in the total for each of our invoices to you. You must pay the Travel Document Processing fee in advance to cover the costs of arranging and obtaining reimbursement for travel. It is generally included in the first day fee for assessments and audits. We charge this fee separately for trips to a location when the preparation time for the trip is minimal. An example is trips to a site that the NRTL has qualified to perform specific or limited testing or certification activities for the NRTL.

<sup>5</sup>When do I pay the Review and Evaluation and the Final Report/Register Notice fees?

An applicant or an NRTL must pay the appropriate fees in advance of OSHA performing the assessment for the application. We calculate the Review and Evaluation Fee at the rate of \$30 per test standard requested for those standards that OSHA previously recognized for any NRTL and that require minimal review or do not represent a new area of testing for the NRTL. Otherwise, this fee is \$296 per standard requested.

<sup>6</sup>When do I pay the Audit fee?

Each NRTL must pay this fee (on-site or office, as deemed necessary) in advance of OSHA commencing the audit, and we calculate this prepaid fee based on estimated staff time and travel costs. Following the audit, we will calculate the actual fee based on actual staff time and travel costs incurred in performing the audit. We calculate our fee at the rate of \$4,240 for the first day at the site, \$730 for each additional day at the site, and \$730 for each day in travel, plus actual travel expenses for each auditor. Actual travel expenses are determined by government per diem and other travel rules. We may add any underpayment(s) or credit any overpayments to the invoice for a future audit of the NRTL's site.

<sup>7</sup>When do I pay the Additional Review fee, Renewal Information Review fee, or Limited Review fee?

The Additional Review fees cover the staff time in reviewing new or modified information submitted after we have completed our preliminary review of an application. There is no charge for review of a "minor" revision, which entails modifying or supplementing less than approximately 10% of the documentation in the application. You must pay the Additional Review fee when submitting revisions modifying or supplementing from 10% to 50% of that documentation. For a new application, the fee represents 16 hours of additional review time and for a renewal or expansion application, the fee represents 8 hours of additional review time. If an applicant exceeds that 50% threshold in revising its application, when submitting your revised documentation, you must pay half the Initial Application Review fee or the full Expansion Application Review fee (\$3,420), as applicable. The Renewal Information Review fee applies when an NRTL submits updated information to OSHA in connection with a request for renewal of recognition. You must pay the Additional Review or Renewal Information Review fee when submitting the additional or updated information. The Limited Review Fee covers the time to review and return a new application that we find to be substantially deficient. This fee is deducted from any refund issued to the applicant.

<sup>8</sup>When and how can I obtain a refund for the fees that I paid?

If you withdraw your initial application or your expansion application to include an additional site, we will refund half of the application review fee. If you withdraw your application before we commence travel to your site to perform the on-site assessment, we will refund any prepaid assessment fees or credit your account. We will also credit your account for any amount of the prepaid assessment or audit fees collected that is greater than the actual cost of the assessment. If the Limited Review fee applies, we will refund the amount of the initial application review fee in excess of the limited fee. If an organization is no longer part of the program, we will refund any funds collected in excess of all valid actual costs incurred through the date of the termination. Other than these cases, we do not generally refund or grant credit for any other fees that are due or collected.

<sup>9</sup>Am I still liable for any fees even if my application is rejected or my recognition is terminated?

If we reject your application, we will retain the fees pertaining to tasks that we have performed. For example, if we perform an assessment for an expansion application but deny the expansion, we will retain your prepaid assessment fee. Similarly, we will retain the Final Report and **Federal Register** fee if we also wrote the report and published the notice. See note 11 for the consequences of nonpayment.

<sup>10</sup>What rate does OSHA use to charge for staff time (including Comp Time)?

OSHA has estimated an equivalent staff cost per hour that it uses for determining the fees that are shown in the Fee Schedule. This hourly rate takes into account the costs for salary, fringe benefits, equipment, contract services, supervision and support for each "direct staff" member, that is, the staff that perform the main activities identified in the Fee Schedule. The rate is an average of these amounts for each of these direct staff members. The current estimated equivalent staff costs per hour = \$147.90. The hourly rate for Comp Time is based on the direct staff average salary and fringe costs only (\$56.40).

[For more information about Comp Time, see *additional explanation in section VIII* of this notice (Major Changes to the Fee Schedule).]

<sup>11</sup>What happens if I do not pay the fees that I am billed?

As explained above, if you are an applicant, we will send you a final bill (for any assessment and for the Review and Evaluation and Final Report/Register Notice fees) in advance of the assessment. If you do not pay the bill by the due date, we will assess the Late Payment fee shown in the Fee Schedule. This late payment fee represents one hour of staff time at the equivalent staff cost per hour (see note 10). We will halt any work on the application. If we do not receive payment within 30 days of the original due date, we will cancel your application. If you do not pay the prepaid fee for an audit by the due date, we will assess the Late Payment Fee shown in the Fee Schedule. However, OSHA may decide to proceed with the audit. If we do not receive payment within 30 days of the original due date, for an audit, we will publish a **Federal Register** notice stating our intent to revoke recognition. However, please note that in either case, you may be subject to collection procedures under U.S. (Federal) law.

<sup>12</sup>How do I know whether this is the most Current Fee Schedule?

You should contact OSHA's NRTL Program (202-693-2110) or visit the program's Web site to determine the effective date of the most current Fee Schedule. Access the site by selecting "N" in the Subject Index at [www.osha.gov](http://www.osha.gov). Any application review fees are those in effect on the date you submit your application. Other application processing fees are those in effect when the activity covered by the fee will be performed. Audit fees are those in effect on the date we will begin our audit.

### *B. Proposed Final Fee Schedule as Projected*

As explained above, OSHA has decided not to phase in the increase in fees for new applicants that apply after the effective date of the new fee

schedule. These applicants, unlike currently recognized NRTLs or pending applicants, do not have a stake in the current fee schedule; new applicants are free to choose whether or not to participate in the program and would be charged the full amount of the fee

increase. Table B represents the final fee schedule as currently projected. It shows the amounts that would be charged to new applicants immediately, and to existing NRTLs or pending applicants in the third and later years after this rule becomes effective. Table

B assumes that OSHA makes no additional adjustments during its annual review of the NRTL fees; in fact, however, it is likely that these fees will be adjusted during the annual fee review process.

TABLE B—FEE SCHEDULE NATIONALLY RECOGNIZED TESTING LABORATORY PROGRAM (NRTL PROGRAM): FEE SCHEDULE [Effective—if fully implemented]<sup>12</sup>

| Type of service   | Activity or category<br>fee charged per application unless noted otherwise)  | Fee amount                               |
|---|--|--|
| APPLICATION PROCESSING.   | Initial Application Review <sup>1,8</sup> .....  | \$17,750.                                |
|   | Expansion Application Review (per additional site) <sup>1,8</sup> .....  | \$8,280.                                 |
|   | Renewal or Expansion (other) Application Review <sup>1</sup> .....   | \$300.                                   |
|   | Renewal Information Review Fee <sup>7</sup> .....  | \$2,370.                                 |
|   | Additional Review—Initial Application (if the application is substantially revised, submit one-half Initial Application Review fee) <sup>7</sup> .....   | \$2,370.                                 |
|   | Additional Review—Renewal or Expansion Application <sup>7</sup> .....  | \$730.                                   |
|   | Limited Review—Initial Application <sup>7</sup> .....  | \$3,550.                                 |
|   | Assessment—Initial Application (per person, per site—first day) <sup>2,10</sup> .....  | \$4,440 + travel expenses.               |
|   | Assessment—Renewal Application (per person, per site—first day) <sup>3,10</sup> .....  | \$4,140 + travel expenses.               |
|   | Assessment—Expansion Application (additional site) (per person, per site—first day) <sup>3</sup> .....   | \$3,550 + travel expenses.               |
|   | Assessment—Expansion Application (other) (per person, per site—first day) <sup>3</sup> .....   | \$2,960 + travel expenses.               |
|   | Assessment—each addnl. day or each day on travel (per person, per site) <sup>2,3</sup> .....   | \$1,180 + travel expenses.               |
|   | Review & Evaluation <sup>5</sup> (\$30 per standard if it is already recognized for NRTLs and requires minimal review; OR else \$296 per standard) ..... | \$30 per standard OR \$296 per standard. |
|   | Final Report/Register Notice—Initial Application <sup>5,9</sup> .....  | \$19,520.                                |
| Final Report/Register Notice—Renewal or Expansion Application (if OSHA performs on-site assessment) <sup>5,9</sup> .....    | \$7,390.   |  |
| Final Report/Register Notice—Renewal or Expansion Application (if OSHA performs NO on-site assessment) <sup>5,9</sup> ..... | \$4,440.   |  |
| AUDITS .....  | On-site Audit (per person, per site, first day) <sup>6</sup> .....   | \$7,400 + travel expenses.               |
|   | On-site Audit—each addnl. day or each day on travel (per person, per site) <sup>6</sup> .....  | \$1,180 + travel expenses.               |
| MISCELLANEOUS   | Office Audit (per person, per site) <sup>6</sup> .....   | \$1,180.                                 |
|   | Supplemental Travel (per site—for sites located outside the 48 contiguous States or the District of Columbia) <sup>4</sup> .....                         | \$1,000.                                 |
|   | Supplemental Program Review (per program requested) <sup>4</sup> .....   | \$590.                                   |
|   | Fees Invoice Processing (per application or audit) <sup>4</sup> .....  | \$300.                                   |
|   | Travel Document Processing (6 hours, per application or audit) <sup>4</sup> .....  | \$890.                                   |
|   | Late Payment <sup>11</sup> .....   | \$150.                                   |
|   | Comp Time (per hour) <sup>10</sup> .....   | \$56.40.                                 |

The Notes to Table B would be the same as shown for Table A above, except for the fee amounts included in notes 2, 3, 6, and 7.

**VII. Description of Fees**

The following is a description of the major tasks and functions currently covered by each type of fee category, e.g., application fees, and the basis used to charge each fee. A description already included in the notes to the fee schedule is not repeated below.

*Application Fees:* This fee reflects the technical work performed by office and field staff in reviewing application documents to determine whether an applicant submitted complete and adequate information. The application review does not include a determination on the test standards requested, which is reflected in the Review and Evaluation fee. Application fees are based upon the average cost per type of application. OSHA uses an average cost since the amount of time spent on the application review does not vary greatly by type of application. This is based on the premise that the number and type of documents submitted will generally be the same for a given type of application. Experience has shown that most

applicants follow the application guide that OSHA provides to them.

*Assessment Fees:* This fee is different for the initial, renewal, expansion (site) and expansion (other) applications. It is based on the number of days for staff preparatory and on-site work and related travel. Six types of fees are shown, and five are charged per site and per person. The four fees for the first day reflect time for office preparation and 8 hours at the applicant’s facility. There is one fee covering either additional days at the facility and/or days in travel. Additional days or days in travel are assessed for either a half or a full day. A supplemental travel amount is assessed for travel outside the contiguous 48 states or the District of Columbia. For initial applications, an amount to cover the assessment must be submitted “up-front” with the application. In addition to the first day and additional day amounts, the applicant or NRTL must pay actual travel expenses, based on government per diem and travel rules. For initial applications, any difference between

actual travel expenses and the up-front travel amount is reflected in the final bill or refund sent to the applicant.

Similar to the application fee, the office preparation time generally involves the same types of activities. Actual time at the facility may vary, but the staff devote at least a full day for performing the on-site work. The fee for the additional day reflects time spent at the facility and the actual travel expenses for that day.

*Review and Evaluation Fee:* This fee is charged per test standard (which is part of an applicant’s proposed scope of recognition). The fee reflects the fact that staff time spent during the office review of an application varies mainly in accordance with the number of test standards requested by the applicant. In general, the fee is based on the estimated time necessary to review test standards to determine whether each one is “appropriate,” as defined in 29 CFR 1910.7, and whether each test standard covers equipment for which OSHA mandates certification by an NRTL. The fee also covers time to

determine the current designation and status (i.e., active or withdrawn) of a test standard by reviewing current directories of the applicable test standard organization. Furthermore, it includes time spent discussing the results of the application review with the applicant. The actual time spent will vary depending on whether an applicant requests test standards that have previously been approved for other NRTLs. When the review is minimal, these activities take approximately 2 hours for 10 standards, or \$30 per standard. When the review is more substantial, the estimated average review time per standard is one hour for each standard, which translates to \$296 per standard. Substantial review will occur when the standard has not been previously recognized for any NRTL or when the NRTL is proposing to do testing in a “new” area, i.e., for a type of product not similar to any currently included under its scope of recognition.

**Final Report/Register Notice Fees:** Each of these fees are charged per application. The fee reflects the staff time to prepare the report of the on-site review of an applicant’s or an NRTL’s facility, which includes contacting the

applicant or NRTL to discuss issues or items in its response to our findings during our assessment. The fee also reflects the time spent making the final evaluation of an application, preparing the required **Federal Register** notices, and responding to comments received in response to the preliminary finding notice. These fees are based on average costs per type of application, since the type and content of documents prepared are generally the same for each type of applicant. There is a separate fee when OSHA does not perform an on-site assessment. In these cases, the NRTL Program staff perform an office assessment and prepare a memo to recommend the expansion or renewal.

**Audit (Post-Recognition Review) Fees:** These fees reflect the time for office preparation, time at the facility and travel, and time to prepare the report of the on-site audit. A separate fee is shown for an office audit conducted in lieu of an actual visit. Each fee is per site and does not generally vary for the same reasons described for the assessment fee and because the audit is generally limited to between one and two days. As previously described, the audit fee includes amounts for travel,

and, as with assessments, OSHA will bill the NRTL for actual travel expenses.

**Miscellaneous Fees:** The sample fee schedule only shows the average cost for one full day of staff time. OSHA uses this fee primarily in cases of refunding the assessment fee. OSHA will also charge a fee for late payment of the annual audit fee. The amount for the late fee is based on 1 hour of staff time charged at the fully implemented rate.

Also shown is a fee for Supplemental Program Review, which represents the time OSHA needs to review the documents that the NRTL submits to show how it meets our criteria for use of a supplemental program. Under each program, NRTLs can use other qualified parties or facilities to perform the specific tasks that are covered by the program and that are necessary for product testing and certification.

**VIII. Major Changes to the Fee Schedule**

The following table shows the major adjustments (i.e., increases or decreases of \$100 or more) that we propose to make to the fee schedule in Table A as compared to the current fee schedule.<sup>10</sup>

TABLE OF MAJOR ADJUSTMENTS TO FEE SCHEDULE

| Description of activity or category  | Current fee amount   | Proposed fee amount—first year increase                    | Proposed fee amount—full increase |
|--|----------------------|--|-----------------------------------|
| Initial Application Review .....   | \$5,100 .....        | \$17,750 .....   | \$17,750.                         |
| Expansion Application Review .....   | \$1,020 .....        | \$3,420 .....  | \$8,280.                          |
| Additional Review—Initial Application .....  | \$1,020 .....        | \$2,370 .....  | \$2,370.                          |
| Renewal Application Information Review .....   | \$1,020 .....        | \$1,470 .....  | \$2,370.                          |
| Additional Review—Renewal or Expansion Application .....   | \$510 .....          | \$730 .....  | \$1,180.                          |
| Limited Review—Initial Application .....   | \$0 .....            | \$3,550 .....  | \$3,550.                          |
| Assessment—Initial Application (per person, per site—first day .....   | \$1,910 .....        | \$4,440 .....  | \$4,440.                          |
| Assessment—Renewal Application (per person, per site—first day) .....  | \$1,790 .....        | \$2,570 .....  | \$4,140.                          |
| Assessment—Expansion (additional site) (per person, per site—first day) .....                                | \$1,530 .....        | \$2,200 .....  | \$3,550.                          |
| Assessment—Expansion (other) (per person, per site—first day) .....  | \$1,280 .....        | \$1,830 .....  | \$2,960.                          |
| Assessment—each addnl. day OR travel time—each day (per person, per site) .....                              | \$510 .....          | \$1,180 (new applications); \$730 other applications. .... | \$1,180.                          |
| Review & Evaluation .....  | \$13 per standard .. | \$30 per standard ..                                       | \$30 per standard.                |
| Final Report/Register Notice—Initial Application .....   | \$8,420 .....        | \$19,520 .....   | \$19,520.                         |
| Final Report/Register Notice—Renewal or Expansion Application (if OSHA performs on-site assessment) .....    | \$3,190 .....        | \$4,580 .....  | \$7,390.                          |
| Final Report/Register Notice—Renewal or Expansion Application (if OSHA performs NO on-site assessment) ..... | \$1,910 .....        | \$2,740 .....  | \$4,440.                          |
| On-site Audit (first day) .....  | \$2,680 .....        | \$4,240 .....  | \$7,400.                          |
| Supplemental Program Review .....  | \$260 .....          | \$270 .....  | \$590.                            |
| Invoice Processing .....   | \$130 .....          | \$300 .....  | \$300.                            |

**Clarification About Travel Expenses Fee.** The fee schedule states that OSHA will charge for time on travel following government travel rules. Those rules currently permit a traveler to earn a

special type of overtime called Compensatory Time For Travel, or simply travel comp time. This time is generally earned when the traveler is engaged in government business beyond

his or her regular work schedule. The travel comp time amounts to earning time off as opposed to receiving an overtime payment. The amount of travel comp time will vary depending on the

<sup>10</sup>Our current fee schedule is available on the OSHA Web site.

specific circumstances of the travel. In general, it is greater for trips outside the contiguous 48 states than for trips within those states. This travel comp time exceeds an employee's regular work hours, i.e., the total available work hours (TAW) discussed under section IV, above. Because this time is specific to a particular trip, it will be included in the travel fee that OSHA charges for that trip. The travel comp time is not included in the total time used to develop the ECR, i.e., the TAS. Instead, it will be charged at the average rate for direct OSHA staff time, which would be \$56.40 under the revised fee schedule.

**IX. Proposed Changes to 29 CFR 1910.7(f)**

As noted earlier, 29 CFR 1910.7(f) provides the overall parameters for determining the fees. The rule states that OSHA will assess fees for the processing of applications for initial recognition, expansion of recognition, or renewal of recognition, review and evaluation of the applications, and preparation of reports, evaluations and Federal Register notices, and audits of sites. It further states that OSHA calculates the fees based on either the average or actual time required to perform the work necessary, the staff costs per hour, and the average or actual costs for travel when on-site reviews are involved. 29 CFR 1910.7(f)(1) and (2). In addition, the rule states that OSHA will review costs annually and will propose a revised fee schedule, if warranted. OSHA proposes to replace the reference to an "annual" review with a "periodic" review to allow for more flexibility in adjusting fees where appropriate. OSHA does not expect that it would review the fee schedule more than once annually, but anticipates situations where the review of costs may not be fully completed within a single-year period.

OSHA is proposing to make a small change to the language in paragraph (f) to clarify the basis used for calculating fees, consistent with OMB Circular A-25. Specifically, when discussing the "costs" that the agency charges, OSHA will make clear that it means the "full" costs of performing the activities that benefit the NRTLs. Thus, as revised, the proposed paragraph (f)(2) would read: "The fee schedule established by OSHA reflects the full cost of performing the activities for each service listed in paragraph (f)(1) of this section." (Emphasis added). Similarly, OSHA proposes to revise paragraph (f)(3)(i) to clarify that the two references to the cost of the program mean the full cost of the program.

OSHA is also proposing to change the language in paragraphs 29 CFR

1910.7(f)(1) and (4) to require advance payment of the fees. The first sentence of 29 CFR 1910.7(f)(1) would be revised to specify that NRTLs must pay all applicable fees in advance. In addition, the table in 29 CFR 1910.7(f)(4), which sets out important billing periods and related actions, would be revised to accommodate the proposed advanced-billing process. Included in the proposed changes to this section is a revision of the amount of time that OSHA must wait before publishing its intention to revoke its recognition of NRTLs that have not paid their audit fees: "60 days after the bill date" would be changed to "30 days after due date." See "III. Audit Fees" in proposed 29 CFR 1910.7(f)(4).

**X. Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis**

Executive Order (E.O.) 12866 and the Regulatory Flexibility Act (RFA), as amended in 1996, require Federal agencies to analyze the costs, and other consequences and impacts, including small business impacts, of their rules. Consistent with these requirements, OSHA has analyzed the costs of the proposed rule and the impacts of the rule on affected laboratories and small businesses.

*Affected Industry*

When the Agency established its NRTL fee schedule in 2000, there were 17 NRTLs with 42 sites of operation. Today, there are 15 NRTLs (including two foreign-owned and operated NRTLs) with 49 sites (see Table C).

**TABLE C—NATIONALLY RECOGNIZED TESTING LABORATORIES (NRTLs)**

| NRTL name  | Number of sites |
|--|-----------------|
| Canadian Standards Association (CSA) .....               | 6               |
| Communication Certification Laboratory, Inc. (CCL) ..... | 1               |
| Curtis-Straus LLC (CSL) .....                            | 1               |
| FM Global Technologies LLC (FM) .....                    | 2               |
| Intertek Testing Services NA, Inc. (ITSNA) .....         | 13              |
| MET Laboratories, Inc. (MET) .....                       | 1               |
| National Technical Systems, Inc. (NTS) .....             | 1               |
| NSF International (NSF) .....                            | 1               |
| SGS U.S. Testing Co., Inc. (SGSUS) .....                 | 1               |
| Southwest Research Institute (SwRI) .....                | 1               |
| TUV America, Inc. (TUVAM) .....                          | 3               |
| TUV Product Services GmbH (TUVPSG) .....                 | 1               |
| TUV Rheinland of North America, Inc. (TUV) .....         | 1               |
| Underwriters Laboratories Inc. (UL) .....                | 15              |

**TABLE C—NATIONALLY RECOGNIZED TESTING LABORATORIES (NRTLs)—Continued**

| NRTL name                          | Number of sites |
|------------------------------------|-----------------|
| Wyle Laboratories, Inc. (WL) ..... | 1               |
| <b>Total (15 NRTLs) .....</b>      | <b>49</b>       |

OSHA: Directorate of Technical Support and Emergency Management.

*Costs*

The Agency had estimated in 2000 that approximately \$239,000 in fees would be collected annually (65 FR 46815). OSHA most recently updated its fees in February 2007, and showed total estimated program costs of approximately \$755,000 (72 FR 7469), only about half of which (about \$380,000) would have been collected through the 2007 updated fees. As Figure 1, above, shows, revising the approach of calculating OSHA costs and updating Federal-employee salary levels will increase the fees collected to about \$1,152,000. In comparison, if costs were updated using the original approach of calculation (without adjustment for ancillary activities and leave), and included the increase in staff resources, the total fees collected would have increased to about \$583,000. The impact of the revised approach on all existing NRTLs is \$772,000 (\$1,152,000 minus \$380,000). The actual impact on these NRTLs would be less because some of the increase will be paid by new applicants.

*Economic Impacts*

The proposed fee increase represents a tiny impact on industry revenues and profits. NAICS 54138 Testing Laboratories had \$8.77 billion in revenues in 2002 (2002 Bureau of Economic Census publication EC02-54A-1 US), and the Agency estimates that revenues in 2006 have grown to approximately \$11.0 billion. In the 2000 rulemaking, as here, the Agency estimated that net before-tax profits were 5.7 percent of revenues (Robert Morris Associates, Annual Statement Studies). The Agency, therefore, estimates 2006 industry before-tax profits as \$627 million (5.7% of \$11 billion). Even the entire \$1.15 million in user fees represents 0.000104, or 0.0104 percent, of industry revenues (\$1.15 million/\$11 billion) and 0.0018, or 0.18 percent, of industry profits (1.15/627). The impact of the additional, new user fees of \$772,000 would be even less. The Agency concludes that imposition of higher user fees is economically feasible for the industry.

Average cost *per affected firm* of the higher NRTL fees is about \$76,867 (\$1,152,000/15); while average cost per affected NRTL *establishment* (site) is about \$23,510 (\$1,152,000/49). Larger firms with more recognized sites are expected to have higher total user fees. The Agency believes that higher proposed NRTL user fees would have little, if any, impact on the affected firms. Demand for NRTL services continues to grow and there was no apparent adverse affect of the imposition of the NRTL fees in 2000.

Any impact on the NRTLs would hinge on whether or not they can raise prices to their customers. The Agency believes that there are no good substitutes for the certification supplied by NRTLs, and that it is likely that the higher user fees would be passed on to the very large number of NRTL customers via small price increases. The Agency preliminarily concludes that the new, higher NRTL fees will have little economic impact on the affected firms and establishments.

#### *Regulatory Flexibility Act Certification*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), federal agencies must assess the impact of their proposed rules on small entities and prepare an initial regulatory flexibility analysis unless the head of the agency can certify that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Thus, the Agency has also estimated the relative effect of the new user fees on small businesses. In the original fees rulemaking in 2000, small businesses were defined as those with less than \$5 million in sales (the Small Business Administration criterion for the industry). These businesses have fewer than 100 employees and average revenue of about \$2.4 million. User fees were estimated to be about \$6,000 per "small" testing laboratory, which was less than 0.3 percent of average small business revenues and less than 5 percent of before-tax profits (Table 6, 65 FR 46817). The February 15, 2007, revision raised the average establishment's fee to about \$7,700 (\$380,000/49). The higher user fees proposed by the Agency herein increases the expected average user fee for a small testing laboratory to about \$23,500.

Revenues for the industry have also increased, from \$5 billion in 1992 to an estimated \$11 billion in 2006 (1992 and 2002 Economic Census). Similarly, the SBA size criterion of a small business in the testing laboratory industry has increased to \$11 million in annual revenues (SBA Web site). The Agency

estimates that the new user fees still represent less than 1 percent of revenues and 5 percent of profits for small businesses in this industry. The marginal increase in user fees, which is about \$15,800 per testing laboratory (to \$23,500 from \$7,700), is an even smaller fraction of current revenues and profits. The economic costs are less than 1 percent of revenues and 5 percent of before-tax profits, and the Agency believes that the costs will be passed on to the firms' customers. The Agency, therefore, certifies that the proposed higher NRTLs fees will not have a significant impact on a substantial number of small entities. The Agency has preliminarily concluded that 13 of the 15 affected NRTLs are small entities, as defined by SBA size criterion.

Finally, as noted in the 2000 rulemaking, the collection of user fees from NRTLs is not a new cost to society, but represents a transfer of the governmental cost of the NRTL Program from taxpayers to an industry directly consuming government services.

#### **References**

1. U.S. Department of Commerce, Bureau of the Census, 1992 Census of Service Industries: Industry Series: SC92-S-1, -4, -5. Washington, DC, February 1995.
2. U.S. Department of Commerce, Bureau of the Census, Economic Census, 2002, publication EC02-54A-1 US.
3. Risk Management Associates (formerly Robert Morris Associates), Annual Statement Studies, September 1995.
4. U.S. Small Business Administration Web site <http://www.sba.gov>. Table of Small Business Size Standards Matched to North American Industry Classification System Codes [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

#### **XI. Unfunded Mandates Reform Act**

For the purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501, *et seq.*), this rule does not include any federal mandate that may result in increased expenditures by State, local, or tribal governments, or an increased expenditure by the private sector of more than \$100 million.

#### **XII. Paperwork Reduction Act**

This rule does not impose or remove any information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-30.

#### **XIII. Federalism**

OSHA has reviewed this proposed rule in accordance with Executive Order 13132. This final rule would only set fees for services provided by the Federal government to private entities and has

no impact on Federalism. The rule does not limit or restrict State policy options.

#### **XIV. State Plan States**

The 26 States and territories with their own OSHA-approved occupational safety and health plans are not affected by this final rule. These 26 States and territories include: Alaska; Arizona; California; Hawaii; Indiana; Iowa; Kentucky; Maryland; Michigan; Minnesota; Nevada; New Mexico; North Carolina; Oregon; Puerto Rico; South Carolina; Tennessee; Utah; Vermont; Virginia; Washington; and Wyoming; all of which operate plans covering both private and public sector employees. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only.

#### **XV. Public Participation**

OSHA invites comments on all aspects of the proposed rule. OSHA will carefully review and evaluate these comments, information, and data, as well as all other information in the rulemaking record, before it decides how to proceed.

You may submit comments in response to this document (1) Electronically at <http://www.regulations.gov>, which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All comments, attachments and other material must identify the Agency name and the OSHA docket number for this rulemaking. You may supplement electronic submissions by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit three copies to the OSHA Docket Office (*see ADDRESSES* section). The additional materials must clearly identify your electronic comments by name, date, and docket number so OSHA can attach them to your comments.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693-2350 (TTY (877) 889-5627).

Comments and submissions in response to this **Federal Register** notice are posted without change at <http://www.regulations.gov>. Therefore, OSHA cautions commenters about submitting personal information such as Social Security numbers and date of birth.

Although all submissions in response to this **Federal Register** notice and exhibits referenced in this **Federal Register** notice are listed in the <http://www.regulations.gov> and/or <http://dockets.osha.gov> indexes, some information (e.g., copyrighted material) is not publicly available to read or download through those Webpages. All submissions and exhibits, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using <http://www.regulations.gov> to submit comments and access dockets is available at the Webpage's User Tips link. Contact the OSHA Docket Office for information about materials not available through the Webpage and for assistance in using the Internet to locate docket submissions.

Electronic copies of this **Federal Register** document are available at <http://www.regulations.gov>. This document, as well as news releases and other relevant information, also are available at OSHA's Webpage at <http://www.osha.gov>.

**XVI. List of Subjects**

Fees, Occupational safety and health, Product testing and certification, Safety, Testing laboratories.

**XVII. Authority and Signature**

This document was prepared under the direction of Jordan Barab, Acting Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington,

DC 20210. This action is taken pursuant to Section 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 657); Secretary of Labor's Order No. 5-2007 (72 FR 31160), and 29 CFR Part 1911. This action is also taken pursuant to the Independent Offices Appropriations Act (31 U.S.C. 9701); Public Law 111-8; the Administrative Procedures Act (31 U.S.C. 553); 29 U.S.C. 9a; and OMB Circular A-25.

Signed at Washington, DC, on November 30, 2009.

**Jordan Barab,**  
*Acting Assistant Secretary of Labor for Occupational Safety and Health.*

**XVIII. Proposed Changes**

For the reasons stated in the preamble of this proposed rule, OSHA is proposing to amend Subpart A of 29 CFR part 1910 as follows:

**PART 1910—[AMENDED]**

**Subpart A—General—[Amended]**

1. The authority citation for Subpart A of part 1910 is revised to read as follows:

**Authority:** Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12-71 (36 FR 8754), 8-76 (41 FR 25059), 9-83 (48 FR 35736), 1-90 (55 FR 9033), 6-96 (62 FR 111), 3-2000 (65 FR 50017), 5-2002 (67 FR 65008), and 5-2007 (72 FR 31159), as applicable.

Sections 1910.6, 1910.7, 1910.8 and 1910.9 are also issued under 29 CFR Part 1911. Section 1910.7(f) is also issued under 31

U.S.C. 9701, 29 U.S.C. 9a, 5 U.S.C. 553; Pub. L. 106-113 (113 Stat. 1501A-222); Public Law 111-8; and OMB Circular A-25 (dated July 8, 1993) (58 FR 38142, July 15, 1993).

2. In § 1910.7, revise the first sentence of paragraphs (f)(1) and (f)(2) and revise paragraphs (f)(3)(i) and (f)(4) to read as follows:

**§ 1910.7 Definition and requirements for a nationally recognized testing laboratory.**

\* \* \* \* \*

(f) \* \* \*

(1) Each applicant for NRTL recognition and each NRTL must pay fees for services provided by OSHA in advance of the provision of those services. OSHA will assess fees for the following services:

\* \* \* \* \*

(2) The fee schedule established by OSHA reflects the full cost of performing the activities for each service listed in paragraph (f)(1) of this section. \* \* \*

(3)(i) OSHA will review the full costs periodically and will propose a revised fee schedule, if warranted. In its review, OSHA will apply the formula established in paragraph (f)(2) of this section to the current estimated full costs for the NRTL Program. If a change is warranted, OSHA will follow the implementation shown in paragraph (f)(4) of this section.

\* \* \* \* \*

(4) OSHA will implement periodic review, and fee assessment, collection, and payment, as follows:

| Dates   | Action required  |
|---|--|
| <b>I. Periodic Review of Fee Schedule</b>   |  |
| When review completed .....<br>Fifteen days after publication<br>When Fee Schedule is approved. | OSHA will publish any proposed new Fee Schedule in the <b>Federal Register</b> , if OSHA determines changes in the schedule are warranted.<br>Comments due on the proposed new Fee Schedule.<br>OSHA will publish the final Fee Schedule in the <b>Federal Register</b> , making it effective.   |
| <b>II. Application Processing Fees</b>  |  |
| Time of application .....<br>Before assessment performed.                                       | Applicant must pay the applicable fees in the Fee Schedule that are due when submitting an application; OSHA will not begin processing until fees are received. OSHA may cancel an application if the fees are not paid when due.<br>Applicant must pay the estimated staff time and travel costs for its assessment based upon the fees in effect at the time of the assessment. Applicant also must pay the Final Report/Register notice and other applicable fees, as specified in the Fee Schedule. OSHA will cancel an application if the fees are not paid when due.   |
| <b>III. Audit Fees</b>  |  |
| Before audit performed .....<br>On due date .....<br>Thirty days after due date ....            | NRTL must pay the estimated staff time and travel costs for its audit based upon the fees in effect at the time of the audit. NRTL also must pay other applicable fees, as specified in the Fee Schedule. After the audit, OSHA adjusts the audit fees to account for the actual travel and staff time costs.<br>NRTLs must pay the estimated audit fees or any balance due by the due date established by OSHA; OSHA will assess a late fee if audit fees (or any balance of fees due) is not paid by the due date. OSHA may still perform the audit.<br>OSHA will publish a notice in the <b>Federal Register</b> announcing its intent to revoke recognition for NRTLs that have not paid the estimated audit fees and any balance of fees due. |

For the purposes of 29 CFR 1910.7(f)(4), "days" means "calendar days," and "applicant" means "the NRTL" or "an applicant for NRTL recognition."

\* \* \* \* \*

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BILLING CODE 4510-26-P

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 600****[Docket No. 080102007-91368-02]****RIN 0648-AW18****Magnuson-Stevens Fishery Conservation and Management Act; Regional Fishery Management Councils; Operations**

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

**ACTION:** Supplementary proposed rule; request for comments.

**SUMMARY:** NMFS proposes changes to the regulations that address the operations and administration of Regional Fishery Management Councils (Councils). The regulatory changes are needed to clarify which Council documents should be available to the public, clarify Council member nomination procedures, clarify financial disclosure requirements for Council members, and revise the security assurance procedures for nominees to and members of the Councils.

**DATES:** Written comments must be received no later than 5 p.m. e.d.t. on January 6, 2010.

**ADDRESSES:** You may submit comments, identified by "RIN 0648-AW18," by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- *Fax:* 301-713-1175.
- *Mail:* Alan Risenhoover, Director, Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910. Please mark the outside of the envelope "Council Operations."

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter n/a in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe pdf file formats only.

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 the Office of Sustainable Fisheries at the mailing address or fax number specified above and by e-mail to [David\\_Rostker@omb.eop.gov](mailto:David_Rostker@omb.eop.gov), or fax to (202) 395-7285.

**FOR FURTHER INFORMATION CONTACT:** William Chappell, at 301-713-2337.

**SUPPLEMENTARY INFORMATION:** Section 302 of the Magnuson-Stevens Act includes provisions for the establishment and administration of the Councils. On March 27, 2009 at 74 FR 13386, NMFS published a proposed rule affecting these regulations. Subsequent to the publication of that proposed rule, several issues regarding Council operations and appointments to the Councils have demonstrated a need for additional proposed changes to the regulations. These proposed changes are all administrative in nature and would increase the transparency of the Council process to the public or improve the efficiency of the Council member appointments process. A discussion of the specific proposed changes follows.

*Government Accounting Office (GAO) report recommendations.*

On May 20, 2009, the GAO submitted a report on the Western Pacific Fishery Management Council (GAO-09-508R Fisheries Management) that provided several recommendations to improve the transparency of the Council's operations. NMFS' considers two of those recommendations appropriate for all Councils. The first recommendation was for the Council to maintain current and archived copies of documents available for public inspection, such as the Council's meeting minutes and briefing book materials, on the Council's Web site. The second recommendation was for the Council to adopt procedures that require Council meeting minutes to include not only a Council member's statement of recusal from voting, but also the nature of the financial interest that would be affected.

Some of the Councils already maintain many of their documents on their web sites. Among documents that may be available are current drafts of fishery management plan (FMP) amendments the Council is developing,

proposed regulatory amendments to FMPs, and analysis for those actions. Documentation (briefing book documents) for upcoming Council meetings may also be posted, as are meeting summaries. In some cases, transcripts of past meetings may also be available. Some Councils have their FMPs and amendments posted, along with current regulations or links to them. Other archival documents such as histories of the FMPs and synopses of FMPs are often available.

Posting of information is limited by the size of the server supporting the Council's Web site and the staff time and expertise in posting and maintaining documents on the server. In some cases, documents are so large that posting them on the Web site is impracticable, so they are made available for retrieval through a file sharing protocol (FTP) site. Because of variations among the Councils, NMFS proposes that Councils post their documents "to the extent practicable." Current documents and information related to current and recent meetings are of a higher priority than documents related to past actions. However, both are of interest to the public. Posting them on the Internet or making them readily available through an FTP site or other technology improves the transparency of the Council process to the public and reduces the amount of staff time needed in responding to inquiries from the public. For documents too large to maintain on the Web site, not available electronically, or seldom requested, the Council must provide copies of the documents for viewing at the Council office during regular business hours or may provide the documents through the mail.

In response the GAO's recommendation, NMFS proposes that a Council member's statement of recusal from voting would also include the nature of the financial interest that would be affected and to require that Council meeting minutes include that information. Under the current regulations at § 600.235(e), Council members are already required to identify the financial interest that would be affected if they wanted to participate in the deliberations on an issue for which they have recused themselves. This proposal would go a step further in requiring them to identify the financial interest any time they recuse themselves. This identification would make the reason behind the recusal and the interests at stake more transparent to the other members of the Council and to the public.