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Presidential Documents

Title 3—

The President

Executive Order 13529 of January 16, 2010

Ordering the Selected Reserve and Certain Individual Ready Reserve Members of the Armed Forces to Active Duty

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 121 and 12304 of title 10, United States Code, I hereby determine that it is necessary to augment the active Armed Forces of the United States for the effective conduct of operational missions, including those involving humanitarian assistance, related to relief efforts in Haiti necessitated by the earthquake on January 12, 2010. Further, under the stated authority, I hereby authorize the Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, under their respective jurisdictions, to order to active duty any units, and any individual members not assigned to a unit organized to serve as a unit, of the Selected Reserve, or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, and to terminate the service of those units and members ordered to active duty.

This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
January 16, 2010.

[FR Doc. 2010–1229
Filed 1–20–10; 8:45 am]
Billing code 3195–W0–P

Rules and Regulations

Federal Register
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Thursday, January 21, 2010

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS–FV–09–0055; FV09–948–3 FR]

Irish Potatoes Grown in Colorado; Modification of the Handling Regulation for Area No. 2

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule revises the minimum size requirement under the Colorado potato marketing order, Area No. 2. The marketing order regulates the handling of Irish potatoes grown in Colorado, and is administered locally by the Colorado Potato Administrative Committee for Area No. 2 (Committee). This rule changes the minimum size requirement from 1⅞ inches in diameter to 2 inches in diameter or 4 ounces minimum weight for all long varieties of potatoes. This change returns the minimum size requirement to the standard that had been in place prior to the 2008–2009 season, when adverse weather conditions damaged the crop and resulted in the Committee recommending a temporary relaxation in the minimum size requirement.

DATES: *Effective Date:* January 22, 2010.

FOR FURTHER INFORMATION CONTACT: Teresa Hutchinson or Gary Olson, Northwest Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Telephone: (503) 326–2724, Fax: (503) 326–7440, or E-mail: *Teresa.Hutchinson@ams.usda.gov* or *GaryD.Olson@ams.usda.gov.*

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

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement No. 97 and Marketing Order No. 948, both as amended (7 CFR part 948), regulating the handling of Irish potatoes grown in Colorado, hereinafter referred to as the "order." The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This final rule revises the minimum size requirement under the order. This rule changes the minimum size requirement from 1⅞ inches in diameter to 2 inches in diameter or 4 ounces minimum weight for all varieties of potatoes, except for round varieties. This rule was recommended by the Committee at a meeting on June 25, 2009.

Section 948.22 authorizes the issuance of grade, size, quality, maturity, pack, and container regulations for potatoes grown in the production area. Section 948.21 further authorizes the modification, suspension, or termination of requirements issued pursuant to § 948.22.

Section 948.40 provides that whenever the handling of potatoes is regulated pursuant to §§ 948.20 through 948.24, such potatoes must be inspected by the Federal-State Inspection Service, and certified as meeting the applicable requirements of such regulations.

Under the order, the State of Colorado is divided into three areas of regulation for marketing order purposes. Area No. 1, commonly known as the Western Slope, includes and consists of the counties of Routt, Eagle, Pitkin, Gunnison, Hinsdale, La Plata, and all counties west thereof; Area No. 2, commonly known as the San Luis Valley, includes and consists of the counties of Sanguache, Huerfano, Las Animas, Mineral, Archuleta, and all counties south thereof; and, Area No. 3 includes and consists of all the remaining counties in the State of Colorado which are not included in Area No. 1 or Area No. 2. The order currently regulates the handling of potatoes grown in Areas No. 2 and No. 3 only; regulation for Area No. 1 is currently not active.

Grade, size, and maturity regulations specific to the handling of potatoes grown in Area No. 2 are contained in § 948.386 of the order.

On June 25, 2009, the Committee unanimously recommended changing the minimum size requirement from 1⅞ inches to 2 inches in diameter or 4 ounces minimum weight for all varieties of potatoes, except for round varieties. This had been the industry standard in place prior to the 2008–2009 season. Because severe and adverse weather conditions in 2008 significantly decreased yields and damaged the crop, the Committee had recommended for the 2008–2009 marketing season that the minimum size be reduced from 2 inches in diameter or 4 ounces minimum weight to 1⅞ inches in diameter for all varieties of potatoes, except round varieties. The Committee believes it is now appropriate to return to the size regulations that were in place prior to the 2008–2009 season.

The Committee believes that quality assurance is very important to the Colorado potato industry. Providing acceptable quality produce that is appealing to consumers on a consistent basis is necessary to maintain buyer

confidence in the marketplace and improve producer returns.

Under this final rule, potatoes other than round varieties will meet the size requirement if they are at least 2 inches in diameter or 4 ounces in weight. Some long, thin potatoes might be smaller than 2 inches in diameter, but weigh at least 4 ounces. These potatoes will meet the revised size requirement. Some potatoes might weigh less than 4 ounces, but be at least 2 inches in diameter. These potatoes will also meet the revised minimum size requirement.

Final Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 72 handlers of Colorado Area No. 2 potatoes subject to regulation under the order and approximately 175 producers in the regulated production area. Small agricultural service firms are defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $7,000,000, and small agricultural producers are defined as those having annual receipts of less than $750,000.

During the 2007–2008 marketing year, 14,225,568 hundredweight of Colorado Area No. 2 potatoes were inspected under the order and sold into the fresh market. Based on an estimated average f.o.b. price of $12.05 per hundredweight, the Committee estimates that 61 Area No. 2 handlers, or about 85 percent, have annual receipts of less than $7,000,000. In view of the foregoing, the majority of Colorado Area No. 2 potato handlers may be classified as small entities.

In addition, based on information provided by the National Agricultural Statistics Service (NASS), the average producer price for Colorado potatoes for 2007 was $9.85 per hundredweight. The average annual fresh potato revenue for each of the 175 Colorado Area No. 2 potato producers is therefore calculated to be approximately $778,455. Consequently, on average, the majority of the Area No. 2 Colorado potato producers may not be classified as small entities.

This rule changes the minimum size requirement from 1⅞ inches in diameter to 2 inches in diameter or 4 ounces minimum weight for all potato varieties, except round varieties. Authority for this action is contained in §§ 948.21 and 948.22.

NASS estimated planted acreage for the 2007 crop in Area No. 2 at 59,200 acres, a decrease of 700 acres when compared with 59,900 acres planted in 2006. Based on Committee records, 88.4 percent of Area No. 2 potatoes entered the fresh market during the 2007–2008 marketing year (including potatoes produced for seed). Of those potatoes, Russet or long potato varieties accounted for 88.3 percent.

Only a small portion of the crop is expected to be negatively affected by this minimum size increase (i.e., that portion of the crop, other than round varieties, smaller than 2 inches in diameter or 4 ounces minimum weight, but larger than 1⅞ inches in diameter) and thus no longer meet order requirements. However, due to current customer demand, many handlers are already shipping potatoes that measure 2-inches or greater. The Committee believes that the expected benefits of improved quality, increased purchases and sales volume, and increased returns received by producers will greatly outweigh the costs related to the regulation.

The Committee discussed alternatives to this rule. One alternative included making no change at all to the current regulation. However, the Committee did not believe this alternative would have met the needs of buyers or provided any benefit to the industry. The Committee believes that the change will increase returns to producers while supplying the market with a higher percentage of larger high quality potatoes.

This final rule changes the size requirement for all varieties of potatoes, except for round varieties. Accordingly, this action will not impose any additional reporting or recordkeeping requirements on either small or large potato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

As noted in the initial regulatory flexibility analysis, USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this final rule.

In addition, the Committee's meeting was widely publicized throughout the Colorado Area No. 2 potato industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the June 25, 2009, meeting was a public meeting and all entities, both large and small, were able to express views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on November 23, 2009 (74 FR 61053). Copies of the rule were e-mailed or sent via facsimile to all Committee members and potato handlers. Finally, the rule was made available through the Internet by USDA and the Office of the Federal Register. A 15-day comment period ending December 8, 2009, was provided to allow interested persons to respond to the proposal. No comments were received.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant matter presented, including the information and recommendation submitted by the Committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

It is further found that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register** (5 U.S.C. 553) because handlers are already shipping potatoes from the 2009–2010 crop. Further, handlers are aware of this rule, which was recommended at a public meeting. Also, a 15-day comment period was provided for in the proposed rule.

List of Subjects in 7 CFR Part 948

Marketing agreements, Potatoes, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, 7 CFR part 948 is amended as follows:

PART 948—IRISH POTATOES GROWN IN COLORADO

■ 1. The authority citation for 7 CFR part 948 continues to read as follows:

Authority: 7 U.S.C. 601–674.

■ 2. Amend § 948.386 by revising paragraph (a)(2) to read as follows:

§ 948.386 Handling Regulation.

* * * * *

(a) * * *

(2) *All other varieties.* U.S. No. 2, or better grade, 2 inches minimum diameter or 4 ounces minimum weight.

* * * * *

Dated: January 13, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–1000 Filed 1–20–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 300

[Docket No. 070717350–9936–02]

RIN 0648–AV63

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Initial Implementation of the Western and Central Pacific Fisheries Convention

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act), which authorizes the Secretary of Commerce to promulgate regulations needed to carry out the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), including implementing the decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). The regulations include requirements related to permitting, vessel monitoring systems, vessel observers, vessel markings, reporting and recordkeeping, at-sea transshipment, and boarding and inspection on the high seas, among others. NMFS has determined that this action is necessary for the United States to satisfy its international obligations under the Convention, to which it is a Contracting Party. It will have the effect of requiring that all relevant U.S. fishing vessels are operated in conformance with the provisions of the Convention.

DATES: This final rule is effective February 22, 2010.

ADDRESSES: Copies of supporting documents that were prepared for this final rule, including the regulatory impact review (RIR) and environmental assessment (EA), as well as the proposed rule, are available via the Federal e-Rulemaking portal, at *http://www.regulations.gov*. Those documents, and the small entity compliance guide prepared for this final rule, are also available from the Regional Administrator, NMFS, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814–4700. The initial regulatory flexibility analysis (IRFA) and final regulatory flexibility analysis (FRFA) prepared for this rule are included in the proposed rule and this final rule, respectively.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS, Pacific Islands Regional Office (see contact information above), and by e-mail to *David_Rostker@omb.eop.gov* or fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS Pacific Islands Regional Office, 808–944–2219.

SUPPLEMENTARY INFORMATION:

Electronic Access

This final rule is also accessible at *http://www.gpoaccess.gov/fr*.

Background

On May 22, 2009, NMFS published a proposed rule in the **Federal Register** (74 FR 23965) that would add regulations at 50 CFR part 300, subpart O, in order to implement certain provisions of the Convention and decisions of the WCPFC. The proposed rule was open to public comment through June 22, 2009.

This final rule is implemented under authority of the WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the WCPFC. The authority to promulgate regulations has been delegated to NMFS.

The proposed rule includes additional background information, including information on the Convention and the WCPFC, the international obligations of the United States under the Convention, and the basis for the proposed regulations.

New Requirements

This final rule establishes the following requirements:

1. Authorization To Fish

Owners or operators of U.S. vessels used for commercial fishing for highly migratory species (HMS) on the high seas in the Convention Area will be required to obtain a new NMFS-issued fishing authorization, called a "WCPFC Area Endorsement." The definition of fishing will include, consistent with its definition under the WCPFC Implementation Act, receiving fish from another fishing vessel and bunkering or otherwise supplying or supporting a vessel that engages in fishing. Thus, carriers that receive HMS from another vessel, vessels that bunker vessels used to fish for HMS, and vessels that engage in operations at sea directly in support of, or in preparation for, fishing or transshipping by other vessels will also be subject to this and other requirements of the final rule. This new authorization will be issued by the Regional Administrator of NMFS, Pacific Islands Region, supplemental to, and as an endorsement on, the permits issued under the authority of the High Seas Fishing Compliance Act of 1995 (HSFCA; 16 U.S.C. 5501 *et seq.*) (hereafter, "high seas fishing permits;" see 50 CFR 300.13). The prerequisites to obtaining a WCPFC Area Endorsement will be: (1) Having a valid high seas fishing permit (or simultaneously applying for one); (2) submitting a complete application (see the next item, "vessel information"); and (3) paying the required administrative fee. The application form will be designed as a supplement to the application for a high seas fishing permit. The WCPFC Area Endorsement will become void upon expiration, suspension, or revocation of the underlying high seas fishing permit. The WCPFC Area Endorsement is also subject to suspension or revocation independent of the high seas fishing permit. Holding a WCPFC Area Endorsement will trigger a number of

other requirements, as described in the elements that follow.

2. Vessel Information

Vessel owners and operators that apply for WCPFC Area Endorsements will be required to submit to NMFS, in their application forms for WCPFC Area Endorsements, specified information about the vessel and its operator (*i.e.*, the master on board and in charge of the vessel) that is not already collected via the high seas fishing permit application. This information includes the name and nationality of the vessel operator (or operators); all communication types used on the vessel (*e.g.*, single sideband radio, voice Inmarsat, fax Inmarsat, e-mail Inmarsat, telex Inmarsat, or other type of satellite telephone), along with the communication service used and the identifying/contact number for each; the fishing methods used or intended to be used; the vessel's fish hold capacity, expressed in terms of either cubic meters or short tons; and the vessel's refrigeration and freezer capacity, including the types of refrigeration and freezer systems on board, the number of refrigeration and freezer units of each type, and the total refrigerating or freezing capacity of each type of system.

In addition, a bow-to-stern side-view photograph of the vessel that shows the vessel in its current form and appearance and that is no older than five years will have to be submitted to NMFS. The photograph can be in either paper or electronic format and must meet certain minimum specifications in terms of its size and resolution and the legibility of the vessel markings. Although the international radio call sign assigned to a given vessel is already collected in high seas fishing permit applications, an indication of whether or not an international radio call sign has been assigned to the vessel, and if so, the call sign itself, will have to be submitted to NMFS by applicants for WCPFC Area Endorsements. This is because of the importance under the Convention of a vessel's international radio call sign (*e.g.*, see paragraph below on "vessel identification") and NMFS' need to verify that the collected information is accurate. WCPFC Area Endorsement holders will have to submit to NMFS any subsequent changes to the submitted information within 15 days of the change.

In addition, owners or operators of any U.S. vessel used for fishing for HMS in the Convention Area in areas under the jurisdiction of any nation other than the United States (*i.e.,* vessels for which a WCPFC Area Endorsement will not necessarily be required) will be required to submit to NMFS information about the vessel, its owners and operators and any fishing authorizations issued by such other nations. Specifically, all the information specified in the application for high seas fishing permits and in the application for WCPFC Area Endorsements will be required, as well as, for each fishing authorization issued by a nation or political entity other than the United States, the name of the nation or political entity, the name of the issuing authority, the authorization type, the period of validity, the specific activities authorized, the species for which fishing is authorized, the areas in which fishing is authorized, and any unique identifiers assigned to the authorization. Copies of any such fishing authorizations will also have to be submitted to NMFS. This information will be collected via a new form (hereafter, "Foreign EEZ Form") designed for this purpose, and vessel owners/operators will be required to submit to NMFS any subsequent changes to the submitted information within 15 days of the change.

The collected information referred to above will be incorporated by NMFS into a record of U.S. fishing vessels authorized to be used for commercial fishing for HMS in the Convention Area beyond areas of U.S. jurisdiction. In accordance with the Convention, NMFS will keep this record updated and share it with the WCPFC, which will combine it with the records of its other Members and Cooperating Non-Members and make it publicly available via its Web site and other means.

3. Vessel Monitoring System

Owners and operators of vessels with WCPFC Area Endorsements will be required to have installed, activate, carry and operate vessel monitoring system (VMS) units (also known as "mobile transmitting units") that are type-approved by NMFS, and authorize the WCPFC and NMFS to receive and relay transmissions (also called "position reports") from the VMS unit to the WCPFC and to NMFS. The WCPFC and NMFS will use the position reports as part of their respective VMS. Activation of a VMS unit will be required any time the unit is installed or reinstalled, any time the mobile communications service provider has changed, and any time directed by NMFS. Activation will involve submitting to NMFS a report ("activation report") via mail, facsimile or e-mail with information about the vessel, its owner or operator, and the VMS unit, as well as receiving confirmation from NMFS that the VMS unit is transmitting position reports properly. The VMS unit will have to be turned on and operating (*i.e.,* transmitting automated position reports) at all times while the vessel is at sea, both inside and outside the Convention Area. The VMS unit may be turned off while the vessel is in port, but only if the vessel operator notifies NMFS via mail, facsimile or e-mail prior to such shut-down. In such cases, NMFS must also be notified when the VMS unit is subsequently turned back on (these two types of notifications are called "on/off reports"), and the vessel operator must receive confirmation from NMFS that the VMS unit is functioning properly prior to leaving port. In the case of failure of the VMS unit while at sea, the vessel operator will be required to contact NMFS and follow the instructions provided by NMFS, which could include, among other actions: Submitting position reports at specified intervals by other means, ceasing fishing, stowing fishing gear, and/or returning to port; and repairing or replacing the VMS unit and ensuring it is operable before starting the next trip. To facilitate communication with management and enforcement authorities about the functioning of the VMS unit and for other purposes, operators of vessels with WCPFC Area Endorsements will be required to carry on board and continuously monitor while at sea a two-way communication device capable of real-time communication with NMFS in Honolulu. For the purpose of submitting position reports that might be required in the case of VMS unit failure, vessel operators must also carry on board a communication device capable of transmitting communications by telephone, facsimile, e-mail, or radio to the WCPFC in Pohnpei, Micronesia, while the vessel is on the high seas in the Convention Area.

The vessel owner and operator will be responsible for all costs associated with the purchase, installation and maintenance of the VMS unit, and for all charges levied by the mobile communications service provider as necessary to ensure the transmission of automatic position reports to NMFS. However, if the VMS unit is being carried and operated in compliance with the requirements in 50 CFR parts 300, 660, or 665 relating to the installation, carrying, and operation of VMS units, the vessel owner and operator will not be responsible for costs that are the responsibility of NMFS under those regulations. In addition, the vessel owner and operator will not be responsible for the costs of transmitting the automatic position reports to the WCPFC.

NMFS publishes separately type-approval lists of VMS units. The current type-approval lists can be obtained from the NOAA Office of Law Enforcement, 8484 Georgia Avenue, Suite 415, Silver Spring, MD 20910; by telephone at 888–210–9288; or by fax at 301–427–0049.

This final rule is worded so as to avoid duplication with other VMS requirements, such as those established under the Magnuson-Stevens Fishery Conservation and Management Act (MSA; 16 U.S.C. 1801 *et seq.*) and the South Pacific Tuna Act of 1988 (SPTA; 16 U.S.C. 973–973r). Compliance with the existing VMS requirements at 50 CFR parts 300, 660, and 665 will satisfy this new requirement, provided that the VMS unit is type-approved by NMFS specifically for fisheries governed under the WCPFC Implementation Act, the VMS unit is operated continuously at all times while the vessel is at sea, the vessel owner and operator have authorized the WCPFC and NMFS to receive and relay transmissions from the VMS unit, and the requirements in case of VMS unit failure are followed.

4. Vessel Observer Program

The operator of a vessel with a WCPFC Area Endorsement will be required to accept on board and accommodate observers deployed as part of the WCPFC "Regional Observer Programme" (WCPFC ROP) on fishing trips that are partially or fully in the Convention Area. Such observers include persons designated by the WCPFC Secretariat, by the United States or by other Members of the WCPFC. Persons will be designated as WCPFC observers by the United States or other WCPFC Members only if the national or sub-regional observer program that deploys such observers has been authorized by the WCPFC to be a part of the WCPFC ROP. Once an observer program of NMFS is determined by the WCPFC to meet specified minimum standards and incorporated into the WCPFC ROP, relevant data collected in the NMFS program will be submitted to the WCPFC and maintained and used by the WCPFC as data in its larger WCPFC ROP.

The preamble to the proposed rule inaccurately stated that the observer requirements would also apply to vessels used in areas under the jurisdiction of another Member of the WCPFC. This final rule clarifies that the observer requirements apply only to vessels that have, or are required to have, WCPFC Area Endorsements.

It is anticipated that the NMFS observer program operating out of Honolulu, Hawaii, and Pago Pago, American Samoa, will be among the first national observer programs to be authorized to be part of the WCPFC ROP. The NMFS observer program currently has interim authorization until July 1, 2012, and full authorization is anticipated after a successful audit of the program. Accordingly, NMFS expects there to be little, if any, change in the placement of observers on vessels in the longline fleets based in Hawaii and American Samoa. The WCPFC Secretariat may place an occasional observer as part of an auditing process to ensure that national and sub-regional observer programs are operating up to WCPFC standards.

It is also anticipated that U.S. purse seine vessels operating under the SPTA will continue to carry observers from the Pacific Islands Forum Fisheries Agency (FFA) observer program (a sub-regional observer program). If the FFA is unable to provide observers to meet increased coverage levels mandated by the WCPFC, those vessels may make other arrangements to obtain WCPFC-approved observers.

The responsibilities of vessel operators and crew members with respect to observers will include allowing and assisting observers to do the following: embark and disembark at agreed times and places; have access to and use of all facilities and equipment on board that are necessary to conduct observer duties; remove samples; and carry out all duties safely. The vessel operator also will be responsible for providing observers, while on board the vessel, with food, accommodation and medical facilities of a reasonable standard equivalent to those normally available to an officer on board the vessel. In the case of longline vessels in the Hawaii and American Samoa fleets, however, costs incurred for providing subsistence for NMFS observers will be eligible for reimbursement, as currently provided at 50 CFR Part 665.

5. Vessel Identification

Vessels with WCPFC Area Endorsements will be required to be marked in accordance with the Convention's requirements, which are based on the FAO Standard Specifications for the Marking and Identification of Fishing Vessels. Specifically, if assigned an international radio call sign (IRCS), the port and starboard sides of a vessel's hull or superstructure, as well as a deck, will have to be marked with the IRCS; if not assigned an IRCS, they will have to be marked with the vessel's official number (*i.e.*, USCG documentation number or state or tribal registration number), preceded by the characters "USA" and a hyphen. In both cases, the specified marking will be the only allowable marking on the hull or superstructure apart from the vessel's name and hailing port. The markings will have to be placed so that they are clear, distinct, uncovered, and unobstructed. Any boats, skiffs, or other watercraft that are carried on board the vessel also will have to be marked with the same identifier as the fishing vessel. For some affected vessels, this marking requirement will conflict with other existing vessel marking requirements, such as those at 50 CFR 300.14 (under the HSFCA; applicable to vessels used for fishing on the high seas), 50 CFR 300.173 (under the legislation implementing the U.S.-Canada Albacore Treaty; applicable to vessels used for fishing under that treaty), 50 CFR 660.704 (under the MSA; applicable to vessels in West Coast HMS fisheries), and 50 CFR 665.16 (under the MSA; applicable to vessels in western Pacific fisheries). Accordingly, with respect to the vessel identification requirements at 50 CFR 300.14, this final rule will slightly modify those requirements to make them consistent with this new requirement. With respect to the vessel identification requirements at 50 CFR 665.16, NMFS has issued a proposed rule (74 FR 34707; July 17, 2009) to revise those requirements such that they do not conflict with the requirements of this final rule. NMFS anticipates issuing the final rule for that action nearly concurrently with this final rule, in which case there will be no conflict. With respect to the vessel identification requirements at 50 CFR 300.173 and 660.704, no regulatory action to revise those requirements has been undertaken to date, so the vessel identification requirements in this final rule are written such that they will not apply to fishing vessels subject to the requirements of either 50 CFR 300.173 or 660.704 until the conflicts have been reconciled and a notice to that effect has been published in the **Federal Register.**

6. Transshipment Restrictions

Offloading fish from a U.S. purse seine vessel or using a U.S. fishing vessel to receive fish from a purse seine vessel at sea in the Convention Area will be prohibited. Transshipping at sea is already regulated for U.S. purse seine vessels licensed under the SPTA.

7. Reporting and Recordkeeping

The owner or operator of any U.S. vessel used for commercial fishing for HMS anywhere in the Pacific Ocean will be required to maintain and submit to NMFS information on fishing effort and catch. The final rule was developed to avoid duplication with other effort

and catch reporting requirements, particularly those established under the MSA, the HSFCA, the Tuna Conventions Act of 1950 (16 U.S.C. 951–961 *et seq.*), the SPTA, and the implementing legislation for the U.S.-Canada Albacore Treaty, as well as relevant State reporting requirements. Specifically, compliance with other existing reporting requirements will satisfy the new reporting requirement established in this final rule. The main effect of these new reporting requirements is to collect fishing effort and catch information under the authority of the WCPFC Implementation Act, which will enable NMFS to meet the reporting requirements of the WCPFC in accordance with the Convention and the decisions of the WCPFC. Confidentiality of information will be protected and handled by NOAA as required under U.S. laws, including the WCPFC Implementation Act and the regulations established in this final rule (see element 10 below). Once the information is submitted by NOAA to the WCPFC, it will be handled in accordance with policies and procedures adopted by the WCPFC.

8. Compliance With the Laws of Other Nations

A vessel with a WCPFC Area Endorsement will be prohibited from being used for fishing in areas under the jurisdiction of another nation unless it holds any license, permit or authorization that may be required by such nation to do so. When a vessel with a WCPFC Area Endorsement operates in the Convention Area in areas under the jurisdiction of a Member of the WCPFC other than the United States, it will have to be operated in compliance with the laws of that Member.

Additionally, the owner and operator of any U.S. fishing vessel used in the Convention Area in an area under the jurisdiction of another Member of the WCPFC, if used for fishing for, retaining on board or landing HMS, will be required to comply with the relevant laws of that Member, including any laws related to the use of VMS units.

It will be the responsibility of vessel owners and operators to ascertain the applicable laws and requirements of WCPFC members.

9. Facilitation of Enforcement and Inspection

The operator and crew of a vessel with a WCPFC Area Endorsement, when in the Convention Area, will be subject to the following requirements:

- Carry on board any fishing authorizations issued by another nation or political entity, or copies thereof, and make them available to specified authorities, depending on the area of jurisdiction the vessel is in;
- Continuously monitor the international safety and calling radio frequency (156.8 MHz; Channel 16, VHF–FM) and, if equipped to do so, the international distress and calling radio frequency (2.182 MHz);
- Carry on board a copy of the International Code of Signals; and
- When engaged in transshipment, allow and assist transshipment monitors authorized by the WCPFC (if on the high seas) or other Members of the WCPFC (if within their areas of jurisdiction) to inspect the vessel and gather information and samples.

In addition, the operator of any U.S. fishing vessel that is used for commercial fishing for HMS, when present in the Convention Area in an area in which it is not authorized to fish (*e.g.*, on the high seas without a valid WCPFC Area Endorsement or in an area under the jurisdiction of another nation without an authorization from that nation to fish in the area), will be required to stow all fishing gear and equipment so such materials are not readily available for fishing.

Further, the operator of any U.S. fishing vessel (regardless of the species for which it is used to fish), when on the high seas in the Convention Area, will be required to accept and assist boarding and inspection by authorized inspectors of other Contracting Parties to the Convention and of fishing entities that have agreed to be bound by the regime established by the Convention, provided that such boarding and inspection is undertaken in conformance with the WCPFC's adopted procedures. At present, Chinese Taipei (Taiwan) is the only fishing entity that has agreed to be bound by the regime established by the Convention.

10. Confidentiality of Information

As mandated by the WCPFC Implementation Act, the final rule includes procedures designed to preserve the confidentiality of information submitted in compliance with the WCPFC Implementation Act and its implementing regulations. In accordance with the Convention, the procedures allow for the disclosure of confidential information to the WCPFC. Once such information is held by the WCPFC, access to the information will be governed by the policies and procedures adopted by the WCPFC.

Comment and Responses

Public comments on the proposed rule, organized by subject, are summarized below, with responses from NMFS.

Authorization to Fish and Vessel Information

Comment 1: NMFS proposes to charge $25 (or $5 per year) for the WCPFC Area Endorsement. Although this is a small amount relative to vessel revenues, NMFS does not provide adequate reasoning of why or how this amount will recoup administrative costs, resulting in the perception of NMFS attempting to "nickel and dime" U.S. fishing vessels. NMFS should not charge any fees for WCPFC Area Endorsements, but if NMFS insists, then it should describe in the final rule or EA how the total amount of monies received from area endorsement applications would offset administrative costs.

Response: NMFS does not agree that an application fee should not be charged for WCPFC Area Endorsements. As stated in footnote 63 of the EA, the cost estimates for the application fee are based on the administrative cost burden incurred by NMFS, which is derived from agency practice and experience. The fee has been calculated in accordance with the NOAA Finance Handbook to recover the administrative costs of administering the permit program for WCPFC Area Endorsements, as authorized under section 506 of the WCPFC Implementation Act.

Comment 2: The new information that will be solicited from vessel owners, including nationality of vessel master, vessel communication types, type of fishing or method, color photograph of the vessel, and carrying capacity, including freezer type, capacity and number, and fish hold capacity, could generate confusion regarding the units of measurement related to capacity, as well as confusion on the level of detail of the required information. NMFS should produce a comprehensive compliance guide for vessel owners to follow.

Response: Clear instructions on the level of detail required, as well as the measurement units, will be included in the forms used to collect the required information. The requirements are also explained in the small entity compliance guide that has been prepared for this final rule, available at: *http://www.fpir.noaa.gov/IFD/ifd_documents_data.html*.

Comment 3: In 50 CFR 300.212(g) and 300.213(a) the proposed regulations call for any changes to vessel information to be reported to the NMFS Pacific Islands Regional Administrator within 15 days of the change. This requirement would

be burdensome; 30 days would be much more manageable.

Response: The proposed 15-day requirement is necessary to satisfy the provisions of the Convention and decisions of the WCPFC with respect to the obligations of the United States to notify the WCPFC of changes to information associated with U.S.-flagged vessels authorized to fish in the Convention Area. Furthermore, the proposed 15-day requirement is consistent with the existing, related, 15-day requirement for changes to application information for permits issued under the HSFCA (50 CFR 300.13(g)). The requirement at proposed section 300.212(g) relates to application information for a WCPFC Area Endorsement, which would be issued supplemental to, and as an endorsement on, a permit issued under the HSFCA.

Vessel Monitoring System

Comment 4: The proposed rule includes a requirement in § 300.219(c)(3)(iii) that prior to leaving port, a vessel owner and operator must "receive verbal or written confirmation from NMFS that proper transmissions are being received from the VMS unit." The lack of availability of staff in the NOAA Office of Law Enforcement, Pacific Islands Division ("OLE–PID"), may cause an unreasonable loss of fishing time for fishing vessels, which do not operate on a 9 a.m. to 5 p.m. basis and operate in various time zones. There should be a system that allows confirmation of VMS unit operation outside the regular office hours of OLE–PID. One suggestion is to allow a vessel to contact, and receive confirmation from, a representative of the VMS unit manufacturer, after which the vessel could contact and receive confirmation from OLE–PID once it opens for business.

Response: The referenced requirement applies in the case that the vessel owner and operator have chosen to shut down the VMS unit while at port or otherwise not at sea. NMFS recognizes that the office hours of OLE–PID are somewhat constraining, but notes that the owner and operator of a fishing vessel need not wait until immediately prior to the port departure time to turn on the VMS unit and submit the on/off report to NMFS. In order to provide a few additional hours each day for these communication purposes, NMFS has made a revision to the final rule such that vessel owners and operators may submit the VMS unit on/off reports to, and receive confirmations from, either OLE–PID or the NOAA Office of Law Enforcement's VMS Helpdesk. The contact information and business hours for the latter are: telephone: 888–219–9228; e-mail: *ole.helpdesk@noaa.gov;* 7 a.m. to 11 p.m., Eastern Time.

Comment 5: Under the proposed rule, if a VMS unit fails while the vessel is at sea, the vessel owner, operator, or designee must contact OLE–PID by telephone, facsimile, or e-mail at the earliest opportunity during OLE–PID's business hours, identify the caller and vessel, and follow the instructions given by OLE–PID, which could include ceasing fishing, stowing fishing gear, returning to port, and/or submitting periodic position reports at specified intervals by other means. We expect that OLE–PID will be reasonable in the instructions it gives in these cases.

Response: In determining what instructions to give to the operator of a fishing vessel whose VMS unit has failed while at sea, OLE–PID would take into account the specific circumstances of the case, and determine the appropriate course of action consistent with this rule.

Comment 6: Given that albacore troll and baitboats are small, have little problems with bycatch, enforcement issues, or gear conflicts, land nearly all their fish on the U.S. west coast and document their catch in logbooks, and there are few marine protected areas in offshore regions where U.S. albacore troll vessels operate, how effective and useful will the required VMS data be?

Response: The United States is obligated, as a Contracting Party to the Convention, to implement Article 24 of the Convention, which calls for each WCPFC member to require that its fishing vessels used to fish for highly migratory fish stocks on the high seas in the Convention Area use near real-time satellite position-fixing transmitters while in such areas. In addition, NMFS believes that requiring U.S. albacore troll vessels to carry VMS units would provide important information that will aid in scientific and compliance-related purposes.

Comment 7: Why is it proposed that the VMS units have to be turned on 365 days per year? A declaration of departure and a check to see if the VMS unit is on should serve the purpose.

Response: Under the proposed rule, as well as this final rule, the VMS unit can be shut down while the fishing vessel is at port or otherwise not at sea, provided that NMFS is notified both in advance of the shut-down and upon turning the VMS unit back on, and that prior to subsequently leaving port, the vessel owner and operator receive verbal or written confirmation from NMFS that proper transmissions are being received from the VMS unit.

Comment 8: If the United States is requiring VMS units under the Convention then NOAA should pay for installation as in other fisheries. The U.S. albacore fleet is in economic distress and is an important component of the coastal rural economy; any new fees at this time would be detrimental to the family-owned U.S. albacore fleet and community at this time.

Response: NMFS is indeed requiring that VMS units be carried in order to implement the provisions of the Convention, and NMFS recognizes that the proposed VMS requirements would bring new costs to businesses that operate HMS fishing vessels in the Convention Area. NMFS does not agree that the U.S. Government is responsible for covering the cost of coming into compliance with this rule, but notes that it has conducted an analysis of the impact of this rule on small entities, in accordance with the Regulatory Flexibility Act (see IRFA and FRFA). In addition, fishermen may be eligible for full or partial reimbursement for the required purchase costs of authorized VMS units, to the extent appropriations allow. Questions concerning reimbursement eligibility can be directed to the NOAA Office of Law Enforcement VMS Support Center at 888–219–9228, and further information is available on the Web site of the Pacific States Marine Fisheries Commission: *http://www.psmfc.org/Vessel_Monitoring_System.*

Comment 9: According to the proposed rule and EA, 73 vessels would have to buy, install, and maintain VMS units as well as pay for VMS transmission costs. This would cost approximately up to $1,775 [per vessel] per year or $7,100 over the course of four years, which is a VMS unit's general lifespan. It does not make sense to break out the VMS unit cost by year, as the VMS unit itself costs approximately $4,000. The EA does not describe whether NMFS has pursued government funding to cover these costs for the 73 affected vessels. NMFS should find government funding to make this requirement equitable amongst fishery participants—the Western Pacific Regional Fishery Management Council strongly believes that NMFS should pay for the VMS costs for the two longline vessels operating out of the Commonwealth of the Northern Mariana Islands (CNMI), as well as for the albacore troll fleet. Furthermore, the proposed rule would require albacore trolling vessels to continue to transmit their VMS positions while fishing in the eastern Pacific Ocean (EPO). This seems particularly onerous and costly for this

fleet, especially since the proposed rule is in response to WCPFC measures. The proposed rule would also require that vessel operators provide NMFS with a notice when they power down in port and shut off power supply to their VMS unit. Vessel operators would also have to inform NMFS that they have powered back on and that they are going on a fishing trip. As this is not current practice, NMFS will need to develop a detailed outreach plan to inform fishery participants.

Response: With respect to breaking out the VMS unit costs by year, NMFS annualized the estimated cost of purchasing and installing a VMS unit in order to express expected compliance costs in terms that could be compared with, and added to, the compliance costs of other aspects of the proposed requirements—that is, in annual terms (the annualized cost of a VMS unit that costs $4,000 to purchase and install and that has a lifespan of four years would be about $1,000).

With respect to who should pay the costs of the VMS-related requirements, NMFS does not agree that NMFS or the U.S. Government is responsible for covering the costs, but notes that vessel owners might be eligible for reimbursement for the cost of VMS units under a program administered by the NOAA Office of Law Enforcement (for more information, see the response to comment 8, above).

With respect to the costs and burden of having to transmit position reports via VMS while a vessel is fishing in the EPO, outside the Convention Area, NMFS considered alternatives that would not require such reporting (see the IRFA, FRFA, EA, and RIR, particularly Alternatives B and C in the latter two). Position reports will cost about $1.50 per day, so the annual VMS-related compliance costs of Alternative B, which would require position reports to be transmitted only while the vessel is on the high seas in the Convention Area, would be about $105–$285 less than under the proposed rule for albacore troll vessels, depending on where they fish. However, allowing the VMS unit to be turned on and off depending on where at sea the vessel is would make it more difficult to ensure that position reports are transmitted while in the Convention Area, which would reduce the effectiveness of the VMS. For that reason, NMFS believes that the benefits of the preferred alternative of requiring position reports everywhere at sea outweigh the burden.

With respect to informing fishery participants about these new VMS-related requirements, NMFS does not intend to prepare an "outreach plan," but it has prepared a small entity compliance guide, available at *http://www.fpir.noaa.gov/IFD/ifd_documents_data.html,* for this purpose, and NMFS will use various means to reach out to fishery participants to ensure they are aware of the new requirements.

Vessel Observer Program

Comment 10: The Western Pacific Regional Fishery Management Council strongly believes that NMFS should pay for the observer costs for the two longline vessels operating out of the CNMI, as well as for the albacore troll fleet.

Response: NMFS has analyzed the costs of accommodating observers in the IRFA and has assessed its impacts on small entities. NMFS believes that these costs are reasonable and properly should be borne by vessels that accept the benefits of commercial fishing for HMS in the Convention Area.

Comment 11: The EA is unclear on why alternatives were not identified or considered for implementation of the WCPFC observer program. The VMS category considered alternatives that would trigger VMS requirements if certain temporal and spatial characteristics were met. However, similar alternatives were [not] considered for the vessel observer program category. The EA does not provide any explanation on why NMFS has no discretion in implementing the WCPFC observer program. The observer requirements could be especially onerous for U.S. albacore fishermen who fish on relatively small vessels, and no reason is provided for potentially requiring them to carry observers when they may not be fishing in the Convention Area. NMFS should include and analyze this alternative that would avoid this situation in the Final EA.

Response: The observer requirements in the rule implement the specific requirements of the WCPFC ROP set forth in Article 28 of the Convention. The requirements will apply to any U.S. vessel used for commercial fishing for HMS on the high seas in the Convention Area (*i.e.,* a vessel that has, or that is required to have, a WCPFC Area Endorsement). As explained below, NMFS has clarified in this final rule that fishing vessels with WCPFC Area Endorsements will be required to accept and accommodate observers only on trips that take place partially or fully in the Convention Area. The compliance costs for the observer requirements have been estimated accordingly, as described in the RIR and IRFA and summarized in the EA.

Chapters 1 and 2 of the EA set forth the discretionary provisions of the rule and the alternatives analyzed in the EA, while Appendix I of the EA describes the non-discretionary provisions of the rule. NMFS characterized the discretionary provisions as those for which reasonable and feasible alternatives could be considered and analyzed. As discussed in more detail in the response to Comment 27, below, the EA discussed the environmental impacts that could be caused by the non-discretionary provisions of the rule as part of the cumulative impacts analysis. The purpose of the rule is for NMFS to develop and promulgate domestic fishery regulations to implement the provisions of the Convention that are ready for implementation, while the need for the rule is to satisfy the obligations of the United States under the Convention. Thus, alternatives that would impose requirements on vessel owners and operators that would go beyond the requirements specified under the Convention would be outside the scope of this rule. Correspondingly, alternatives that would impose requirements on vessel owners and operators that would be less restrictive than the requirements specified under the Convention would not meet the purpose of and need for the rule. NMFS did consider alternatives for the VMS requirements that would apply on broader temporal and spatial scales than the VMS requirements specified in the Convention. However, these alternatives were considered primarily in terms of their capability to enhance the enforcement of and compliance with the VMS requirements specified in the Convention, concerns not applicable to the observer requirements. Alternatives to the observer requirements set forth in the rule, such as an alternative that would require vessels with WCPFC Area Endorsements to carry observers when operating outside of the Convention Area, or an alternative that would allow particular vessels to operate without observers, would either exceed the scope of the rule or not meet the purpose of and need for the rule.

Comment 12: With respect to the proposed vessel observer requirements, a clear list of questions that observers may appropriately ask should be developed and provided to vessel management, vessel operators, and observers. The proposed rule spells out the responsibilities of vessel operators and crew with respect to accommodating observers, but little information is provided on the expected

behavior and responsibilities of observers.

Response: This final rule does not establish any new reporting requirements with respect to WCPFC observers.

With regard to the expected behavior and responsibilities of observers, under the WCPFC ROP, WCPFC observers must be trained to specified minimum standards, and they are obligated to behave and perform in conformance with principles and guidelines specified in the WCPFC Conservation and Management Measure for the Regional Observer Programme (Conservation and Management Measure 2007–01, available at: *http://www.wcpfc.int/conservation-and-management-measures*). In the case that a WCPFC observer is deployed as part of a NMFS observer program, NMFS would work to ensure that the observer behaves and performs in conformance with those principles and guidelines. If the WCPFC observer is deployed under some other program, such as the FFA observer program, NMFS would work with the personnel in that program, as well as in the WCPFC, to ensure, to the extent possible, that that program's observers behave and perform in conformance with the principles and guidelines established in the WCPFC ROP.

Comment 13: In order to provide timely feedback to vessel operators, which would improve their observer responsibilities, observers should be debriefed at the end of each fishing trip, such as by NMFS staff in the presence of the vessel captain.

Response: NMFS agrees that debriefings are important and should be an element of the WCPFC ROP. However, WCPFC observers are not necessarily deployed by NMFS or otherwise in the employ of the U.S. Government, so NMFS is not able to mandate that observer debriefings occur or that vessel captains be allowed to attend such debriefings. Instead, such provisions would have to be incorporated into the WCPFC ROP, the applicable provisions of which NMFS would then implement as needed. As part of U.S. delegations to the WCPFC, NMFS will keep this comment under consideration as the WCPFC further develops the WCPFC ROP.

Comment 14: The cost of carrying an observer is estimated in the IRFA to cost $20 per day, which, at a 5% coverage rate, would total $350 per trip, depending on the length of the trip. But because albacore vessels operating west of 150° W. long. would be at sea for 25 to 100 days, the cost would be more like $400 to $2,000 per trip. These costs should be clarified and a cap of $350 per trip should be considered.

Response: It is stated in the IRFA that at a daily cost of $20, a 5% coverage rate, and 170 to 350 days at sea per year, the annual (not per-trip) cost would be $170 to $350. This is an estimate of average annual costs; the cost would be greater in a year in which a vessel was required to carry an observer on more than 5% of its sea-days, and the cost would be less in a year in which the vessel was required to carry an observer on less than 5% of its sea-days. The estimated cost of an observed trip 100 days long would indeed be about $2,000, as indicated by the commenter. NMFS believes it to be appropriate that vessel owners and operators bear the entirety of these costs and that a cap is not appropriate.

Comment 15: Most albacore vessels are small compared to longline and purse seine vessels; a typical vessel operating west of 150° W. long. would be 50–100 feet in length and have a crew of 2–3 persons; most of the vessels in the 50–65-foot range have limited space for observers, especially on extended trips.

Response: NMFS recognizes that some fishing vessels have limited space and small crew sizes. If NMFS determines that deploying an observer on a particular vessel would compromise the safety of the observer or the vessel crew, it would not deploy the observer.

Comment 16: Considering that albacore troll vessels may be at sea for 25 to 100 days at a time and operate in a fishery with virtually no environmental or regulatory impacts, how practical is it to carry an observer?

Response: One of the purposes of deploying observers under the WCPFC ROP is to gather information that can be used to characterize fishing activities and their impacts on living marine resources. As more information is gathered and better characterizations are developed in a given fishery, such as the albacore troll fishery, NMFS expects that the coverage rate in that fishery would be adjusted by the WCPFC accordingly.

Comment 17: Albacore troll vessels operate at least 7–10 days away from any harbor and travel at only 7–9 knots; aborting a trip because of a health or other problem with an observer would be problematic; who would reimburse the vessel for potentially two to three weeks of lost time?

Response: NMFS recognizes that there may be instances in which the presence of an observer on board a fishing vessel could influence the course of a fishing trip. NMFS, however, believes that these occurrences will be rare. Accordingly, the final rule does not include any provisions for reimbursing or otherwise compensating vessel owners or operators for any losses incurred in such instances.

Vessel Identification

Comment 18: The proposed vessel identification requirements, which in the case of a vessel that has not been assigned an international radio call sign require that the vessel's Federal, State or other documentation number be preceded by the letters "USA", might be a problem for some smaller albacore vessels because of space, particularly given that under the U.S.-Canada Albacore Treaty U.S. vessels are already required to put a "U" after the vessel's U.S. Coast Guard Documentation number or state registration number.

Response: The rule specifies minimum heights of the letters and numbers to be marked on the vessel that are proportional to the length of the vessel. The rule also specifies minimum widths of strokes, minimum hyphen lengths, and minimum sizes of the spaces between letters and numbers, all of which are expressed in terms of the letter height. In other words, the size specifications for the vessel markings explicitly take boat length into consideration.

It should also be noted that the vessel identification requirements under the U.S.-Canada Albacore Treaty (at 50 CFR 300.173) conflict with the vessel identification requirements established in this rule, and because of that, the requirements in this rule will become effective only when the requirements at 50 CFR 300.173 have been revised so as to remove the conflict.

Transshipment Restrictions

Comment 19: The proposed rule's prohibition on purse seine transshipments at sea is appropriate. However, NMFS should provide information on the impact of the proposed rule's prohibition on purse seine transshipments at sea and also describe if the U.S. fleet has historically transshipped, including the locations of such transshipments, in past years.

Response: As described in the IRFA and RIR, U.S. purse seine vessels are already subject to substantial restrictions on at-sea transshipments under the SPTA, and U.S. purse seine vessels consequently do not, in practice, transship at sea. Accordingly, this requirement is not expected to bring a new compliance burden on affected fishermen or otherwise cause any impacts on purse seine transshipments at sea.

Reporting and Recordkeeping

Comment 20: The proposed rule would require any U.S. commercial fishing vessel fishing for HMS anywhere in the Pacific Ocean to submit catch and effort information to NMFS. The preamble to the proposed rule indicates that these reporting requirements are already met by reporting requirements established under the MSA, the HSFCA, the Tuna Conventions Act of 1950, the SPTA, the implementing legislation for the U.S.-Canada Albacore Treaty, as well as relevant State reporting requirements. The proposed rule and EA do not include detailed information to verify NMFS' indication that this is applicable to 5,000 vessels, nor do they discuss in detail how NMFS is currently obtaining this important information.

Response: The proposed rule and EA include what NMFS believes to be sufficient detail to explain the proposed requirements and their basis and to assess their impacts. The rule at 50 CFR 300.218 details the specific regulations that contain the applicable catch and effort reporting requirements.

Compliance With the Laws of Other Nations

Comment 21: The proposed rule's requirement for owners and operators to comply with laws of other nations is appropriate. However, the EA does not provide any current or historical information on the number of U.S. vessels that fish in the exclusive economic zones of other member nations. To get a better understanding on the issue, the Final EA should include this information.

Response: Annex III, Article 2 of the Convention sets forth the specific provisions for complying with national laws that are being implemented in this rule. Providing current or historical information on the number of U.S. vessels that fish in the exclusive economic zones of other WCPFC members in the EA would not provide information relevant to the analysis or affect the proposed action. See the IRFA and FRFA for estimates of the numbers of vessels and small entities to which this requirement will apply.

Facilitation of Enforcement and Inspection

Comment 22: The proposed rule states that the operator of any U.S. fishing vessel must accept and assist boarding and inspection by contracting parties of the WCPFC. As there are U.S. vessels that have Pacific Remote Island Areas bottomfish, lobster, and troll permits, NMFS should provide information to these vessel operators so that they are aware of potential boarding and inspection by non U.S. parties. The final rule and Final EA should describe this outreach as well as the number and type of other U.S. fishing vessels that could be subject to non-U.S. boarding and inspection.

Response: NMFS will endeavor to ensure that all affected U.S. fishing vessels are aware of this new requirement, such as by making copies of this final rule and its associated small entity compliance guide available to affected permit holders.

Comment 23: In the case of a high seas boarding and inspection of a U.S. vessel, NMFS or the U.S. Coast Guard should establish and maintain communication with the U.S. vessel during the boarding and inspection and should also follow up with the vessel afterwards to ascertain if any problems occurred. NMFS should also provide guidelines for U.S. vessel operators to follow in the event of a boarding on the high seas by a WCPFC member nation.

Response: U.S. Government entities such as NMFS and the U.S. Coast Guard will establish and maintain communications with U.S. vessels as required under applicable laws and in accordance with agency policies and practices. This rule establishes the requirements with which U.S. vessel operators must comply in the event of a boarding and inspection undertaken pursuant to WCPFC procedures. These requirements are also explained in the small entity compliance guide prepared for this rule, available at *http://www.fpir.noaa.gov/IFD/ifd_documents_data.html.*

Confidentiality of Information

Comment 24: The proposed rule and the EA offer no details on how the proposed procedures regarding the confidentiality of information vary or are consistent with current procedures, what specific procedures will be followed, or what specific information will be protected. Without this information, it is not possible to comment on this issue. All information submitted by or collected from vessel owners, operators, or crew must be treated as confidential business information and not released in any manner that reveals the identities, operations, or fishing locations of any individual vessel. Fishing operations, locations, and catches are considered to be proprietary business information and must be treated as such. Furthermore, the EA should discuss the current status of agreements within the WCPFC with respect to confidential information.

Response: NMFS does not believe that any of this further information was or is needed in the proposed rule or the EA. The procedures established in this rule regarding the confidentiality of information are consistent with, and implement, the requirements of the WCPFC Implementation Act, specifically section 506(d). The provisions of that section are substantially similar to the information confidentiality provisions of the MSA. Accordingly, the procedures established in this rule are substantially similar to the procedures established under the MSA (see 50 CFR part 600, subpart E), but tailored to conform to the provisions of the WCPFC Implementation Act. With respect to agreements with the WCPFC, there are no bilateral agreements between the U.S. Government and the WCPFC with respect to confidential information, such as an agreement that would prevent public disclosure of the identity or business of any person, as referred to in section 506(d)(1)(B) of the WCPFC Implementation Act. However, information held by the WCPFC is subject to rules and procedures concerning the protection of, access to, and dissemination of WCPFC-held data. These rules and procedures are available at: *http://www.wcpfc.int/guidelines-procedures-and-regulations.*

Other

Comment 25: The definition of "fishing" should not include activities that take place in port, such as transshipping. The proposed definition, which would include transshipment, could improperly cause days in port to be counted against available fishing days.

Response: The definition of "fishing" in the regulations must be consistent with the definition in the WCPFC Implementation Act, which specifies that "fishing" includes transshipment, but only "at sea." Accordingly, NMFS has revised the definition of "fishing" in the final rule to clarify that it includes transshipment, but only at sea.

Comment 26: Carriers and refueling vessels should not be treated as fishing vessels in virtually all ways; the United States should be careful to not impose more regulations on these vessels than are required; we hope the United States will continue to negotiate reasonable working arrangements for these vessels.

Response: The definition in this rule of "fishing vessel" includes carriers and bunkering and other support vessels, consistent with the definition of "fishing vessel" in the WCPFC Implementation Act. The scope of the regulations established in this rule as they relate to carriers and bunkers is consistent with the provisions of the Convention and

the decisions of the WCPFC. NMFS, as part of U.S. delegations to the WCPFC, will continue to promote conservation and management measures that include appropriate and reasonable requirements for carriers and bunkers.

Comment 27: Overall, the EA should be improved to discuss the impact of the "non-discretionary" obligations.

Response: The EA addressed the "non-discretionary" provisions of the rule as part of the cumulative impacts analysis, as specified in Section 4.2.13 of the EA. The non-discretionary provisions would impose a financial burden on fishermen that is minor relative to the total gross revenue earned by each fishing vessel. Table 40 of the EA details this financial burden. Accordingly, the financial burden of the non-discretionary provisions in addition to the financial burden imposed on fishermen from the discretionary provisions, would enhance the likelihood and/or magnitude of the expected environmental impacts of the discretionary provisions of the rule (which are detailed in the EA), but only slightly so.

Comment 28: Table 41 of the EA indicates that NMFS contacted the Western Pacific Regional Fishery Management Council (Council) for information, but the Council has no record of this.

Response: As indicated in Section 1.3 of the EA, NMFS published a Notice of Intent (NOI) to prepare the EA in the **Federal Register** on February 26, 2007. During the time between the publication of the NOI and issuance of the EA, NMFS informally discussed the scope and contents of the EA with Council staff who have NEPA expertise. Thus, NMFS believed it appropriate to list the Council as a party that was contacted for information in Table 41 of the EA.

Comment 29: It is vital to the survival of the U.S. purse seine fleet that the United States negotiate measures in regional fisheries management organizations (RFMO) that impose a comparable burden on all participants in the fishery, and that U.S. fishermen do not bear an unfair amount of the conservation burden. Furthermore, it is critical to the survival of the U.S. purse seine fleet that domestic regulations implementing RFMO measures not be significantly more burdensome on the U.S. fleet than those imposed on the fleet's foreign competitors. Also, it is the responsibility of the U.S. Government to ensure that other governments implement substantially similar rules and regulations, and the U.S. Government should promptly give notice to the appropriate RFMO of any shortcomings in the regulations and enforcement by other member countries of the RFMO.

Response: This comment does not pertain to the proposed rule itself. NMFS, as part of U.S. delegations to the WCPFC and other RFMOs, shares the view that all participants in affected fisheries should share comparable burdens when seeking to achieve conservation and management objectives, and NMFS applies this principle in its role as part of U.S. delegations to the WCPFC and other RFMOs. As part of such U.S. delegations, NMFS routinely endeavors to determine whether all RFMO members are satisfying their obligations to implement the decisions of the RFMOs, and to alert the RFMOs, as appropriate, about any shortcomings in such implementation.

Changes From the Proposed Rule

In the proposed regulations, regulatory instruction (3) said that "Subpart O, consisting of §§ 300.210 through 200.222, is added to part 300 to read as follows:" The instruction was meant to read "* * * consisting of §§ 300.210 through 300.222 * * *" and the corresponding instructions in this final rule are corrected accordingly.

The proposed rule that led to this final rule would have established a new subpart O in part 300 of title 50 of the *Code of Federal Regulations,* titled "Western and Central Pacific Fisheries for Highly Migratory Species." However, on August 4, 2009, after publication of that proposed rule, NMFS published in the **Federal Register** a final rule to implement certain decisions of the WCPFC (74 FR 38544). That final rule (called here the "WCPFC purse seine rule") established subpart O in part 300 of title 50, including some of the definitions and certain other regulations that would have been established in the proposed rule for this action. Consequently, the regulations in this final rule are written as amendments to the sections in subpart O, and since some of the regulations in the proposed rule for this action have already been established in the WCPFC purse seine rule, they need not be included in this final rule. Specifically, the following elements of the regulations in the proposed rule for this action are not included in this final rule: § 300.210, "Purpose and scope," in its entirety; in § 300.211, "Definitions," the introductory sentence and the definitions for all the terms needed in the WCPFC purse seine rule; in § 300.215, "Observers," all of paragraph (c) except the sentence "All fishing vessels subject to this section must carry a WCPFC observer when directed to do so by NMFS" (which has been further revised—see below); and in § 300.222, "Prohibitions," the introductory sentence.

In § 300.211, "Definitions," the definition of "Fishing" has been revised to clarify that it includes transshipment only if the transshipment takes place at sea.

In § 300.212, "Vessel permit endorsements," the following statement has been removed from paragraph (c)(3), which relates to the requirement that a photograph of the subject vessel be included with the application for a WCPFC Area Endorsement: "A vessel photograph submitted as part of an application for a high seas fishing permit will be deemed to satisfy the requirement under this section, provided that it clearly shows that the vessel is marked in accordance with the vessel identification requirements of § 300.217 and it meets the specifications prescribed on the WCPFC Area Endorsement application form." This statement was included in the proposed rule in anticipation that the high seas fishing permit application requirements under 50 CFR 300.13 might be revised to require that the applicant provide a vessel photograph. The high seas permit application requirements have not been revised in that manner, so the statement has been removed from this final rule. Also in § 300.212, paragraph (f) has been revised to clarify that a WCPFC Area Endorsement shall be void whenever the underlying high seas fishing permit is void, "suspended, sanctioned or revoked," and "is also subject to suspension or revocation independent of the high seas fishing permit."

In § 300.215, "Observers," paragraph (c) has been clarified to say that the requirement to carry a WCPFC observer when directed to do so by NMFS is limited to fishing trips during which the fishing vessel at any time enters or is within the Convention Area.

In § 300.216, "Transshipment," paragraph (b) has been clarified to say that the restrictions apply to transshipments from purse seine fishing vessels "of the United States" and to transshipments from purse seine fishing vessels to fishing vessels "of the United States."

In § 300.217, "Vessel identification," a new paragraph (c) has been added to say that the section does not apply to fishing vessels that are subject to the vessel identification requirements of 50 CFR 300.173 or 660.704 until conflicts with those requirements are reconciled, and only upon publication in the **Federal Register** of a notice or final rule that includes a statement to that effect.

In § 300.218, "Reporting and recordkeeping," paragraph (a)(1) has been clarified to say that the requirements of the section apply to fishing vessels "of the United States" used for commercial fishing for HMS in the Pacific Ocean.

In § 300.219, "Vessel monitoring system," paragraph (a) has been revised to include the NOAA Office of Law Enforcement's VMS Helpdesk as a contact for the purpose of submitting on/off reports. Also in § 300.219, several references to "NMFS" have been replaced by "the SAC" in order to clarify that certain communications from NMFS can be expected to be received specifically from the SAC, which is the Special-Agent-In-Charge, NOAA Office of Law Enforcement, Pacific Islands Division, or a designee.

In § 902.1(b) of title 15 of the *Code of Federal Regulations,* which includes a table listing control numbers issued by the Office of Management and Budget (OMB) for collections of information required under NOAA regulations, new entries have been added for the OMB control numbers approved for the information collections required under §§ 300.212, 300.213, and 300.219 of title 50 of the *Code of Federal Regulations.*

Delegation of Authority

Under NOAA Administrative Order 205–11, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated authority to sign material for publication in the **Federal Register** to the Assistant Administrator for Fisheries, NOAA.

Classification

The NOAA Assistant Administrator for Fisheries has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

National Environmental Policy Act

NMFS prepared an Environmental Assessment (EA) that discusses the expected impacts that implementation of the rule would have on the environment. NMFS issued a draft version of the EA for public review and comment in conjunction with the proposed rule. Comments on the draft EA have been addressed in the preamble to the final rule. The final version of the EA is available at *http://www.fpir.noaa.gov/IFD/ifd_documents_data.html.* NMFS analyzed four action alternatives as well as the no-action, or baseline, alternative in the EA. The action alternatives include the provisions of the rule that are discretionary in nature (*i.e.,* the provisions that allow NMFS discretion in the methods and means to implement them), while the other provisions of the rule were analyzed as part of the cumulative impacts analysis. The primary environmental effect of any of the action alternatives is that implementation of the requirements would make it more costly to fish, and thus, there could be a disincentive to fish, at least in the area of application of the requirements. However, the disincentive to fish would be expected to be minor for the majority of affected vessels. At most, the disincentive to fish could result in slight decreases in longline and/or albacore troll fishing effort on the high seas in the area of application of the Convention, and correspondingly slight increases in other areas. None of the requirements would directly control fishing practices per se, such as how much fishing effort is exerted, how much of a given resource may be caught, where fishing may take place, what type of fishing gear may be used, or how fishing gear may be deployed. None of the action alternatives would authorize or open the possibility for a new fishery or expand fishing opportunities. None of the action alternatives would be anticipated to result in an increase in fishing effort in the area of application of the Convention, and none would be expected to result in marked changes in fishing patterns anywhere. The non-discretionary provisions of the rule analyzed as part of the cumulative impacts analysis would also make it more costly to fish, and thus, would enhance the likelihood and/or magnitude of the expected impacts of the action alternatives, but only slightly so. The contribution to cumulative environmental impacts on the affected environment from any of the provisions in the rule would be minor. The final rule implements Alternative D, because it would achieve what NMFS believes is the best balance between the compliance costs that would be imposed on fishermen and the effectiveness of the resulting management regime. Based on the analysis in the EA, NMFS has determined that there will be no significant impact on the human environment as a result of this rule.

The economic impacts of the rule are addressed in the EA only insofar as they are related to impacts to the biophysical environment. They are addressed more fully in the RIR, IRFA, and FRFA. A copy of the EA is available from NMFS (*see* **ADDRESSES**).

Executive Order 12866

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

Regulatory Flexibility Act

NMFS prepared a final regulatory flexibility analysis (FRFA) for the rule, Initial Implementation of the Western and Central Pacific Fisheries Convention. The FRFA incorporates the IRFA prepared for the proposed rule (74 FR 23965; May 22, 2009; available from NMFS—*see* **ADDRESSES**). The analysis provided in the IRFA is not repeated here in its entirety.

The need for, reasons why action by the agency is being considered, and the objectives of the action are explained in the preambles to the proposed rule and final rule and are not repeated here. There are no disproportionate economic impacts between small and large vessels resulting from this final rule. Furthermore, there are no disproportionate economic impacts from this rule based on vessel size, gear, or homeport. The new recordkeeping or reporting requirements in this rule, as well as other compliance requirements, are described in the IRFA. This final rule is issued under authority of the WCPFC Implementation Act.

Description of Small Entities to Which the Rule Will Apply

This final rule will apply to owners and operators of U.S. vessels used for fishing in the Pacific Ocean. Most elements of the proposed rule will apply to smaller subsets of that pool of vessels, as shown in Table 1. The numbering of the elements in Table 1 corresponds to the numbering used in the descriptions earlier in this section of the preamble. Table 1 also shows estimates of the numbers of vessels, broken down by vessel type where possible, to which each element of the rule will apply. Based on available financial information about the affected fishing fleets, NMFS believes that with the exception of most vessels in the purse seine and carrier and support vessel fleets, virtually all the affected vessels are owned by small business entities (*i.e.,* they have gross annual receipts of no more than $4.0 million). In the purse seine fleet, NMFS believes that as many as 10 of the affected vessels are owned by small entities. In the carrier and support vessel fleet, NMFS believes that no vessels are owned by small entities. The estimated numbers of small entities that will be affected by each element of the rule are shown in parentheses in the last column of Table 1.

TABLE 1—DESCRIPTIONS AND NUMBERS OF VESSELS AND SMALL ENTITIES TO WHICH THE PROPOSED RULE WOULD APPLY

Element of proposed rule	Description of vessels to which element would apply	Estimated number of vessels (and small entities) to which element would apply
1. Authorization to fish	Vessels used for commercial fishing for HMS on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
2a. Vessel information—high seas	Vessels used for commercial fishing for HMS on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
2b. Vessel information—foreign jurisdictions	Vessels used for commercial fishing for HMS in foreign jurisdictions in Convention Area.	Longline, troll, support 20 (20). Purse seine 40 (10). Total 60 (30).
3. VMS	Vessels used for commercial fishing for HMS on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
4. Vessel observer program	Vessels used for commercial fishing for HMS on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
5. Vessel identification	Vessels used for commercial fishing for HMS on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
6. Transshipment restrictions	Purse seine vessels used for fishing in Convention Area and vessels used to receive fish in Convention Area.	Longline 0 (0). Purse seine 40 (10). Troll 0 (0). Support 5 (0). Total 45 (10).
7. Reporting and recordkeeping	Vessels used for commercial fishing for HMS in Pacific Ocean.	Total 5,000 (5,000).
8a. Compliance with the laws of other nations—high seas.	Vessels used for commercial fishing for HMS on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
8b. Compliance with the laws of other nations—jurisdictions of other WCPFC members.	Vessels used for commercial fishing for HMS in areas under the jurisdiction of other WCPFC members.	Longline, troll, support 20 (20). Purse seine 40 (10). Total 60 (30).
9a. Facilitation of enforcement and inspection—HMS fishing.	Vessels used for commercial fishing for HMS in the Convention Area on high seas or in areas under the jurisdiction of other nations.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
9b. Facilitation of enforcement and inspection—all fishing.	Fishing vessels used on high seas in Convention Area.	Longline 139 (139). Purse seine 40 (10). Troll 69 (69). Support 5 (0). Total 253 (218).
10. Confidentiality of information	None	Longline 0 (0). Purse seine 0 (0). Troll 0 (0). Support 0 (0). Total 0 (0).

Steps Taken To Minimize the Significant Economic Impact on Small Entities

NMFS explored alternatives that would achieve the objective of this action (to satisfy the international obligations of the United States under the Convention and accomplish the objectives of the WCPFC Implementation Act) while minimizing economic impacts on small entities. As described in the IRFA, NMFS has limited discretion as to how to implement the provisions of the Convention and the decisions of the WCPFC. Consequently, NMFS was able to identify alternatives that would satisfy the Convention's provisions for only four elements of the rule, as identified in the IRFA: Element (1),

authorization to fish; element (2), vessel information; element (3), VMS; and the high seas boarding and inspection component of element (9), facilitation of enforcement and inspection. NMFS was not able to identify any additional alternatives that would minimize significant economic impacts on small entities while satisfying the obligations of the United States under the Convention. The alternatives considered in the IRFA, and the reasons for preferring one over another, are summarized below.

With respect to element (1), authorization to fish, one alternative would be to rely on the existing high seas fishing permit requirement under the HSFCA (that requirement applies to the high seas globally, not just the high seas in the Convention Area), rather than establishing an additional authorization requirement. Although this would be less costly to affected small entities than the proposed action, this alternative would fail to identify the pool of vessel owners and operators interested in fishing on the high seas in the Convention Area and subject to all the other Convention-related requirements. As a consequence, it would be difficult to conduct effective outreach and enforcement activities to achieve a high level of compliance with those requirements. For that reason, this alternative was rejected. A second alternative would be to create a new stand-alone permit (WCPFC Area Permit) that would be required for any vessel used for commercial fishing for HMS on the high seas in the Convention Area but which, unlike the proposed WCPFC Area Endorsement (which would be an endorsement on a high seas fishing permit), would not be related in any way to the high seas fishing permit. This would be slightly more costly to affected small entities than the WCPFC Area Endorsement. For that reason, this alternative was rejected.

With respect to element (2), vessel information, one alternative would be to collect the needed information separately from any permit requirement; that is, as a stand-alone requirement for vessel owners to submit specified information to NMFS. The cost to affected small entities would be about the same as that of the proposed action, but because it would not be tied to obtaining a fishing authorization, compliance with this alternative would likely be poorer than for the proposed action. For that reason, this alternative was rejected. A second alternative would be to collect the needed information via the application for a WCPFC Area Permit. The cost to affected small entities under this alternative would be about the same as that of the proposed action, but because the cost of the WCPFC Area Permit alternative would be slightly more costly to affected small entities than the WCPFC Area Endorsement alternative (see above), this alternative was rejected.

With respect to element (3), VMS, one alternative would be to require that VMS units be carried and operated on vessels used for commercial fishing for HMS on the high seas in the Convention Area, but only when the subject vessel is actually on the high seas in the Convention Area. This could be slightly less costly to affected small entities because they would be allowed to turn off the VMS unit when not on the high seas in the Convention Area, but because vessel operators would be allowed to operate in many areas with their VMS units disabled, compliance with this alternative while on the high seas in the Convention Area would be expected to be lower than under the proposed action. That is, it is expected that more vessels would operate within the Convention Area more often without operating their VMS units. For that reason, this alternative was rejected. A second alternative would be to require that VMS units be carried and operated on vessels used for commercial fishing for HMS during the entirety of any trip that includes the high seas in the Convention Area. Like the previous alternative, this could be slightly less costly to affected small entities than the proposed action, but for the same reasons cited for the previous alternative, compliance with this alternative would likely be poorer than for the proposed action. For that reason, this alternative was rejected. A third alternative would be to require that a VMS unit be carried and operated at all times on any vessel with a WCPFC Area Permit. The costs to affected small entities under this alternative would be slightly more than under the proposed action. For that reason, and because the WCPFC Area Permit alternative would be slightly more costly to affected small entities than the WCPFC Area Endorsement alternative (see above), this alternative was rejected.

With respect to the high seas boarding and inspection component of element (9), facilitation of enforcement and inspection, one alternative would be to require that only operators of vessels used to fish for HMS (rather than for any species, as being proposed) on the high seas in the Convention Area accept and facilitate boarding and inspection by authorized inspectors of other members of the WCPFC. The number of affected small entities would be smaller than under the proposed action. However, since the inspectors of other members of the WCPFC may not be able to readily distinguish U.S. vessels used for fishing for HMS (which the WCPFC's boarding and inspection regime is designed to target) from other U.S. fishing vessels, an effective boarding regime may require that U.S. fishing vessels in the latter category accept boarding from inspection vessels of other members of the WCPFC in order to verify the fishing vessel's status. By applying this requirement to all U.S. fishing vessels, not just those used for fishing for HMS, non-HMS U.S. fishing vessels would be more prepared for the prospect of being boarded and inspected. As a consequence of such preparation, any boardings and inspections of non-HMS U.S. fishing vessels would be more likely to be completed quickly and without misunderstandings and the potential for conflict. NMFS believes that the proposed action would be safer and less costly to small entities than the alternative of applying the requirement only to operators of vessels used to fish for HMS. For that reason, the alternative of applying this requirement to just those vessels used for fishing for HMS was rejected.

The alternative of taking no action at all was rejected because it would fail to accomplish the objective of the WCPFC Implementation Act or satisfy the international obligations of the United States as a Contracting Party to the Convention.

The selected alternative would satisfy the international obligations of the United States as a Contracting Party to the Convention and thereby accomplish the objective of the WCPFC Implementation Act, and do so with minimal adverse economic impacts on small entities, and for these reasons was adopted in the final rule.

Comments and Responses on the IRFA

NMFS received a number of comments on the proposed rule that pertained to information in the IRFA. These were comments 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 22, and 23, as presented in a previous section of this preamble. These comments, and NMFS' responses, are incorporated by reference into this FRFA.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such

publications as "small entity compliance guides." The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a small entity compliance guide (the guide) has been prepared. The guide will be sent to all holders of relevant fishing permits and licenses. Copies of this final rule and the guide are available from NMFS (*see* **ADDRESSES**) and are available at: *http://www.fpir.noaa.gov/IFD/ifd_documents_data.html.*

Paperwork Reduction Act

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The collection of this information has been approved by the Office of Management and Budget (OMB) under OMB Control Numbers 0648–0595 (vessel information requirements) and 0648–0596 (VMS requirements). The public reporting burden for the vessel information requirements is estimated to average 60 minutes per WCPFC Area Endorsement application, with about one application per five years per respondent (*i.e.,* 12 minutes per respondent per year, on average); and about 90 minutes per Foreign EEZ Form, with about one form per five years per respondent (*i.e.,* 18 minutes per respondent per year, on average). The public reporting burden for the VMS requirements is estimated to average 5 minutes per activation report, with about one activation report per two years per respondent (*i.e.,* 2.5 minutes per respondent per year, on average); 5 minutes per on/off report, with about 10 on/off reports per year per respondent (*i.e.,* 50 minutes per respondent per year, on average); 4 hours per VMS unit purchase and installation, with about one purchase and installation per four years per respondent (*i.e.,* 1 hour per respondent per year, on average); and 1 hour per year per respondent for VMS unit maintenance (*i.e.,* 1 hour per respondent per year, on average). These estimated burdens include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of this data information, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov,* or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

Prior notice and opportunity for public comment are not required with respect to the revision to the table of OMB control numbers in 15 CFR 902.1(b) because this action is a rule of agency organization, procedure or practice under 5 U.S.C. 553(b)(A).

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: January 14, 2010.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 15 CFR Chapter IX and 50 CFR Chapter III are amended as follows:

15 CFR CHAPTER IX—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. In § 902.1, paragraph (b), the table is amended by adding in the left column under 50 CFR, in numerical order, entries for §§ 300.212, 300.213, and 300.219, and, in the right column, in corresponding positions, the control numbers "–0595," "–0595," and "–0596," as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * *	
50 CFR	
* * * * *	
300.212	–0595
300.213	–0595
300.219	–0596
* * * * *	

50 CFR CHAPTER III—INTERNATIONAL FISHING AND RELATED ACTIVITIES

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart B—High Seas Fisheries

■ 3. The authority citation for 50 CFR part 300, subpart B, continues to read as follows:

Authority: 16 U.S.C. 5501 *et seq.*

■ 4. In § 300.14, paragraph (b)(2)(i) is revised to read as follows:

§ 300.14 Vessel identification.

* * * * *

(b) * * *

(2) * * *

(i) A vessel must be marked with its IRCS if it has been assigned an IRCS. If an IRCS has not been assigned to the vessel, it must be marked (in order of priority) with its Federal, State, or other documentation number appearing on its high seas fishing permit and if a WCPFC Area Endorsement has been issued for the vessel under § 300.212, that documentation number must be preceded by the characters "USA" and a hyphen (that is, "USA-").

* * * * *

Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

■ 5. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 *et seq.*

■ 6. In § 300.211, definitions of "1982 Convention," "Aggregate or summary form," "Commercial," "Confidential information," "Conservation and management measure," "High seas fishing permit," "Highly migratory species (or HMS)," "Marine Fisheries Commission," "NOAA," "Observer employer/observer provider," "Observer information," "Special Agent-In-Charge (or SAC)," "Vessel monitoring system (or VMS)," "VMS unit," "WCPFC Area Endorsement," "WCPFC inspection vessel," "WCPFC inspector," and "WCPFC transshipment monitor" are added, in alphabetical order, and the definition of "Fishing" is revised, to read as follows:

§ 300.211 Definitions.

* * * * *

1982 Convention means the United Nations Convention on the Law of the Sea of 10 December 1982.

Aggregate or summary form means information structured in such a way which does not directly or indirectly disclose the identity or business of any person who submits such information.

Commercial, with respect to commercial fishing, means fishing in which the fish harvested, either in whole or in part, are intended to enter commerce through sale, barter or trade.

* * * * *

Confidential information means any observer information or any information submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission by any person in compliance with any requirement or regulation under the Act or under the Magnuson-Stevens Fishery Conservation and Management Act.

Conservation and management measure means those conservation and management measures adopted by the Commission pursuant to Article 10 of the WCPF Convention.

* * * * *

Fishing means using any vessel, vehicle, aircraft or hovercraft for any of the following activities, or attempting to do so:

(1) Searching for, catching, taking, or harvesting fish;

(2) Engaging in any other activity which can reasonably be expected to result in the locating, catching, taking, or harvesting of fish for any purpose;

(3) Placing, searching for, or recovering fish aggregating devices or associated electronic equipment such as radio beacons;

(4) Engaging in any operations at sea directly in support of, or in preparation for, any of the activities previously described in paragraphs (1) through (3) of this definition, including, but not limited to, bunkering;

(5) Engaging in transshipment at sea, either unloading or loading fish.

* * * * *

Highly migratory species (or HMS) means any of the following species:

Common name	Scientific name
Albacore	*Thunnus alalunga.*
Pacific bluefin tuna	*Thunnus orientalis.*
Southern bluefin tuna	*Thunnus maccoyii.*
Bigeye tuna	*Thunnus obesus.*
Skipjack tuna	*Katsuwonus pelamis.*
Yellowfin tuna	*Thunnus albacares.*
Little tuna	*Euthynnus affinis.*
Frigate mackerel	*Auxis thazard; Auxis rochei.*
Pomfrets	Family Bramidae.
Marlins	*Tetrapturus angustirostris; Tetrapturus audax; Makaira mazara; Makaira indica; Makaira nigricans.*
Sail-fishes	*Istiophorus platypterus.*
Swordfish	*Xiphias gladius.*
Dolphinfish	*Coryphaena hippurus; Coryphaena equiselis.*
Oceanic sharks	*Hexanchus griseus; Cetorhinus maximus;* Family Alopiidae; *Rhincodon typus*; Family Carcharhinidae; Family Sphyrnidae; Family Isuridae (or Lamnidae).

High seas fishing permit means a permit issued under § 300.13.

* * * * *

Marine Fisheries Commission means the Atlantic States Marine Fisheries Commission, the Gulf States Marine Fisheries Commission, or the Pacific States Marine Fisheries Commission.

* * * * *

NOAA means the National Oceanic and Atmospheric Administration, Department of Commerce.

Observer employer/observer provider means any person that provides observers to fishing vessels, shoreside processors, or stationary floating processors under a requirement of the Act or the Magnuson-Stevens Fishery Conservation and Management Act.

Observer information means any information collected, observed, retrieved, or created by an observer or electronic monitoring system pursuant to authorization by the Secretary, or collected as part of a cooperative research initiative, including fish harvest or processing observations, fish sampling or weighing data, vessel logbook data, vessel or processor-specific information (including any safety, location, or operating condition observations), and video, audio, photographic, or written documents.

* * * * *

Special Agent-In-Charge (or SAC) means the Special-Agent-In-Charge, NOAA Office of Law Enforcement, Pacific Islands Division, or a designee (1601 Kapiolani Blvd., Suite 950, Honolulu, HI 96814; tel: (808) 203–2500; facsimile: (808) 203–2599; e-mail: *pidvms@noaa.gov*).

* * * * *

Vessel monitoring system (or VMS) means an automated, remote system that provides information about a vessel's identity, location and activity, for the purposes of routine monitoring, control, surveillance and enforcement of area and time restrictions and other fishery management measures.

VMS unit, sometimes known as a "mobile transmitting unit," means a transceiver or communications device, including all hardware and software, that is carried and operated on a vessel as part of a VMS.

WCPFC Area Endorsement means the authorization issued by NMFS under § 300.212, supplementary to a valid high seas fishing permit and expressed as an endorsement to such permit, for a fishing vessel used for commercial fishing for highly migratory species on the high seas in the Convention Area.

* * * * *

WCPFC inspection vessel means any vessel that is:

(1) Authorized by a member of the Commission to be used to undertake boarding and inspection of fishing vessels on the high seas pursuant to, and in accordance with, Article 26 of the WCPF Convention and procedures established by the Commission pursuant thereto;

(2) Included in the Commission's register of authorized inspection vessels and authorities or inspectors, established by the Commission in procedures pursuant to Article 26 of the WCPF Convention; and

(3) Flying the WCPFC inspection flag established by the Commission.

WCPFC inspector means a person that is authorized by a member of the

Commission to undertake boarding and inspection of fishing vessels on the high seas pursuant to, and in accordance with, the boarding and inspection procedures adopted by the Commission under Article 26 of the WCPF Convention, and referred to therein as a "duly authorized inspector" or "authorized inspector."

* * * * *

WCPFC transshipment monitor means, with respect to transshipments that take place on the high seas, a person authorized by the Commission to conduct transshipment monitoring on the high seas, and with respect to transshipments that take place in areas under the jurisdiction of a member of the Commission other than the United States, a person authorized by such member of the Commission to conduct transshipment monitoring.

■ 7. Section 300.212 is added to read as follows:

§ 300.212 Vessel permit endorsements.

(a) Any fishing vessel of the United States used for commercial fishing for HMS on the high seas in the Convention Area must have on board a valid high seas fishing permit, or a copy thereof, that has a valid WCPFC Area Endorsement, or a copy thereof.

(b) *Eligibility.* Only a fishing vessel that has a valid high seas fishing permit is eligible to receive a WCPFC Area Endorsement.

(c) *Application.* (1) A WCPFC Area Endorsement may be applied for at the same time the underlying high seas permit is applied for, or at any time thereafter.

(2) The owner or operator of a high seas fishing vessel may apply for a WCPFC Area Endorsement by completing an application form, available from the Pacific Islands Regional Administrator, and submitting the complete and accurate application, signed by the applicant, to the Pacific Islands Regional Administrator, along with the required fees.

(3) The application must be accompanied by a bow-to-stern side-view photograph of the vessel in its current form and appearance. The photograph must meet the specifications prescribed on the application form and clearly show that the vessel is marked in accordance with the vessel identification requirements of § 300.217.

(d) *Fees.* NMFS will charge a fee to recover the administrative expenses of issuance of a WCPFC Area Endorsement. The amount of the fee will be determined in accordance with the procedures of the NOAA Finance Handbook, available from the Pacific Islands Regional Administrator, for determining administrative costs of each special product or service. The fee is specified in the application form. The appropriate fee must accompany each application. Failure to pay the fee will preclude issuance of the WCPFC Area Endorsement. Payment by a commercial instrument later determined to be insufficiently funded is grounds for invalidating the WCPFC Area Endorsement.

(e) *Issuance.* (1) The Pacific Islands Regional Administrator will issue a WCPFC Area Endorsement within 30 days of receipt of a complete application that meets the requirements of this section and upon payment of the appropriate fee.

(2) If an incomplete or improperly completed application is submitted, the Pacific Islands Regional Administrator will notify the applicant of such deficiency within 30 days of the date of receipt of the application. If the applicant fails to correct the deficiency and send a complete and accurate application to the Pacific Islands Regional Administrator within 30 days of the date of the notification of deficiency, the application will be considered withdrawn and no further action will be taken to process the application. Following withdrawal, the applicant may at any time submit a new application for consideration.

(f) *Validity.* A WCPFC Area Endorsement issued under this subpart expires upon the expiration of the underlying high seas fishing permit, and shall be void whenever the underlying high seas fishing permit is void, suspended, sanctioned or revoked. A WCPFC Area Endorsement is also subject to suspension or revocation independent of the high seas fishing permit. Renewal of a WCPFC Area Endorsement prior to its expiration is the responsibility of the WCPFC Area Endorsement holder.

(g) *Change in application information.* Any change in the required information provided in an approved or pending application for a WCPFC Area Endorsement must be reported by the vessel owner or operator to the Pacific Islands Regional Administrator in writing within 15 days of such change.

(h) *Transfer.* A WCPFC Area Endorsement issued under this subpart is valid only for the vessel, owner, and high seas fishing permit to which it is issued and is not transferable or assignable to another high seas fishing permit or to another vessel.

(i) *Display.* A valid WCPFC Area Endorsement, or a photocopy or facsimile copy thereof, issued under this subpart must be on board the vessel and available for inspection by any authorized officer while the vessel is at sea and must be available for inspection by any WCPFC inspector while the vessel is on the high seas in the Convention Area.

■ 8. Section 300.213 is added to read as follows:

§ 300.213 Vessel information.

(a) The owner or operator of any fishing vessel of the United States that is used for fishing for HMS in the Convention Area in waters under the jurisdiction of any nation other than the United States must, prior to the commencement of such fishing, submit to the Pacific Islands Regional Administrator information about the vessel and its ownership and operation, and the authorized fishing activities, including copies of any permits, licenses, or authorizations issued for such activities, as specified on forms available from the Pacific Islands Regional Administrator. The owner or operator of such a fishing vessel must also submit to the Pacific Islands Regional Administrator a bow-to-stern side-view photograph of the vessel in its current form and appearance, and the photograph must meet the specifications prescribed on the application form. If any of the submitted information changes, the vessel owner or operator must report the updated information to the Pacific Islands Regional Administrator in writing within 15 days of the change.

(b) If any of the information or the vessel photograph required under paragraph (a) of this section has been submitted for the subject vessel on an application for a high seas fishing permit or an application for a WCPFC Area Endorsement, then the requirements of paragraph (a) of this section will be deemed satisfied. However, in order to satisfy this requirement, the high seas fishing permit or WCPFC Area Endorsement must be valid, the information provided must be true, accurate and complete, and in the case of a vessel photograph, it must meet the specifications prescribed on the form used for the purpose of submitting the photograph under this section.

■ 9. Section 300.214 is added to read as follows:

§ 300.214 Compliance with laws of other nations.

(a) The owner and operator of a fishing vessel of the United States with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required:

(1) May not use the vessel for fishing, retaining fish on board, or landing fish in areas under the jurisdiction of a nation other than the United States unless any license, permit, or other authorization that may be required by such other nation for such activity has been issued with respect to the vessel.

(2) Shall, when the vessel is in the Convention Area in areas under the jurisdiction of a member of the Commission other than the United States, operate the vessel in compliance with, and ensure its crew complies with, the applicable national laws of such member.

(b) The owner and operator of a fishing vessel of the United States shall ensure that:

(1) The vessel is not used for fishing for HMS, retaining HMS on board, or landing HMS in the Convention Area in areas under the jurisdiction of a nation other than the United States unless any license, permit, or other authorization that may be required by such other nation for such activity has been issued with respect to the vessel.

(2) If the vessel is used for commercial fishing for HMS, including transshipment of HMS, in the Convention Area in areas under the jurisdiction of a member of the Commission other than the United States, the vessel is operated in compliance with, and the vessel crew complies with, the applicable laws of such member, including any laws related to carrying vessel observers or the operation of VMS units.

(c) For the purpose of this section, the meaning of transshipment does not include transfers that exclusively involve fish that have been previously landed and processed.

■ 10. In § 300.215, paragraphs (a), (c), and (d) are revised to read as follows:

§ 300.215 Observers.

(a) *Applicability.* This section applies to any fishing vessel of the United States with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required.

* * * * *

(c) *Accommodating observers.* All fishing vessels subject to this section must carry, when directed to do so by NMFS, a WCPFC observer on fishing trips during which the vessel at any time enters or is within the Convention Area. The operator and each member of the crew of the fishing vessel shall act in accordance with this paragraph with respect to any WCPFC observer.

(1) The operator and crew shall allow and assist WCPFC observers to:

(i) Embark at a place and time determined by NMFS or otherwise agreed to by NMFS and the vessel operator;

(ii) Have access to and use of all facilities and equipment on board as necessary to conduct observer duties, including, but not limited to: full access to the bridge, the fish on board, and areas which may be used to hold, process, weigh and store fish; full access to the vessel's records, including its logs and documentation, for the purpose of inspection and copying; access to, and use of, navigational equipment, charts and radios; and access to other information relating to fishing;

(iii) Remove samples;

(iv) Disembark at a place and time determined by NMFS or otherwise agreed to by NMFS and the vessel operator; and

(v) Carry out all duties safely.

(2) The operator shall provide the WCPFC observer, while on board the vessel, with food, accommodation and medical facilities of a reasonable standard equivalent to those normally available to an officer on board the vessel, at no expense to the WCPFC observer.

(3) The operator and crew shall not assault, obstruct, resist, delay, refuse boarding to, intimidate, harass or interfere with WCPFC observers in the performance of their duties, or attempt to do any of the same.

(d) *Related observer requirements.* Observers deployed by NMFS pursuant to regulations issued under other statutory authorities on vessels used for commercial fishing for HMS in the Convention Area will be deemed by NMFS to have been deployed pursuant to this section.

■ 11. Section 300.216 is added to read as follows:

§ 300.216 Transshipment.

(a) *Transshipment monitoring.* [Reserved]

(b) *Transshipment restrictions.* Fish may not be transshipped from a purse seine fishing vessel of the United States at sea in the Convention Area, and a fishing vessel of the United States may not be used to receive a transshipment of fish from a purse seine fishing vessel at sea in the Convention Area.

■ 12. Section 300.217 is added to read as follows:

§ 300.217 Vessel identification.

(a) *General.* (1) A fishing vessel must be marked in accordance with the requirements of this section in order for a WCPFC Area Endorsement to be issued for the fishing vessel.

(2) Any fishing vessel of the United States with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required shall be marked for identification purposes in accordance with this section, and all parts of such markings shall be clear, distinct, uncovered, and unobstructed.

(3) Any boat, skiff, or other watercraft carried on board the fishing vessel shall be marked with the same identification markings as required under this section for the fishing vessel and shall be marked in accordance with this section.

(b) *Marking.* (1) Vessels shall be marked in accordance with the identification requirements of § 300.14(b)(2), and if an IRCS has not been assigned to the vessel, then the Federal, State, or other documentation number used in lieu of the IRCS must be preceded by the characters "USA" and a hyphen (that is, "USA-").

(2) With the exception of the vessel's name and hailing port, the marking required in this section shall be the only vessel identification mark consisting of letters and numbers to be displayed on the hull and superstructure.

(c) This section will not apply to fishing vessels that are subject to the vessel identification requirements of §§ 300.173 or 660.704 of this title until conflicts between the requirements of this section and the requirements of those sections are reconciled, and only upon publication in the **Federal Register** of a notice or final rule that includes a statement to that effect.

■ 13. Section 300.218 is added to read as follows:

§ 300.218 Reporting and recordkeeping requirements.

(a) *Fishing reports.*—(1) *General.* The owner or operator of any fishing vessel of the United States used for commercial fishing for HMS in the Pacific Ocean must maintain and report to NMFS catch and effort and other operational information for all such fishing activities. The reports must include at a minimum: identification information for the vessel; description of fishing gear used; dates, times and locations of fishing; and species and amounts of fish retained and discarded.

(2) *Reporting options.* Vessel owners and operators shall be deemed to meet the recordkeeping and reporting requirements of paragraph (a)(1) of this section by satisfying all applicable catch and effort reporting requirements as listed below:

(i) *Western Pacific pelagic fisheries.* Fishing activities subject to the reporting requirements of § 665.14 of this title must be maintained and

reported in the manner specified in that section.

(ii) *West Coast HMS fisheries.* Fishing activities subject to the reporting requirements of § 660.708(a) of this title must be maintained and reported in the manner specified in that section.

(iii) *Pacific tuna fisheries.* Fishing activities subject to the reporting requirements of § 300.22 must be maintained and reported in the manner specified in that section.

(iv) *South Pacific tuna fisheries.* Fishing activities subject to the reporting requirements of § 300.34(c)(1) must be maintained and reported in the manner specified in that section.

(v) *High seas fisheries.* Fishing activities subject to the reporting requirements of § 300.17(a) must be maintained and reported in the manner specified in § 300.17(a) and (b).

(vi) *Canada albacore fisheries.* Fishing activities subject to the reporting requirements of § 300.174 must be maintained and reported in the manner specified in that section.

(vii) *State-regulated fisheries.* Catch and effort information for fishing activities for which reporting of effort, catch, and/or landings is required under State law must be maintained and reported in the manner specified under such State law.

(viii) *Other fisheries.* All other fishing activities subject to the requirement of paragraph (a)(1) of this section must be recorded on paper or electronic forms specified or provided by the Pacific Islands Regional Administrator. Such forms will specify the information required, which may include: Identification information for the vessel; description of fishing gear used; dates, times and locations of fishing; and species and amounts of fish retained and discarded. All information specified by the Pacific Islands Regional Administrator on such forms must be recorded on paper or electronically within 24 hours of the completion of each fishing day. The information recorded must, for each fishing day, include a dated signature of the vessel operator or other type of authentication as specified by the Pacific Islands Regional Administrator. The vessel operator must, unless otherwise specified by the Pacific Islands Regional Administrator, submit the information for each fishing day to the Pacific Islands Regional Administrator within 72 hours of the first landing or port call after the fishing day, and must submit the information in the manner specified by the Pacific Islands Regional Administrator.

(3) *Exceptions.* (i) Catch and effort information for fishing activities that take place in waters under State jurisdiction must be maintained and reported only in cases where the reporting of such activity is required under State law or under Federal regulations at §§ 300.22 and 300.34, and §§ 660.708 and 665.14 of this title.

(ii) Catch and effort information for fishing activities that take place in waters under Federal jurisdiction around American Samoa, Guam and the Northern Mariana Islands need not be reported under this section unless reporting of such activity is required under regulations in chapter VI of this title.

(b) *Transshipment reports.* [Reserved]

■ 14. Section 300.219 is added to read as follows:

§ 300.219 Vessel monitoring system.

(a) *SAC and VMS Helpdesk contact information and business hours.* The contact information for the SAC for the purpose of this section is: 1601 Kapiolani Blvd., Suite 950, Honolulu, HI 96814; telephone: (808) 203–2500; facsimile: (808) 203–2599; e-mail: *pidvms@noaa.gov.* The business hours of the SAC for the purpose of this section are: Monday through Friday, except Federal holidays, 8 a.m. to 4:30 p.m, Hawaii Standard Time. The contact information for the NOAA Office of Law Enforcement's VMS Helpdesk for the purpose of this section is: telephone: (888) 219–9228; e-mail: *ole.helpdesk@noaa.gov.* The business hours of the VMS Helpdesk for the purpose of this section are: Monday through Friday, except Federal holidays, 7 a.m. to 11 p.m., Eastern Time.

(b) *Applicability.* This section applies to any fishing vessel of the United States with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required.

(c) *Provision of vessel position information*—(1) *VMS unit installation.* The vessel owner and operator shall obtain and have installed on the fishing vessel, in accordance with instructions provided by the SAC and the VMS unit manufacturer, a VMS unit that is type-approved by NMFS for fisheries governed under the Act. The vessel owner and operator shall authorize the Commission and NMFS to receive and relay transmissions from the VMS unit. The vessel owner and operator shall arrange for a NMFS-approved mobile communications service provider to receive and relay transmissions from the VMS unit to NMFS. NMFS makes available lists of type-approved VMS units and approved mobile communications service providers.

(2) *VMS unit activation.* If the VMS unit has not yet been activated as described in this paragraph, or if the VMS unit has been newly installed or reinstalled, or if the mobile communications service provider has changed since the previous activation, or if directed by the SAC, the vessel owner and operator shall, prior to the vessel leaving port:

(i) Turn on the VMS unit to make it operational;

(ii) Submit a written activation report, via mail, facsimile or e-mail, to the SAC, that includes: the vessel's name; the vessel's official number; the VMS unit manufacturer and identification number; and telephone, facsimile or e-mail contact information for the vessel owner or operator; and

(iii) Receive verbal or written confirmation from the SAC that proper transmissions are being received from the VMS unit.

(3) *VMS unit operation.* The vessel owner and operator shall continuously operate the VMS unit at all times, except that the VMS unit may be shut down while the vessel is at port or otherwise not at sea, provided that the owner and operator:

(i) Prior to shutting down the VMS unit, report to the SAC or the NOAA Office of Law Enforcement's VMS Helpdesk via facsimile or e-mail, the following information: the intent to shut down the VMS unit; the vessel's name; the vessel's official number; and telephone, facsimile or e-mail contact information for the vessel owner or operator; and

(ii) When turning the VMS unit back on, report to the SAC or the NOAA Office of Law Enforcement's VMS Helpdesk, via mail, facsimile or e-mail, the following information: that the VMS unit has been turned on; the vessel's name; the vessel's official number; and telephone, facsimile or e-mail contact information for the vessel owner or operator; and

(iii) Prior to leaving port, receive verbal or written confirmation from the SAC that proper transmissions are being received from the VMS unit.

(4) *Failure of VMS unit.* If the vessel owner or operator becomes aware that the VMS unit has become inoperable or that transmission of automatic position reports from the VMS unit has been interrupted, or if notified by NMFS or the USCG that automatic position reports are not being received from the VMS unit or that an inspection of the VMS unit has revealed a problem with the performance of the VMS unit, the vessel owner and operator shall comply with the following requirements:

(i) If the vessel is at port: The vessel owner or operator shall repair or replace the VMS unit and ensure it is operable before the vessel leaves port.

(ii) If the vessel is at sea: The vessel owner, operator, or designee shall contact the SAC by telephone, facsimile, or e-mail at the earliest opportunity during the SAC's business hours and identify the caller and vessel. The vessel operator shall follow the instructions provided by the SAC, which could include, but are not limited to: ceasing fishing, stowing fishing gear, returning to port, and/or submitting periodic position reports at specified intervals by other means; and, repair or replace the VMS unit and ensure it is operable before starting the next trip.

(5) *Related VMS requirements.* Installing, carrying and operating a VMS unit in compliance with the requirements in part 300 of this title, part 660 of this title, or part 665 of this title relating to the installation, carrying, and operation of VMS units shall be deemed to satisfy the requirements of paragraph (c) of this section, provided that the VMS unit is operated continuously and at all times while the vessel is at sea, the VMS unit is type-approved by NMFS for fisheries governed under the Act, the owner and operator have authorized the Commission and NMFS to receive and relay transmissions from the VMS unit, and the specific requirements of paragraph (c)(4) of this section are complied with. If the VMS unit is owned by NMFS, the requirement under paragraph (c)(4) of this section to repair or replace the VMS unit will be the responsibility of NMFS, but the vessel owner and operator shall be responsible for ensuring that the VMS unit is operable before leaving port or starting the next trip.

(d) *Costs.* The vessel owner and operator shall be responsible for all costs associated with the purchase, installation and maintenance of the VMS unit, and for all charges levied by the mobile communications service provider as necessary to ensure the transmission of automatic position reports to NMFS as required in paragraph (c) of this section. However, if the VMS unit is being carried and operated in compliance with the requirements in part 300 of this title, part 660 of this title, or part 665 of this title relating to the installation, carrying, and operation of VMS units, the vessel owner and operator shall not be responsible for costs that are the responsibility of NMFS under those regulations.

(e) *Tampering.* The vessel owner and operator shall ensure that the VMS unit is not tampered with, disabled, destroyed, damaged or operated improperly, and that its operation is not impeded or interfered with.

(f) *Inspection.* The vessel owner and operator shall make the VMS unit, including its antenna, connectors and antenna cable, available for inspection by authorized officers, by employees of the Commission, by persons appointed by the Executive Director of the Commission for this purpose, and, when the vessel is on the high seas in the Convention Area, by WCPFC inspectors.

(g) *Access to data.* The vessel owner and operator shall make the vessel's position data obtained from the VMS unit or other means immediately and always available for inspection by NOAA personnel, USCG personnel, and authorized officers, and shall make the vessel's position data for positions on the high seas in the Convention Area immediately and always available to WCPFC inspectors and the Commission.

(h) *Communication devices.* (1) To facilitate communication with management and enforcement authorities regarding the functioning of the VMS unit and other purposes, the vessel operator shall, while the vessel is at sea, carry on board and continuously monitor a two-way communication device that is capable of real-time communication with the SAC. The VMS unit used to fulfill the requirements of paragraph (c) of this section may not be used to satisfy this requirement. If the device is anything other than a radio, the contact number for the device must be provided to the Pacific Islands Regional Administrator on the application form for the WCPFC Area Endorsement in accordance with the requirements of § 300.212.

(2) For the purpose of submitting the position reports that might be required in cases of VMS unit failure under paragraph (c)(4)(ii) of this section, the vessel operator shall, while the vessel is at sea, carry on board a communication device capable of transmitting, while the vessel is on the high seas in the Convention Area, communications by telephone, facsimile, e-mail, or radio to the Commission, in Pohnpei, Micronesia. The VMS unit used to fulfill the requirements of paragraph (c) of this section may not be used to satisfy this requirement. The same communication device may be able to satisfy the requirements of both this paragraph and paragraph (h)(1) of this section.

■ 15. Section 300.220 is added to read as follows:

§ 300.220 Confidentiality of information.

(a) *Types of information covered.* NOAA is authorized under the Act and other statutes to collect and maintain information. This section applies to confidential information collected under authority of the Act.

(b) *Collection and maintenance of information*—(1) *General.* (i) Any information required to be submitted to the Secretary, a State fishery management agency, or a Marine Fisheries Commission under the Act shall be provided to the Assistant Administrator.

(ii) Any observer information collected under the Act shall be provided to the Assistant Administrator.

(iii) Appropriate safeguards as specified by NOAA Administrative Order (NAO) 216–100 or other NOAA/NMFS internal procedures, apply to the collection and maintenance of any information collected pursuant to paragraphs (b)(1) or (b)(2) of this section, whether separated from identifying particulars or not, so as to ensure their confidentiality. Information submitted to the Secretary in compliance with this subpart shall not be disclosed except as authorized herein or by other law or regulation.

(2) *Collection agreements with States or Marine Fisheries Commissions.* (i) The Assistant Administrator may enter into an agreement with a State or a Marine Fisheries Commission authorizing the State or Marine Fisheries Commission to collect information on behalf of the Secretary.

(ii) To enter into a cooperative collection agreement with a State or a Marine Fisheries Commission, NMFS must ensure that:

(A) The State has authority to protect the information from disclosure in a manner at least as protective as these regulations.

(B) The Marine Fisheries Commission has enacted policies and procedures to protect the information from public disclosure.

(3) *Collection services by observer employer/observer provider.* The Assistant Administrator shall make the following determinations before issuing a permit or letting a contract or grant to an organization that provides observer services:

(i) That the observer employer/observer provider has enacted policies and procedures to protect the information from public disclosure;

(ii) That the observer employer/observer provider has entered into an agreement with the Assistant Administrator that prohibits public disclosure and specifies penalties for such disclosure; and

(iii) That the observer employer/observer provider requires each observer to sign an agreement with NOAA/NMFS that prohibits public disclosure of observer information and specifies penalties for such disclosure.

(c) *Access to information*—(1) *General.* This section establishes procedures intended to manage, preserve, and protect the confidentiality of information submitted in compliance with the Act and its implementing regulations. This section applies to those persons and organizations deemed eligible to access confidential information subject to the terms and conditions described in this section and the Act. All other persons requesting access to confidential information should follow the procedures set forth in the Freedom of Information Act, 5 U.S.C. 552, 15 CFR parts 15 and 903, NAO 205–14, and Department of Commerce Administrative Orders 205–12 and 205–14, as applicable. Persons eligible to access confidential information under this section shall submit to NMFS a written request with the following information:

(i) The specific types of information requested;

(ii) The relevance of the information to requirements of the Act;

(iii) The duration of time that access will be required: continuous, infrequent, or one-time; and

(iv) An explanation of why the availability of information in aggregate or summary form from other sources would not satisfy the requested needs.

(2) *Federal employees.* Confidential information will only be accessible to the following:

(i) Federal employees who are responsible for administering, implementing, or enforcing the Act. Such persons are exempt from the provisions of paragraph (c)(1) of this section.

(ii) NMFS employees responsible for the collection, processing, and storage of the information or performing research that requires access to confidential information. Such persons are exempt from the provisions of paragraph (c)(1) of this section.

(iii) Other NOAA employees on a demonstrable need-to-know basis.

(iv) Persons that need access to confidential information to perform functions authorized under a Federal contract, cooperative agreement, or grant awarded by NOAA/NMFS.

(3) *Commission.* (i) Confidential information will be subject to disclosure to the Commission, but only if:

(A) The information is required to be submitted to the Commission under the requirements of the WCPF Convention or the decisions of the Commission;

(B) The provision of such information is in accord with the requirements of the Act, the WCPF Convention, and the decisions of the Commission, including any procedures, policies, or practices adopted by the Commission relating to the receipt, maintenance, protection or dissemination of information by the Commission; and

(C) The provision of such information is in accord with any agreement between the United States and the Commission that includes provisions to prevent public disclosure of the identity or business of any person.

(ii) The provisions of paragraph (c)(1) of this section do not apply to the release of confidential information to the Commission.

(4) *State employees.* Confidential information may be made accessible to a State employee only by written request and only upon the determination by NMFS that at least one of the following conditions is met:

(i) The employee has a need for confidential information to further the Department of Commerce's mission, and the State has entered into a written agreement between the Assistant Administrator and the head of the State's agency that manages marine and/or anadromous fisheries. The agreement shall contain a finding by the Assistant Administrator that the State has confidentiality protection authority comparable to the Act and that the State will exercise this authority to prohibit public disclosure of the identity or business of any person.

(ii) The employee enforces the Act or fishery management plans prepared under the authority of the Magnuson-Stevens Conservation and Management Act, and the State for which the employee works has entered into a fishery enforcement agreement with the Secretary and the agreement is in effect.

(5) *Marine Fisheries Commission employees.* Confidential information may be made accessible to Marine Fisheries Commission employees only upon written request of the Marine Fisheries Commission and only if the request demonstrates a need for confidential information to further the Department of Commerce's mission, and the executive director of the Marine Fisheries Commission has entered into a written agreement with the Assistant Administrator. The agreement shall contain a finding by the Assistant Administrator that the Marine Fisheries Commission has confidentiality protection policies and procedures to protect from public disclosure information that would reveal the identity or business of any person.

(6) *Homeland and national security activities.* Confidential information may be made accessible to Federal employees for purposes of promoting homeland security or national security at the request of another Federal agency only if:

(i) Providing the information promotes homeland security or national security purposes including the USCG's homeland security missions as defined in section 888(a)(2) of the Homeland Security Act of 2002 (6 U.S.C. 468(a)(2)); and

(ii) The requesting agency has entered into a written agreement with the Assistant Administrator. The agreement shall contain a finding by the Assistant Administrator that the requesting agency has confidentiality policies and procedures to protect the information from public disclosure.

(7) *Observer and observer employer/observer provider.* Confidential information used for purposes other than those contained in this subpart or in part 600 of this title may only be used by observers and observer employers/observer providers in order:

(i) To adjudicate observer certifications;

(ii) To allow the sharing of observer information among the observers and between observers and observer employers/observer providers as necessary to train and prepare observers for deployments on specific vessels; or

(iii) To validate the accuracy of the observer information collected.

(8) Persons having access to confidential information may be subject to criminal and civil penalties for unauthorized use or disclosure of confidential information. See 18 U.S.C. 1905, 16 U.S.C. 1857, and NOAA/NMFS internal procedures, including NAO 216–100.

(d) *Control system.* (1) The Assistant Administrator maintains a control system to protect the identity or business of any person who submits information in compliance with any requirement or regulation under the Act. The control system:

(i) Identifies those persons who have access to the information;

(ii) Contains procedures to limit access to confidential information to authorized users; and

(iii) Provides handling and physical storage protocols for safeguarding of the information.

(2) This system requires that all persons who have authorized access to the information be informed of the confidentiality of the information. These persons, with the exception of

employees and contractors of the Commission, are required to sign a statement that they:

(i) Have been informed that the information is confidential; and

(ii) Have reviewed and are familiar with the procedures to protect confidential information.

(e) *Release of information.* (1) The Assistant Administrator will not disclose to the public any confidential information, except:

(i) When the Secretary has obtained from the person who submitted the information an authorization to release the information to persons for reasons not otherwise provided for in this subpart. In situations where a person provides information through a second party, both parties are considered joint submitters of information and either party may request a release. The authorization to release such information will require:

(A) A written statement from the person(s) who submitted the information authorizing the release of the submitted information; and

(B) A finding by the Secretary that such release does not violate other requirements of the Act or other applicable laws.

(ii) Observer information as authorized by a fishery management plan (prepared under the authority of the Magnuson-Stevens Fishery Conservation and Management Act) or regulations under the authority of the North Pacific Council to allow disclosure of observer information to the public of weekly summary bycatch information identified by vessel or for haul-specific bycatch information without vessel identification.

(iii) When such information is required to be submitted for any determination under a limited access program.

(iv) When required by a court order.

(2) All requests from the public for confidential information will be processed in accordance with the requirements of 5 U.S.C. 552a, 15 CFR parts 4 and 903, NAO 205–14, and Department of Commerce Administrative Orders DAO 205–12 and DAO 205–14. Nothing in this section is intended to confer any right, claim, or entitlement to obtain access to confidential information not already established by law.

(3) NMFS does not release or allow access to confidential information in its possession to members of advisory groups of the Regional Fishery Management Councils established under the Magnuson-Stevens Fishery Conservation and Management Act, except as provided by law.

■ 16. Section 300.221 is added to read as follows:

§ 300.221 Facilitation of enforcement and inspection.

In addition to the facilitation of enforcement provisions of § 300.5, the following requirements apply to this subpart.

(a) A fishing vessel of the United States with a WCPFC Area Endorsement or for which a WCPFC Area Endorsement is required, including the vessel's operator and each member of the vessel's crew shall, when in the Convention Area, be subject to the following requirements:

(1) The Federal Certificate of Documentation or State or other documentation for the vessel, or a copy thereof, shall be carried on board the vessel. Any license, permit or other authorization to use the vessel to fish, retain fish, transship fish, or land fish issued by a nation or political entity other than the United States, or a copy thereof, shall be carried on board the vessel. These documents shall be made available for inspection by any authorized officer. If the vessel is on the high seas, the above-mentioned licenses, permits, and authorizations shall also be made available for inspection by any WCPFC inspector. If the vessel is in an area under the jurisdiction of a member of the Commission other than the United States, they shall be made available for inspection by any authorized enforcement official of that member.

(2) For the purpose of facilitating communication with the fisheries management, surveillance and enforcement authorities of the members of the Commission, the operator shall ensure the continuous monitoring of the international safety and calling radio frequency 156.8 MHz (Channel 16, VHF–FM) and, if the vessel is equipped to do so, the international distress and calling radio frequency 2.182 MHz (HF).

(3) The operator shall ensure that an up-to-date copy of the International Code of Signals (INTERCO) is on board and accessible at all times.

(4) When engaged in transshipment on the high seas or in an area under the jurisdiction of a member of the Commission other than the United States, the operator and crew shall:

(i) Provide any WCPFC transshipment monitor with full access to, and use of, facilities and equipment which such authorized person may determine is necessary to carry out his or her duties to monitor transshipment activities, including full access to the bridge, fish on board, and all areas which may be used to hold, process, weigh and store fish, and full access to the vessel's records, including its log and documentation for the purpose of inspection and photocopying;

(ii) Allow and assist any WCPFC transshipment monitor to collect and remove samples and gather any other information required to fully monitor transshipment activities.

(iii) Not assault, obstruct, resist, delay, refuse boarding to, intimidate, harass, interfere with, unduly obstruct or delay any WCPFC transshipment monitor in the performance of such person's duties, or attempt to do any of the same.

(b) The operator and crew of a fishing vessel of the United States, when on the high seas in the Convention Area, shall be subject to the following requirements:

(1) The operator and crew shall immediately comply with instructions given by an officer on board a WCPFC inspection vessel to move the vessel to a safe location and/or to stop the vessel, provided that the officer has, prior to the issuance of such instructions:

(i) Provided information identifying his or her vessel as a WCPFC inspection vessel, including its name, registration number, IRCS and contact frequency; and

(ii) Communicated to the vessel operator his or her intention to board and inspect the vessel under the authority of the Commission and pursuant to the boarding and inspection procedures adopted by the Commission.

(2) The operator and crew shall accept and facilitate prompt and safe boarding by any WCPFC inspector, provided that an officer on board the WCPFC inspection vessel has, prior to such boarding:

(i) Provided information identifying his or her vessel as a WCPFC inspection vessel, including its name, registration number, IRCS and contact frequency; and

(ii) Communicated to the vessel operator an intention to board and inspect the vessel under the authority of the Commission and pursuant to the boarding and inspection procedures adopted by the Commission.

(3) Provided that the WCPFC inspector has presented to the vessel operator his or her identity card identifying him or her as an inspector authorized to carry out boarding and inspection procedures under the auspices of the Commission, and a copy of the text of the relevant conservation and management measures in force pursuant to the WCPF Convention in the relevant area of the high seas, the operator and crew shall:

(i) Cooperate with and assist any WCPFC inspector in the inspection of

the vessel, including its authorizations to fish, gear, equipment, records, facilities, fish and fish products and any relevant documents necessary to verify compliance with the conservation and management measures in force pursuant to the WCPF Convention;

(ii) Allow any WCPFC inspector to communicate with the crew of the WCPFC inspection vessel, the authorities of the WCPFC inspection vessel and the authorities of the vessel being inspected;

(iii) Provide any WCPFC inspector with reasonable facilities, including, where appropriate, food and accommodation; and

(iv) Facilitate safe disembarkation by any WCPFC inspector.

(4) If the operator or crew refuses to allow a WCPFC inspector to board and inspect the vessel in the manner described in this paragraph, they shall offer to the WCPFC inspector an explanation of the reason for such refusal.

(5) The operator and crew shall not assault, obstruct, resist, delay, refuse boarding to, intimidate, harass, interfere with, unduly obstruct or delay any WCPFC inspector in the performance of such person's duties, or attempt to do any of the same.

(c) When a fishing vessel of the United States that is used for commercial fishing for HMS is in the Convention Area and is either on the high seas without a valid WCPFC Area Endorsement or is in an area under the jurisdiction of a nation other than the United States without an authorization by that nation to fish in that area, all the fishing gear and fishing equipment on the fishing vessel shall be stowed in a manner so as not to be readily available for fishing, specifically:

(1) If the fishing vessel is used for purse seining and equipped with purse seine gear, the boom must be lowered as far as possible so that the vessel cannot be used for fishing but so that the skiff is accessible for use in emergency situations; the helicopter, if any, must be tied down; and the launches must be secured.

(2) If the fishing vessel is used for longlining and equipped with longline gear, the branch or dropper lines and floats used to buoy the mainline must be stowed and not available for immediate use, and any power-operated mainline hauler on deck must be covered in such a manner that it is not readily available for use.

(3) If the fishing vessel is used for trolling and equipped with troll gear, no lines or hooks may be placed in the water; if outriggers are present on the vessel, they must be secured in a vertical position; if any power-operated haulers are located on deck they must be covered in such a manner that they are not readily available for use.

(4) If the fishing vessel is used for pole-and-line fishing and equipped with pole-and-line gear, any poles rigged with lines and hooks must be stowed in such a manner that they are not readily available for use.

(5) For any other type of fishing vessel, all the fishing gear and equipment on the vessel must be stowed in a manner so as not to be readily available for use.

(d) For the purpose of this section, the meaning of transshipment does not include transfers that exclusively involve fish that have been previously landed and processed.

■ 17. In § 300.222, paragraphs (a) through (u) are added to read as follows:

§ 300.222 Prohibitions.

* * * * *

(a) Fail to obtain and have on board a fishing vessel a valid WCPFC Area Endorsement as required in § 300.212.

(b) Fail to report a change in the information required in an application for a WCPFC Area Endorsement as required in § 300.212(g).

(c) Fail to provide information on vessels and fishing authorizations or fail to report changes in such information as required in § 300.213.

(d) Fish for, retain on board, or land fish, including HMS, in areas under the jurisdiction of a nation other than the United States without authorization by such nation to do so, as provided in § 300.214(a)(1) and (b)(1).

(e) Operate a fishing vessel in violation of, or fail to ensure the vessel crew complies with, the applicable national laws of a member of the Commission other than the United States, including any laws related to carrying vessel observers or the operation of VMS units, as provided in § 300.214(a)(2) and (b)(2).

(f) Fail to carry, allow on board, or assist a WCPFC observer as required in § 300.215.

(g) Assault, obstruct, resist, delay, refuse boarding to, intimidate, harass, or interfere with a WCPFC observer, or attempt to do any of the same, or fail to provide a WCPFC observer with food, accommodation or medical facilities, as required in § 300.215.

(h) Offload, receive, or load fish from a purse seine vessel at sea in the Convention Area, in contravention of § 300.216.

(i) Fail to mark a fishing vessel or a boat, skiff, or other watercraft on board the fishing vessel as required in § 300.217, or remove, obscure, or obstruct such markings, or attempt to do so.

(j) Fail to maintain and report catch and effort information or transshipment information as required in § 300.218.

(k) Fail to install, activate, or operate a VMS unit as required in § 300.219(c).

(l) In the event of VMS unit failure or interruption, fail to repair or replace a VMS unit, fail to notify the SAC and follow the instructions provided, or otherwise fail to act as provided in § 300.219(c)(4).

(m) Disable, destroy, damage or operate improperly a VMS unit installed under § 300.219, or attempt to do any of the same, or fail to ensure that its operation is not impeded or interfered with, as provided in § 300.219(e).

(n) Fail to make a VMS unit installed under § 300.219 or the position data obtained from it available for inspection, as provided in § 300.219(f) and (g).

(o) Fail to carry on board and monitor communication devices as required in § 300.219(h).

(p) Fail to carry on board and make available the required vessel documentation and authorizations as required in § 300.221(a)(1).

(q) Fail to continuously monitor the specified radio frequencies as required in § 300.221(a)(2).

(r) Fail to carry on board, and keep accessible, an up-to-date copy of the International Code of Signals as required in § 300.221(a)(3).

(s) Fail to provide access to, or fail to allow and assist, a WCPFC transshipment monitor as required in § 300.221(a)(4).

(t) Fail to comply with the instructions of, or fail to accept and facilitate prompt and safe boarding by, a WCPFC inspector, or fail to cooperate and assist a WCPFC inspector in the inspection of a fishing vessel, as provided in § 300.221(b).

(u) Fail to stow fishing gear or fishing equipment as required in § 300.221(c).

* * * * *

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CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1115

Guidelines and Requirements for Mandatory Recall Notices

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission ("Commission," "CPSC," "we") is issuing a final rule establishing guidelines and requirements for mandatory recall notices as required by section 214 of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). The rule contains the Commission's interpretation of information which must appear on mandatory recall notices ordered by the Commission or a United States district court pursuant to certain sections of the Consumer Product Safety Act ("CPSA"). The rule also contains Commission guidelines for additional information that the Commission or a court may order to be included on a mandatory recall notice.

DATES: *Effective Date:* This rule is effective on February 22, 2010.

Compliance Date: Regardless of when a product subject to a recall was manufactured, all mandatory recalls ordered pursuant to sections 12, 15(c) or 15(d) of the CPSA are subject to the guidelines and requirements herein as of February 22, 2010.

FOR FURTHER INFORMATION CONTACT: Marc Schoem, Deputy Director, Office of Compliance and Field Operations, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7520.

SUPPLEMENTARY INFORMATION:

I. Introduction

In the **Federal Register** of March 20, 2009 (74 FR 11883), the CPSC published a proposed rule that would establish guidelines and requirements for mandatory recall notices ordered by the Commission or a United States District Court under the Consumer Product Safety Act. The rule was intended to provide firms with a uniform set of information they can expect to find in a recall notice ordered by the Commission or a court. The Commission and a court's substantive authority to order that a mandatory recall notice be issued, including control over the final form and content of such notice, arises under sections 12, 15(c), and 15(d) of the CPSA. Section 214 of the CPSIA (Pub. L. 110–314) did not change this authority. Rather, section 214(c) of the CPSIA, which adds a new subsection 15(i) to the CPSA, requires the Commission to establish guidelines which set forth a uniform class of information that will be included in mandatory recall notices, and specifies certain content that must be included in mandatory recall notices. However, the Commission or a court ordering that a recall notice issue retains final authority over the form and content of mandatory recall notices. Accordingly, the Commission or a court may remove information that is unnecessary or inappropriate under the circumstances, or add additional appropriate information to a mandatory recall notice. Sections 15(i)(2) and 15(i)(2)(I) of the CPSA.

The preamble to the proposed rule contained detailed explanations of the proposed rule and described the basis for the proposed rule. *See* 74 FR 11883 through 11886. We refer readers to that preamble if they wish to obtain further information or explanation with regard to the rule. In brief, the Commission developed the proposed rule based on its expertise with recall notifications since the Commission's inception. Accordingly, the final rule is a culmination of the statutory requirements and the Commission's expertise, which is summarized in the Commission's Recall Handbook, available at *http://www.cpsc.gov/BUSINFO/8002.html.* Each section of the rule is either statutorily required by section 214 of the CPSIA, or the Commission has determined will likely increase recall effectiveness by helping consumers to: (a) Identify a product subject to a recall; (b) understand the hazard identified with such product; or (c) understand what remedy is being offered with regard to the recalled product.

The rule does not contain requirements for voluntary recall notices which result from corrective action settlement agreements with Commission staff. If the Commission decides to extend the requirements to voluntary recall notices, it would proceed with a separate rulemaking. While this rule may serve as a general guide for information to include on voluntary recall notices in some instances, we recognize that each voluntary recall is unique and is negotiated as such. Therefore, all recall notices issued, whether voluntary or mandatory, should be tailored to the specific product and circumstances of a recall. Section 214 of the CPSIA did not alter the Commission's ability to negotiate voluntary recall notices with a manufacturer and to tailor both voluntary and mandatory recall notices to a particular recall scenario.

The Commission received 43 substantive comments on the proposed rule. After reviewing the comments the CPSC made several changes to the rule. The changes between the proposed and the final rules are as follows:

TABLE 1—SUMMARY OF CHANGES TO THE FINAL RULE

Proposed rule	Final rule
Did not contain a definition of "Other persons"	Defines "Other persons" in a new § 1115.25(e). This change is discussed in more detail in response to comment 12 in section III of this document below.
Provided that "firms" target and tailor recall notices and consider the manner in which a product was marketed and advertised in determining the form and content of a recall notice.	Removes the word "firm" in § 1115.26(a)(3) to clarify that, in a mandatory recall scenario, firms are not the entity determining the form and content of a recall notice. By statute, the final form and content of mandatory recall notices are ordered by a United States district court or the Commission. *See* sections 12, 15(c) and 15(d) of the CPSA.
Did not address use of more than one form of recall notice	Clarifies in § 1115.26(a)(5) that more than one form of recall notice should be used. This change is discussed in more detail in response to comments 15 and 17 in section III of this document below.
Did not address when a firm has direct contact information. Unclear whether a telephone number is considered direct contact information.	Clarifies in § 1115.26(b)(2) when a firm has direct contact information. Also clarifies that a telephone number is considered direct contact information. These changes are discussed in more detail in response to comment 16 in section III of this document below.
Did not contain examples of when a recall notice may be required in languages in addition to English.	Provides examples of circumstances when a recall notice may be required to be made available in languages in addition to English in § 1115.26(c). This change is discussed in more detail in response to comment 19 in section III of this document below.

TABLE 1—SUMMARY OF CHANGES TO THE FINAL RULE—Continued

Proposed rule	Final rule
Did not clearly set forth that information related to the product description is required.	Clarifies in § 1115.27(c) that the information outlined therein must be included in a recall notice when applicable to a product. This change is discussed in more detail in response to comment 23 in section III of this document below.
Did not specify when a foreign manufacturer's legal name must be identified.	Clarifies in § 1115.27(h) that foreign manufacturers must be identified by a legal name, city, and country of headquarters. This change is discussed in more detail in response to comment 32 in section III of this document below.
Did not require a description of the region where a product was sold or offered for sale.	Adds "Region" at a new § 1115.27(j) as a separate category of information which is required when necessary or appropriate to assist consumers to identify a product. This change is discussed in more detail in response to comment 21 in section III of this document below.

II. Legal Authority

The substantive authority for the Commission or a United States District Court to order that a firm issue a mandatory recall notice comes from existing statutes in sections 12, 15(c), and 15(d) of the CPSA. Section 15(c) of the CPSA specifically provides that, when the Commission orders that a firm conduct a mandatory recall, such order "shall specify the form and content of any notice required to be given * * *." Section 214 of the CPSIA does not alter the Commission's or a court's authority over the final form and content of a mandatory recall notice. Section 214(c) of the CPSIA, which added subsection 15(i) to the CPSA, states that the Commission shall, by rule, within 180 days of the date of enactment of the CPSIA (August 14, 2008), establish guidelines which set forth a uniform class of information to be included in any recall notice ordered under sections 15(c) or (d), or by court order pursuant to section 12 of the CPSA. (15 U.S.C. 2061, 2064(c), or 2064(d)). Thus, the statute calls for a rulemaking which sets forth guidelines concerning information that firms can expect may be ordered in any Commission or court-ordered mandatory recall and the statute specifies specific content that must be included in mandatory recall notices.

Section 15(i) of the CPSA states that the guidelines established by the Commission must include information that would help consumers: (a) Identify a specific product; (b) understand the identified hazard; and (c) understand any remedy available to the consumer. Section 15(i) of the CPSA also requires that a recall notice include certain specific information, unless the Commission determines otherwise. This information includes, but is not limited to, descriptions of the product, hazard, injuries, deaths, action being taken, and remedy; identification of the manufacturer and retailers; identification of relevant dates; and any other information the Commission deems appropriate.

Finally, in addition to section 214 of the CPSIA, section 3 of the CPSIA grants the Commission general rulemaking authority to issue regulations, as necessary, to implement the CPSIA. Accordingly, the Commission has authority to implement section 15(i) of the CPSA, as amended by section 214(c) of the CPSIA, through section 3 of the CPSIA as well as section 214(c) of the CPSIA.

III. Comments on the Proposed Rule and the CPSC's Responses

We describe and respond to significant issues raised by the comments below. To make it easier to identify comments and the Commission's responses, the word "Comment" will appear in italics before each comment description, and the word "Response" will appear in italics before the Commission's response. We have grouped comments based on their similarity and have numbered the comments to help distinguish between different comment themes. The number assigned to each comment summary is for organizational purposes and does not signify the comment's value, importance, or order in which it was received.

Additionally, on our own initiative, we have replaced "U.S." with "United States" in the codified text to preclude any potential confusion as to what the abbreviation of "United States" means.

A. Comments Related to Procedural Issues

Comment 1—Administrative Procedure Act (APA)—One commenter states that the NPR is lacking because it does not contain a list of data or studies relied upon as required by the APA. Although the preamble to the proposed rule states that the agency relied on agency recall guidance materials, including but not limited to the Recall Handbook, the commenter maintains that these resources were not made available to the general public. The commenter believes that, at minimum, information on where to access the resources should be provided or, a Web link provided for direct access to the documents. The commenter states that no final rule should issue until the public has the opportunity to review the underlying data.

Response—The requirements for mandatory recall notices set forth in the proposed rule are largely dictated by section 214 of the CPSIA. The proposed rule also includes the Commission's interpretation and clarification of section 214 of the CPSIA, as well as additional guidelines. The preamble to the proposed rule states that, in drafting the proposed rule, the agency relied on its experience conducting recalls and recall effectiveness gained since the CPSC's inception, as well as agency recall guidance materials, including but not limited to the Recall Handbook. Contrary to the commenter's assertion that access to the Recall Handbook was not provided, the preamble to the proposed rule contained a link to the Recall Handbook (*see* 74 FR at 11883). Moreover, the Commission did not rely on quantifiable "data" in drafting the proposed rule; it relied on the text of the statute and more than thirty years of experience conducting recalls, which is summarized in the Recall Handbook. Recall templates and a recall checklist are also available to the public on the CPSC's Web site at *http://www.cpsc.gov/businfo/corrective.html.* These materials have been available to the public on the CPSC Web site long before passage of the CPSIA.

Comment 2—Regulatory Flexibility Act—Two commenters take opposite positions with regard to applicability of the Regulatory Flexibility Act ("RFA") to the proposed rule. One comment states that the RFA should not be applicable

to children's products so that small businesses will not be able to circumvent recall duties. Another commenter opines that the CPSC is attempting to evade the RFA when it states that small businesses will not be affected by the rule. The commenter takes this position based on the discretion the Commission has with regard to determining a "significant retailer," which the commenter believes, depending on the definition, could have a large effect on small businesses. The comment suggests that a small business analysis should be done on the proposed regulation.

Response—The RFA generally requires that agencies review proposed rules for their potential economic impact on small entities, including small businesses. A regulatory flexibility analysis was not conducted pursuant to section 605(b) of the RFA, which states that the requirement to prepare and make available for public comment an initial regulatory flexibility analysis does not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, and the agency provides an explanation for that conclusion.

As with the proposed rule, the final rule will have little to no effect on small businesses. First, the recall notice requirements set forth in the final rule are largely dictated by the CPSIA and are already in effect. Second, mandatory recalls are rare in the Commission's history, so, even if we were to assume that a significant economic impact would exist (and we do not claim that such an impact exists), the impact would not affect a "substantial number" of small entities. Third, the final rule will not alter the agency's reliance on voluntary recalls. Finally, the recall burden on small businesses will not be altered by the definition of "significant retailer." The sole purpose of identifying retailers in the recall notice is to assist consumers with product identification. It has no effect on which firm issues a recall notice or has responsibility for conducting a recall.

Comment 3—Effective Date—Several commenters state that because they believe the proposed rule seeks to impose requirements that go beyond the CPSIA, firms require notice of the additional requirements and time to comply. Accordingly, these commenters state that the rule should not be effective upon publication, but should follow the standard of becoming effective 30 days after publication so that firms have time to comply. One commenter suggests further that the rule be clarified not to apply retroactively and that the requirements only apply to goods manufactured after August 14, 2009.

Response—The final rule applies only to mandatory recalls pursuant to a court order (section 12 of the CPSA) or an order of the Commission (sections 15(c), and 15(d) of the CPSA). Mandatory recalls are infrequent in the Commission's history, and currently there are no pending matters where a mandatory recall is at issue. Because of the length of time involved in litigating these issues in a United States district court or administratively, it is impracticable that any action would be litigated to conclusion and that an order requiring a mandatory recall notice would be issued in 30 days time. Therefore, setting the effective date 30 days after publication is appropriate and there is no good cause for shortening the period. Finally, the final rule does not go beyond the CPSIA. Section 214 of the CPSIA specifically provides that the Commission shall promulgate both guidelines and requirements for mandatory recall notices, and authorizes the Commission to issue additional requirements as it deems appropriate. Section 15(i)(2)(I) of the CPSA.

B. General Comments on the Proposed Rule and Commission Responses

Comment 4—Many commenters seek clarification of the rule. Several are concerned that many requirements are unnecessary, extraneous, too complicated, and do not help consumers locate relevant products and determine what to do with them. In particular, several commenters are concerned about harm that could occur to business reputation based on the detailed requirements and the speed at which imperfect information may travel. Several commenters state that some information is burdensome for firms to maintain and report with no added benefit to consumers, and are concerned about the costs to maintain detailed records such as photographs and pricing information. These commenters prefer a shorter mandatory recall notice that would purportedly be more helpful to consumers.

Response—Most requirements set forth in the final rule are statutorily mandated, and the Commission has the authority to add requirements it determines are appropriate. A review of the CPSC Web site demonstrates that the use of many of the requirements in the final rule in previously issued voluntary recall notices have not resulted in lengthy recall notices. Moreover, the final rule is not burdensome because it does not impose any recordkeeping requirements on firms. Locating a photograph of the product and the price range has not been a significant issue for firms at the time of a recall. Finally, the Commission rejects the idea that a recall notice causes undue harm to business reputation. Responsible firms generally desire to move quickly to remove defective products from the marketplace because it is statutorily required, preserves their brand and consumer confidence, limits liability, and, most importantly, reduces the likelihood of injuries and deaths from unsafe products.

Comment 5—One commenter would create a mandatory recall notice template form that includes all required sections for a notice. The commenter believes that a template will be more efficient, save time and resources, and allow the Commission to quickly check for all requirements to speed approval of recall notices.

Response—The CPSC already has a bank of recall notice examples that staff provides to firms to help create a recall notice. To the extent such a template is revised, it can and should be done outside of this rulemaking process, to allow both the Commission and industry flexibility to update such templates as appropriate.

Comment 6—Several commenters discuss use of the words "should" and "must" in the proposed rule, and suggest that in the final rule, use of the word "should" should be changed to "must" to alleviate any confusion regarding the mandatory nature of the requirements.

Response—With regard to use of the words "should" and "must" in the final rule generally, the statute directs the Commission to issue both a guidance and requirements for mandatory recall notices. Guidance provided by the Commission regarding mandatory recall notices uses the term "should," while requirements are described in the regulation using the words "must" or "shall."

Comment 7—One commenter notes that the rule omits timeliness issues with regard to issuing a mandatory recall notice. This commenter argues that the rule should incentivize firms to comply in a timely fashion, and provide penalties for non-compliance.

Response—Timeliness is important with regard to both mandatory and voluntary recall notices. With regard to mandatory recall notices specifically, the Commission or a court will have control over the timing of recall notices once ordered.

Comment 8—One commenter suggests using the civil penalties in section 20(a) of the CPSA as a guideline for penalties for non-compliance with any time

constraints imposed. Another commenter suggests adding a section on prohibited acts for non-compliance with part C generally.

Response—All prohibited acts over which the Commission has penalty authority are listed in section 19 of the CPSA, and the associated penalty amount provisions are located in section 20 of the CPSA. Section 19(a)(5) of the CPSA provides that it is unlawful for any person to "fail to comply with an order issued under section 15(c) or (d)." Accordingly, these penalty provisions already apply to mandatory recall orders and the Commission declines to duplicate these provisions in the rule.

Comment 9—FOIA Rights—One commenter suggests that the rule include a section on Freedom of Information Act ("FOIA") rights.

Response—The Commission declines to address FOIA issues in the rule because a separate, pre-existing, rule on FOIA exists at 16 CFR part 1015.

C. Specific Comments on the Proposed Rule and Commission Responses

1. Section 1115.23—Purpose

Proposed § 1115.23 would describe the purpose for a new subpart C, "Guidelines and Requirements for Mandatory Recall Notices." In accordance with direction in the CPSIA, the proposed rule would set out guidelines and requirements for recall notices issued under section 15(c) and (d) or section 12 of the CPSA.

Comment 10—One commenter believes that the proposed rule's purpose and reasoning section are too generic and lack specific information. The commenter suggests including specific rationales for why certain requirements will be effective and suggests adding specific examples or data to illustrate what the specific recall problem is and how the rule will address the problem.

Response—Section 214 of the CPSIA sets forth a uniform class of information to be included in mandatory recall notices. The final rule's requirements are largely dictated by the statutory language. Further, the Commission's interpretation of section 214 of the CPSIA is not based on a scientific study, but rather on the culmination of the Commission's and the staff's many years of experience conducting product safety recalls. Because of the wide variety of consumer products and industries that such recalls encompass, it is necessary to allow flexibility to tailor recall notices to a specific target consumer group, product, and hazard situation to effectively remove hazardous products from the hands of consumers. The statute and the final rule give the Commission and/or a court the flexibility to add or remove requirements from a particular recall notice as necessary and appropriate, keeping in mind the goal of increasing recall effectiveness, and to help consumers identify products, understand the product hazard, and understand any available remedy.

2. Section 1115.24—Applicability

Proposed § 1115.24 would explain the requirements in subpart C apply to manufacturers (including importers), retailers, and distributors of consumer products. The preamble to the proposed rule (*see* 74 FR at 11883) explained that the rule would not contain requirements for recalls and recall notices that are voluntary and result from corrective action settlement agreements with Commission staff. The preamble to the proposed rule further noted that, if the Commission decides to extend the requirements to voluntary recalls, it would proceed with a separate rulemaking initiated by a separate notice of proposed rulemaking.

Comment 11—Many commenters note the Commission's statement that the proposed rule will apply to mandatory recall notices only and will serve as a guideline for voluntary recalls unless and until the Commission initiates a separate rulemaking to apply the requirements to voluntary recalls.

Comments from individuals and consumer groups generally support the extension of the mandatory notice requirements to voluntary recalls to promote uniformity and consistency in providing consumers recall data and to prevent firms from circumventing the requirements for a mandatory recall notice by agreeing to a voluntary recall. One commenter notes that voluntary recalls comprise the vast majority of recalls and that the protections and information afforded by the mandatory recall notice should be extended to consumers in voluntary recall notices as well. Some commenters believe that consumer safety is compromised by not using the same notice requirements for both mandatory and voluntary recalls. One commenter states that the mandatory recall notice requirements should at least be applied to voluntary recall notices for ultrahazardous products.

Industry commenters are generally opposed to extending the mandatory recall notice requirements to voluntary recall notices, arguing that important differences exist between a mandatory and voluntary recall. For example, one commenter states that, during a voluntary recall, the firm and the CPSC staff have time to develop an effective recall notice in a more positive environment. Depending on the nature of the product and the harm, the same level of detail may not be necessary for every recall to be helpful to consumers. These commenters support the current system whereby the final notice requirements are left for each specific recall situation working with the staff. One commenter notes the success of the Fast Track program and believes the Commission should continue to foster cooperation in that program and only impose mandatory recall procedures when absolutely required. Some commenters state that imposing mandatory notice requirements will discourage firms from conducting voluntary recalls, which is typically done to avoid the burdens of a mandatory recall. Less voluntary recalls will lead to over-burdening the Commission staff and resources.

A few commenters are concerned about the mandatory notice requirements even serving as a guideline for a voluntary recall notice and urge the Commission to withdraw this statement. One commenter believes that a heightened level of importance should be associated with mandatory recalls. Other commenters note that, even though the Commission acknowledges that a separate rulemaking will be necessary to extend the requirements to voluntary recalls, using the rule as a guideline is essentially a distinction without a difference. One commenter suggests that the Commission explicitly acknowledge in the preamble that a voluntary recall notice will not need to meet all of the guidelines for a mandatory recall notice in order to be approved for voluntary corrective action.

Response—While the Commission may use the mandatory recall requirements as a general guide for voluntary recall notices, we recognize that a separate rule on voluntary recall notices is needed to make these requirements uniform and required. The ultimate purpose of every recall notice is to get dangerous products out of the hands of consumers as quickly as possible, and each recall notice must be negotiated with that goal in mind. The Commission still retains the flexibility to work with firms to tailor voluntary recall notices to a particular product and particular recall circumstance.

3. Section 1115.25—Definitions

Proposed § 1115.25 would define "recall," "recall notice," "direct recall notice," and "firm."

Comment 12—One commenter suggests that the final rule define "other

persons," who were mentioned in proposed § 1115.26. The preamble to the proposed rule explained that "the term 'other persons' would include, but would not be limited to, consumer safety advocacy organizations, public interest groups, trade associations, other State, local and Federal government agencies, and the media." 74 FR at 11884. Another commenter states that it is important to keep "other persons" in the rule to acknowledge that both governmental and non-governmental entities are involved in the dissemination of information in the interest of consumer safety.

Response—The Commission agrees that defining "other persons" in the rule acknowledges the importance that both governmental and non-governmental entities can play in the broad dissemination of consumer product safety information. Accordingly, the final rule adds the definition of "other persons" at § 1115.25(e) as follows: "*Other persons* means, but is not limited to, consumer safety advocacy organizations, public interest groups, trade associations, industry advocacy organizations, other State, local, and Federal government agencies, and the media." This definition is the same as set forth in the preamble to the proposed rule, with the addition of "industry advocacy organizations," to demonstrate the broad range of entities that assist in disseminating product safety information.

4. Section 1115.26—Guidelines and Policies

Proposed § 1115.26 provides general guidance and describes the policies pertaining to recall notices. The proposed guidelines would restate the goals delineated in section 214 of the CPSIA. The CPSIA requires the guidelines to include information helpful to consumers.

In general, proposed § 1115.26(a) would state general principles that are important for recall notices to be effective. For example, proposed § 1115.26(a)(1) would state that a recall notice should provide information that enables consumers and other persons to identify the product and take a stated action. Proposed § 1115.26(a)(2) through (a)(4) would provide guidance on the form of the recall notice, recognizing the various forms of notice and providing guidance concerning direct recall notices and Web site recall notices. Proposed § 1115.26(a)(4) would recognize that a direct recall notice is the most effective form of a recall notice, and proposed § 1115.26(b)(2) would state that when firms have contact information they should issue direct recall notices.

Comment 13—Many comments discuss § 1115.26(b)(2) on direct recall notices and § 1115.26(a)(4) which states that direct recall notices are the most effective form of a recall notice. Overall, individual consumer comments support the proposed rule with regard to direct recall notices, suggesting that consumers tend to tune out information not directed to them. One commenter notes that direct recall notices have worked effectively in Illinois since 2006. A few commenters suggest revising the rule to require firms to exhaust resources and to send direct recall notices via every means possible depending on the data they have, *i.e.,* mail, electronic mail, and via telephone. One commenter suggests requiring e-mail notification when a firm has e-mail contact information. One commenter suggests asking consumers to forward e-mail notices to people they know have an interest in receiving the information in order to take advantage of social networking abilities. However, another commenter suggests that, because people ignore e-mails based on the large volume received, direct regular mail notices and automated phone messages would be more effective. Another commenter suggests that a direct recall notice be required in all cases where a firm has contact information unless the firm can prove by a preponderance of evidence that a direct recall notice will not be as effective as other forms of a recall notice.

However, one commenter urges that direct recall notices should only be required when a significant and imminent health and safety risk is involved because of the costs involved in direct notice and because over-warning can de-sensitize consumers. Moreover, section 15 of the CPSA recognizes that the form of notice depends on the risk involved and affords parties the opportunity for a hearing before the Commission can order a number of actions.

Response—Direct recall notices are the most effective form of a recall notice. 74 FR at 11886. The statement is based on the Commission's experience that one of the most important aspects of conducting a recall is to target recall notices to those consumers that are more likely to have purchased the product at issue. Direct recall notices have the advantage of reaching a large portion of the consuming public that may have actually purchased the product. Even if the product was not ultimately used by the purchaser, in the case of a parent buying a product for a child or a consumer buying a gift, the purchaser is in a good position to notify the product's user about the recall. Ensuring that notice of the recall is provided in a timely manner to the affected target audience is a major component of recall effectiveness, and direct recall notices are a key advantage in the recall process when this information is known. Moreover, the rule recommends, but does not require, use of direct recall notices. Assessing whether direct notice is necessary, appropriate, or possible in a particular mandatory recall is best done on an individual basis.

Comment 14—One commenter advocates a clear delineation in the rule with regard to responsibility for direct recall notices. This commenter argues that manufacturers should never have responsibility for a direct recall notice, but should have responsibility for broad dissemination through other means. Direct notice responsibility should fall to the product distributors and retailers that have such contact information.

Response—Determining which firms have responsibility for a recall and disseminating recall notices is beyond the scope of the rule, which solely relates to information categories required on a mandatory recall notice.

Comment 15—Some commenters note the limitations of relying solely on direct recall notices. One commenter states that direct recall notices are not the best method of notifying consumers, and should never be used as the sole method of notifying consumers because they miss third party consumers that purchase products second-hand or receive them as gifts. Considering the popularity of certain Web sites that sell, re-sell, or auction consumer products, direct recall notices could miss a large population of the consuming public. Additionally, the general public has an interest in knowing about recalled products, such that the recall strategy should be to reach the broadest possible audience.

Response—The Commission agrees that a direct recall notice should not be the sole form of recall notification because the purpose of a recall notice is to reach the broadest possible audience of consumers that may have purchased or received the products. Sole reliance on direct recall notices ignores the fact that other persons may benefit from receiving recall notices and assist in broad dissemination of recall notices. The final rule acknowledges this by adding § 1115.26(a)(5) stating that at least two of the recall notice forms listed in subsection (b) should be used.

Comment 16—One commenter asks the Commission to clarify the rule with regard to the factors for determining

when a firm actually has direct contact information. This commenter states that firms have millions of bits of information, but being able to track the information to a specific time frame and product is time consuming and costly. Moreover, firms may have some information related to the sale, *i.e.,* credit card information, but may not have all information without relying on a third party to match data, which can also be time consuming and costly. The commenter urges that the rule clarify that it only applies when accurate, up to date, contact information is readily and practically available, and is in fact in the firm's direct possession. Another commenter suggests adding "telephone number" to the list of contact information, and to prioritize the direct notice methods as follows: (1) Direct mail; (2) e-mail; and (3) telephone.

Response—Assessing when a firm has possession of direct contact information and when the information should be used is best done on an individual basis because of the variety of information that firms or third parties may possess. However, the final rule clarifies that "[a] direct recall notice should be used for each consumer for whom a firm has direct contact information, or when such information is obtainable, regardless of whether the information was collected for product registration, sales records, catalog orders, billing records, marketing purposes, warranty information, loyal purchaser clubs, or other such purposes." The Commission or a court retains flexibility to determine when a firm has direct contact information and when a direct recall notice is appropriate. The final rule also clarifies that a telephone number is considered direct contact information: "[D]irect contact information includes, but is not limited to, name and address, telephone number, and electronic mail address."

Comment 17—Some commenters are positive about the various methods available for dissemination of information, but want the Commission to make more than one form of notice mandatory. For example, one commenter would require multiple forms of dissemination so that firms cannot rely on a single press release and notice to retailers. Another commenter suggests requiring firms to contact national and local media. Another commenter is concerned that the rule does not require firms to ensure that notices are actually received and not dismissed as spam or junk mail and says requiring multiple dissemination methods would address this problem. Several commenters would require the use of paid advertisements, for example, where injuries and deaths have occurred. Similarly, another commenter suggests that the recall notice be required to be disseminated in the same manner as advertising and promotion for the product.

Response—Section 1115.26(a)(5) in the final rule provides that more than one form of recall notice should be used. The Commission declines to provide for any certain type of notice for every recall in the final rule. Recall notice forms may vary depending on the type of hazard, the severity of the risk, and the nature and distribution of the target audience. While circumstances will arise where paid advertisements are warranted and the Commission's or a court's order may require their use directed to certain target audiences, in certain time frames and intervals, retaining flexibility and creativity to adjust the forms of required recall notices to the specifics of each case and to allow for technological advancements in recall notice forms should be maintained.

Comment 18—Several comments support § 1115.26(b)(3), stating that a Web site recall notice should be prominent and clear on the first entry point of a Web site, such as a home page, and be interactive. Several commenters suggest making a Web site recall notice a mandatory requirement when a firm maintains a Web site. One commenter agrees that the information must be on the home page and urges the CPSC not to allow firms to bury recall notices deep within a Web site. These commenters support the idea of an interactive Web site that allows a consumer to seek a remedy on-line.

However, one commenter opposes placing a recall notice on a firm's home page and states that such a requirement goes beyond the CPSIA mandate. This commenter argues that manufacturers and distributors post Web site recall notices in a location where consumers have become familiar with locating the information. This commenter urges that the CPSC should not adopt a "one-size fits all" home page requirement and that the decision should be based on the circumstances of each case. Moreover, the requirement for an interactive Web site which allows a consumer to request a remedy does not make sense in all cases. The commenter gives the example of ATVs and RVs, which must be taken into an independent dealer for repair. Because section 214 of the CPSIA does not require an interactive Web site, the commenter would delete this section from the final rule.

Response—The Commission agrees that product safety information should not be buried in a firm's Web site. Since at least 2000, the CPSC has provided guidance to firms to post recall notices prominently on the home page of the firm's Web site. The Commission rejects the proposition that the rule goes beyond the requirements of the CPSIA with regard to providing an interactive Web site for recalls. First, the guidelines and policies set forth in section 1115.26 of the final rule are guidelines, not requirements. And, as reviewed above, section 214 of the CPSIA specifically provides that the Commission should "include any information that the Commission determines would be helpful to consumers" to identify the product, understand the hazard, and understand the proposed remedy. Although, for example, an ATV cannot be exchanged through a Web site, a prominently placed Web site recall notice that is interactive will expand the recall notice to the relevant target audience, and increase recall effectiveness by helping consumers with product identification, hazard identification and to understand the nature of the remedy being offered. Moreover, if the remedy is a repair, an interactive Web site can help consumers to locate a dealer to make the necessary repair and/or arrange an appointment for such repair at an appropriate dealer. While the content and nature of Web site interactivity may be product and remedy specific, the tool itself can be used in many ways to enhance consumer understanding and recall effectiveness.

Comment 19—Comments generally support § 1115.26(c), which states that the Commission or a court may require that a recall notice be in languages in addition to English "when necessary or appropriate to adequately inform and protect the public," but would set mandatory criteria for recall notices in additional languages. For example, one commenter states that the phrase "necessary and appropriate" requires further clarification and an explanation of the criteria that will be used. Another commenter urges the Commission to consider languages likely used by consumers when reviewing and approving recall notices and to insure that recall hotlines and on-line forms should be made available in additional languages when the product was likely purchased by non-English speaking consumers.

Several commenters note the current demographic situation in the United States, stating that approximately 12% of the population speaks Spanish, and suggest that the Commission require that all recall notices be drafted in both English and Spanish. Another commenter suggests requiring that all

recall notices be drafted in the top two or three other languages spoken in the United States.

Moreover, several commenters opine that the rule should contain criteria to help determine when recall notices in additional languages should be required. Suggestions for criteria for a mandatory language requirement include:

- When product labeling is primarily in a language other than English;
- When product instructions are written in more than one language; and
- When a product is marketed in a language other than English.

Finally, one commenter suggests that the Commission maintain a "bank" of standard recall information in other major languages spoken in the United States to help reduce the costs of providing recall notices in additional languages.

Response—The final rule clarifies when the Commission or a court may order that a recall notice be made in languages in addition to English by providing non-exhaustive examples. However, the Commission and/or a court retain flexibility to tailor recall notices to individual recall circumstances. Two criteria suggested by commenters have been added as examples in the final rule: When the product labeling is primarily in a language other than English and when a product is marketed in a language other than English. Both examples establish circumstances where it may be necessary or appropriate to issue recall notices in additional languages in order to increase the likelihood that audiences will understand the notices. The final rule, at § 1115.26(c), states one additional example: When a product is marketed or available in a geographic area where English is not the predominant language. This example demonstrates that even when a product's marketing or labeling is in English, there may be circumstances that arise in a mandatory recall scenario that still make it appropriate to distribute recall notices in languages in addition to English.

The Commission declines to adopt additional criteria in the final rule that would not result in an efficient use of staff resources. For example, insufficient information exists to impose a requirement that every mandatory recall notice be made available in two or three languages. Finally, maintaining a "bank" of standard recall information in other languages is something the Commission may consider doing as a matter of efficiency, but it is not within the scope of the rule.

5. Section 1115.27—Recall Notice Content Requirements

Proposed § 1115.27 would set forth the recall notice content requirements specified in the CPSIA and would provide further details where appropriate. For example, proposed § 1115.27(a) would require that a recall notice include the word "recall" in the heading and text. As another example, proposed § 1115.27(b) would require the recall notice to contain the date of its release, issuance, posting, or publication.

Comment 20—One commenter would have the rule address the sequence of information found in a mandatory recall notice. The commenter would have the most important information appear at the top of the notice because it is more likely to be read. For example, the photograph of the product should appear at the top of the notice under the "recall" heading. The commenter would use the following order: Description of product hazard, type of hazard or risk, identification of retailers, *etc.* This commenter also suggests that the rule address readability issues, such as the use of bullet points over lengthy paragraphs.

Response—The Commission agrees that recall notices should be written with the intent to aid readability and understanding by consumers, but that this issue is best addressed on an individual, case-by-case basis. In a mandatory recall situation, the Commission or a court has control over the final form and content of a recall notice, and can require such notices to conform to the standard format already in use. The Commission declines to set a uniform sequence in the current rulemaking because what represents the most critical recall information may vary slightly depending on the circumstances surrounding the recall.

Comment 21—One commenter suggests adding a "Region" provision to mandatory recall notices to specify the geographic region in which the product was made available in order to narrow down areas of concern when a national retailer is involved. This commenter suggests that the "Region" should state whether the product was for sale on line, so that a consumer understands when the geographic area may have been broadened by Internet sales.

Response—When it is relevant, a specific geographic region where a product is sold or offered for sale is typically included in a recall notice. Although the proposed rule did not list "region" as part of the recall notice content requirements, adding a separate "region" requirement to a mandatory recall notice could help to narrow the geographic range for affected retailers and consumers (while not narrowing the range for dissemination of a recall notice generally), and would allow for a description of the region in situations where no significant retailer is identified. Designation of a region may help consumers to identify whether they have the product being recalled. Accordingly, the final rule adds a requirement for "Region" as a new § 1115.27(j), which provides that "[w]here necessary or appropriate to assist consumers in determining whether they have the product at issue, a description of the region where the product was sold, or held for purposes of sale or distribution in commerce, must be provided" and has renumbered the remaining paragraphs accordingly.

Comment 22—Most commenters support § 1115.27(a)'s requirement to use the word "recall" in the heading and text of the notice. A few commenters suggest use of the label "Safety Recall" in the heading to alert consumers to a safety issue with regard to the product. One commenter suggests using the term "Urgent Recall" in the heading whenever there is a serious risk of death or loss of limb. This commenter urges that the Commission use this designation to create a more serious class of product recalls.

One commenter dislikes using the word "recall" in every notice, arguing that it may be misleading and "unnecessarily harmful to the character of a product, manufacturer, importer, or retailer" by suggesting the harm is greater than it actually may be. This commenter suggests using language from the "action taken" section, which the commenter believes will be more accurate in describing the nature of the recall at issue. At minimum, the commenter suggests using "recall" along with the "action taken" in the header so that consumers can quickly and easily see the nature of the action being taken with regard to the product.

Response—As a matter of Commission policy for consistency and uniformity, use of the word "recall" is preferred because consumers and other persons recognize the word "recall" as meaning that a safety issue has arisen that requires action by the consumer. The CPSC's position on the title of a recall notice has been in the Recall Handbook for many years. The Commission does not agree that the dissemination of a recall notice necessarily harms manufacturers. As reviewed in the Recall Handbook, consumers no longer necessarily view product recalls in a negative light and are, instead, more likely to have a

negative view of a firm if it does not take responsibility for conducting an effective recall. How well a company conducts a timely, reasonable recall of a product may have a strong influence on consumers' attitudes about the firm. Successful product recalls can result in continuing consumer support and demand for the firm's products.

While the Commission categorizes recalls, as set forth in the Recall Handbook Section III, CPSC Evaluation of Section 15 Reports, the Commission has avoided categorizing recall notices because it wants consumers to review and respond to all recall notices. Consumers should have the opportunity to read each notice and make an informed decision regarding whether they have the product, whether the risk of injury applies to them, how to avoid injury, and how to take advantage of any remedy associated with the recall. Categorizing recalls by the severity of risk may hinder the overall goal of recall effectiveness.

Comment 23—A few commenters agree with proposed § 1115.27(c)'s requirements pertaining to a description of the product. However, one commenter suggests that it is unclear whether § 1115.27(c)(1) through (6) establishes requirements because the word "must" is not used. This commenter suggests clarifying the rule so that firms know whether all or some subset of these product identification guidelines are required.

Response—Section 15(i)(2) of the CPSA requires that a mandatory recall notice include a product description, including model numbers or SKUs, common product name(s), and a photograph of the product. The final rule is organized such that items in § 1115.26 are guidelines and policies, and items in § 1115.27 are requirements. Accordingly, § 1115.27(c) provides that "[a] recall notice must include a clear and concise statement of the information that will enable consumers and other persons to readily and accurately identify the specific product and distinguish it from similar products. The information must enable consumers to readily determine whether or not they have, or may be exposed to, the product." The rule lists six types of descriptive information relevant to product identification, including the fact that a photograph "must" be included. The final rule clarifies that when the information specified under this section is applicable to a particular product, it must be included as part of the product description: "[T]o the extent applicable to a product, descriptive information that must appear on a recall notice includes, but is not limited to:" The list is not exhaustive, however, and additional product identification information may be required for a particular recall notice.

Comment 24—Several comments would strengthen the remedy requirements in proposed §§ 1115.27(d) and (m). One commenter observes that the remedy offered must be implementable by all parties. The commenter notes that there have been several instances where a manufacturer offered a remedy, such as a voucher or coupon, that was not recognized by all retailers' computer systems when presented by a consumer. Accordingly, consideration of different systems should be given when providing a remedy and approval by the CPSC.

A few commenters suggest limiting a manufacturer's ability to instruct consumers to discard products. They argue that this remedy should be limited to situations where a firm has gone out of business or the product is of nominal value. One commenter urges the Commission to not approve any recall notice that does not include replacement, repair, or refund of the purchase price as a remedy because consumers will be less likely to comply without compensation as they do not want to pay for the item twice. Finally, one commenter urges the Commission to include a section for "incentive" or "reward" to inform consumers about any additional incentives for the return of the product, or state that "none" are being given.

Response—The nature of remedies approved as part of a corrective action plan goes to the substance of a corrective action plan, which is not at issue in the final rule. With regard to the suggestion to include a category for a description of any recall incentive in a mandatory recall notice, while the Commission generally encourages firms to offer incentives for compliance with a recall, the Commission declines to require a separate category for such information. Incentives are properly part of the remedy being offered. An additional category for incentives in every recall notice, even when an incentive is not being offered, will lengthen the recall notice without improving the overall effectiveness of the notice or providing new or different information to help consumers understand the remedy being offered.

The Commission also notes that proposed § 1115.27(m) is now renumbered as § 1115.27(n) in the final rule.

Comment 25—Proposed § 1115.27(e) would require the recall notice to state the approximate number of product units covered by the recall, including all product units manufactured, imported, and/or distributed in commerce. Several comments suggest clarifying § 1115.27(e) by requiring a statement of the number of product units included in a recall notice. A few commenters state that the rule should only include products actually sold to consumers so that the number does not include products that were never sold to any distributor or retailer or are still in the hands of the manufacturer and were never imported. The commenters believe that these products are not subject to a recall and that it is inappropriate and beyond the scope of the CPSIA to include in the number of units products that have never been in the hands of consumers. Moreover, these commenters argue that including such data is misleading and distorting of the number of products actually subject to the recall and cannot be said to help consumers identify a product, understand a product hazard, or obtain a remedy.

One commenter suggests that product unit information is unnecessary, unhelpful to the consumer, and is likely to overwhelm the average consumer. According to this commenter, including product unit information only serves to frustrate the purpose of understanding the product's actual or potential hazard. This information could have a negative effect on the firm, and media and other groups could incorrectly focus on the number of products being recalled rather than any actual threat of public harm.

Response—Section 15(i)(2)(C) of the CPSA requires that a mandatory recall notice include "[t]he number of units of the product with respect to which the action is being taken." Accordingly, firms must state product unit information in a mandatory recall notice pursuant to the statute. The Commission's interpretation of this section of the statute is consistent with past Commission practice for all recall notices, as set forth in the Recall Handbook, which is to list all units of a product manufactured, imported, and/or distributed in commerce. As for those comments suggesting that products that are not in the hands of consumers are not subject to a recall, the CPSC has jurisdiction over all consumer products subject to a recall, and all such products must be dealt with in a corrective action plan, regardless of where the product is in the supply chain. For example, in a mandatory recall situation, a manufacturer holding product could not sell, modify, or destroy product without CPSC authorization. Stating the number of product units involved informs consumers as to the scope of a recall,

aids product identification, and increases recall effectiveness.

Comment 26—Many comments address proposed §§ 1115.27(f) and (l) regarding a description of substantial product hazard and a description of the incidents, injuries and deaths. Several commenters agree that requiring a mandatory recall notice to describe and state the number of injuries and deaths is helpful to consumers and will motivate them to comply with the recall. Many commenters, however, state that specific information on injuries and deaths is unnecessary and irrelevant, or suggest that the rule should be further clarified to prevent the recall notice from becoming a lengthy, multi-paged document. One commenter states that proposed § 1115.27(f) exceeds the scope of the intent of the CPSIA with regard to a description of the substantial product hazard and reason for action. This information may not be feasible for firms to provide and may be more misleading than informative because a firm may not know all of this information at the time of a recall. Further, several commenters state that reporting death statistics is outside the purpose of a recall, will not help consumers or their decision to participate in a recall, but will have an adverse effect on retailers and producers.

Response—Sections 15(i)(2)(D) and (G) of the CPSA require that a mandatory recall notice include "[a] description of the substantial product hazard and the reasons for the action," as well as "[t]he number and a description of any injuries or deaths associated with the product, the ages of any individuals injured or killed, and the dates on which the Commission received information about such injuries or deaths." Accordingly, the statute and the final rule require both a description of the substantial product hazard and specific information on injuries and deaths, including the number, description and ages of persons involved. However, recall notices will, by necessity, only include information regarding a substantial product hazard and any injuries or deaths that are known at the time of the recall notice.

The Commission also notes that it has renumbered § 1115.27(l) as § 1115.27(m) in the final rule.

Comment 27—Some commenters request clarification on what constitutes an injury that requires reporting, what the phrase "associated with the product" in proposed § 1115.27(f) means, what "product conditions or circumstances" can give rise to an injury or death related to a product, and what a "concise summary" constitutes. For example, one commenter opines that the term "injury" should be defined to only include injuries which require medical treatment, and to exclude minor injuries such as superficial scrapes and bruises. This commenter states that defining "injury" will make reporting consistent across recall notices. Another commenter states that "associated with the product" language could be interpreted broadly to require that all deaths or injuries be reported, even when there may be other causes, such as gross negligence or use contrary to warning labels. One commenter suggests that the rule address whether a manufacturer must list any death or injury, however tangential, or may qualify injuries where gross negligence and contrary use are involved. Finally, one commenter believes that requiring detailed information on injuries and deaths will expose firms to liability for acts that have not been proven in court to be causally linked to the products without providing any benefits to the consumer. Moreover, it could require corporations to implicate themselves criminally or civilly, in violation of the Fifth Amendment of the Constitution.

Response—With regard to the types of injuries required to be reported on a recall notice, the Commission interprets the statutory requirement consistent with past agency practice with regard to reporting injuries on a recall notice, which is to include all injuries, regardless of whether a consumer sought medical treatment, where the consumer product is present at the time of the injury and may have been a contributing factor.

A well-crafted recall notice does not necessarily subject a firm to increased product liability. The Commission's mandate is public safety, and effective recall notices can play an important role in enhancing public safety. Allowing a defective product to stay on the market without providing the public with timely hazard and recall information would likely result in increased liability for non-compliant firms, not only from potential civil and criminal penalties by the Commission, but from product liability lawsuits as well. Finally, no concern exists that providing information on injuries and deaths in a recall notice impairs any Fifth Amendment right against self-incrimination, as the Fifth Amendment protects individuals, not corporate entities. *See, e.g., Bellis* v. *United States,* 417 U.S. 85, 88–90 (1974) (reviewing history of decisions regarding the Fifth Amendment privilege and its inapplicability to corporations and stating that no artificial organization may utilize the personal privilege against self-incrimination to avoid producing corporate documents).

Comment 28—Several comments would clarify the rule to allow reporting of injuries and age ranges in the aggregate. These commenters argue that reporting specific ages is not necessarily helpful for the consumer to evaluate the risks involved. Moreover, if the rule is interpreted to require a description of each injury and the age of each person, this could turn the recall notice into a lengthy, multi-page document that defeats the purpose of efficiently and effectively identifying the product, explaining the hazard, and communicating a remedy to consumers. Age ranges can be described in numbered ranges, or, for example, as adult, child, infant. One commenter opines that the number of injuries is not as important as the details of the injuries and deaths, to distinguish minor injuries from other types of harm.

Response—Reporting of injuries and deaths, including the ages of individuals injured or killed, is statutorily required in a mandatory recall notice. Providing this information, however, need not result in a lengthy recall notice. Consumers and firms can find numerous examples of recall notices on the CPSC's Web site, and note that when age and injury information is detailed, it does not result in lengthy, unreadable recall notices. The Commission or a court retains the flexibility to craft effective recall notices for particular recall scenarios which are in the best interest of the consumer. The exact wording of any recall notice cannot be done before the fact, and the Commission declines to adopt a specific, one size fits all, approach to how this information is presented for every recall notice. Firms should anticipate that aggregation of age information will be required in limited circumstances.

Comment 29—One commenter states that information regarding injuries on exact dates can be considered confidential material supplied to staff under section 15(b) of the CPSA. Including such information in a recall notice would undermine confidentiality under section 6(b) of the CPSA and otherwise. Another commenter notes that the date of injury may be unrelated to when the consumer decides to report the injury and how accurately the injury is characterized. One commenter states that if the information must be provided, then the Commission should at least allow firms to provide a range of dates rather than exact dates, or a summary such as "prior to the time of this announcement." Another

commenter, however, agrees that the recall notices should include the dates or date ranges when the Commission received information about deaths or injuries, and suggests that the Commission further require the dates or date ranges when the recalling firm received information about deaths or injuries.

Response—Some commenters may misunderstand the statutory requirement with regard to reporting dates related to injuries. Neither the statute nor the rule require that a mandatory recall notice state the actual date that an injury or death occurred, or the actual date when a firm received information about an injury. Section 15(i)(2)(G) of the CPSA requires that a mandatory recall notice include "the dates on which the *Commission* received information about such injuries or deaths." (Emphasis added.) At minimum, a month and year must be reported as to when the Commission received such information. Accordingly, aggregation of the month and year may occur when necessary or appropriate to shorten the information presented on a recall notice while not sacrificing appropriate and statutorily required detail. For example, if the Commission learns of three injuries on three separate dates in a single month, a mandatory recall notice may provide the month and year in which these injuries were reported, presenting accurate information in a shortened format. However, the Commission or a court retains the flexibility to order the use of exact dates or the use of a range of dates by month and year, depending, among other things, on the number of injuries and the risk involved, if it is more helpful to consumers.

Comment 30—One commenter suggests that information on injuries and deaths is a subpart of the section on substantial product hazard and should be moved under that section.

Response—A description of the substantial product hazard and a description of the associated injuries and deaths are separate categories of information presented on a recall notice. Both the statute and the final rule separate these categories of information. *See, e.g.,* sections 15(i)(2)(D) and (G) of the CPSA. The information presented under substantial product hazard is a short, factual statement regarding the *actual* or *potential* harm, *i.e.,* choking, laceration, drowning, while the number and description of injuries reports actual injuries that have occurred. In some instances, for example, the risk of injury for choking may be present, but no reported injuries have occurred.

Comment 31—Many comments address § 1115.27(h) regarding identification of manufacturers on a mandatory recall notice. A few comments are favorable, but many comments question the value of identifying a foreign manufacturer, and suggest that this information is confidential business information subject to trade secret protection.

A few comments simply state that while the identification of manufacturers may be helpful to the CPSC, it is not helpful to a consumer and may be confusing with regard to who is responsible for the recall. Several commenters opine that not only is the information irrelevant to an effective recall and the stated goals of a recall notice under section 214 of the CPSIA, but the identity of foreign manufacturers is proprietary, confidential business information which should only be required to be provided to the Commission under trade secret protection. These commenters state that the CPSIA does not require identification of a foreign manufacturer, and that the name of the importer and country of origin should be sufficient. Moreover, publishing the name of foreign manufacturers can cause significant harm to a firm and is information not shared with competitors. Naming a foreign manufacturer may cause confusion to consumers, and unfairly place blame on foreign manufacturers when the problem, for example, may actually be with the design of the product. Finally, one commenter opines that information on the country of origin is not helpful to the consumer and detracts from the overall effectiveness of a recall notice. Such information may confuse consumers to believe that all products manufactured in a country are dangerous.

Response—Section 15(i)(2)(E) of the CPSA requires that a mandatory recall notice shall include "[a]n identification of the manufacturers * * * of the product." Section 3(a)(11) of the CPSA defines "manufacturer" as "any person who manufactures or imports a consumer product." The term "manufactured" means to "manufacture, produce, or assemble." Section 3(a)(10) of the CPSA. A consumer product includes "any article, or component part thereof, produced or distributed" for sale to consumers. Section 3(a)(5) of the CPSA. Thus, any firm that manufactures, produces, assembles or imports a consumer product, or any component part thereof, may be characterized as a product manufacturer. As is often the case, a consumer product may have more than one manufacturer. This fact is acknowledged both by the statute, which employs the plural term "manufacturers" and the rule, which provides that "[a] recall notice must identify each manufacturer (including importer) of the product and the country of manufacture."

The identity of a foreign manufacturer is not a trade secret or commercially sensitive information in every case. For example, many voluntary recall notices issued in the past identify a foreign manufacturer. In the context of a mandatory recall situation, whether identification of a foreign manufacturer is indeed trade secret, confidential information, and/or whether an exception to section 6 of the CPSA applies, will necessarily be litigated in the judicial or administrative proceeding. These issues require a fact-dependent, individualized analysis in every case; it is not something that could ever be decided broadly and apply to all manufacturers. To the extent that section 6 of the CPSA is applicable, the Commission acknowledges that it, and a firm, must comply with the law and any exceptions thereto.

Comment 32—Another commenter opines that the rule is ambiguous as to whether different information is required from foreign and domestic manufacturers. The commenter would clarify the rule to state that a recall notice must identify a domestic manufacturer's legal name, city, and state of headquarters, or if a foreign manufacturer is involved, identify the city and country of its headquarters (but omit the name of the company). Another commenter agrees that the manufacturer name and country of manufacture should be on the recall notice, but not the city and state of the headquarters. This commenter does not see any added benefit to the consumer to have this information.

Response—The rule anticipates that many consumer products have both foreign and domestic manufacturers and importers, both of whom must be identified. The rule requires all manufacturers to be identified by their legal names. Additionally, domestic companies should be identified by the city and state of their headquarters, and foreign companies should be identified by the city and country of their headquarters. The Commission agrees that the language in the proposed rule was unclear with regard to what identifying information is required for foreign manufacturers. The final rule clarifies that foreign manufacturers must be identified by: (i) Legal name; (ii) city; and (iii) country of headquarters.

Comment 33—One commenter suggests that the Commission require a manufacturer's Web site address to be listed with the identification information, in addition to name, trade name, city, and state, to facilitate recall information dissemination and allow consumers to access recall and remedy information via the company's Web site.

Response—The Commission declines to require that a manufacturer's Web address be listed as identifying information in every mandatory recall notice. A Web address for recall information is already provided elsewhere on the recall notice. The manufacturer may or may not have a Web site and may or may not be the firm in charge of a recall. The Commission does not want consumers to be confused with regard to which entity is responsible for the recall, or to deluge the wrong firm with phone calls about a recall.

Comment 34—One commenter suggests excluding small importers that are not the sole importer or retailer from any provision that allows them to be characterized as a "manufacturer" or "significant retailer" for purposes of a recall, because the burden on small importers would be too great and they would not likely have the type of information available to manufacturers and retailers to implement a recall. However, another commenter observed that the burden on small businesses should not be great because there are few mandatory recalls.

Response—Determining which firm is responsible for conducting a recall is outside the scope of the final rule, which focuses on guidelines and requirements for information categories to include in a mandatory recall notice.

Comment 35—Many commenters request clarification of proposed § 1115.27(i) with regard to identification of "significant retailers," arguing that the rule is too vague regarding what criteria will be used to determine a "significant retailer."

One commenter opines that singling out retailers does not help to identify a product. This information is only relevant if the remedy is to return the product to the retailer, or if there is only one retailer. Moreover, several commenters prefer to keep the current system whereby no specific retailer is named, and the firm can rely on language such as "sold at department store and retail stores nationwide."

Response—Section 15(i)(2)(E) of the CPSA requires that a mandatory recall notice include "[a]n identification of the * * * significant retailers of the product." Thus, the statute requires the identification of "significant" retailers but does not define "significant."

Comment 36—Several commenters believe the language regarding "significant retailers" should be expanded to include all retailers, instead of just "significant" retailers. Many commenters state that if only a few retailers are listed, consumers may be confused and believe that their product is not at issue in the recall simply because the retailer they purchased the product from is not listed. Moreover, this scenario would leave out the majority of retailers where the products were actually purchased and may compromise dissemination of recall information to the majority of the consuming public. One commenter suggests that, in order to keep the notice short, the Commission should require the notice to state that the retailer list is not exhaustive and to provide a Web site address where the consumer can find an exhaustive list of retailers. Several commenters claim that, because the definition of "significant retailer" is so vague, firms will simply list all retailers to avoid non-compliance. These commenters argue that a long list of retailers will increase the length of the notice and make it difficult for consumers to obtain the information required for an effective recall.

Response—Section 15(i)(2)(E) of the CPSA requires that a mandatory recall notice identify *significant* retailers of the product. Although the statute does not define "significant," the Commission does not read it to mean identification of *all* retailers. While the Commission could identify all retailers on its Web site if it were in the interest of public safety, it declines to do so in every mandatory recall scenario. First, the statute requires identification of "significant" retailers, not all retailers. Second, it is unclear whether requiring every mandatory recall notice to include an exhaustive list of retailers on the CPSC Web site would increase recall effectiveness or would be an efficient use of Commission resources. Such a requirement may become burdensome with no added value to consumers. Finally, listing significant retailers will not result in a lengthy recall notice because the Commission retains the discretion to control the substance, format, and organization of recall notices in the interest of consumer safety and recall effectiveness.

Comment 37—Many commenters suggest that the concept of, and the criteria for, "significant retailer" be clarified and that § 1115.27(i)(5) should not contain a vague catch-all that allows the Commission to find a retailer significant if it "is in the public interest." Many commenters request that the Commission set forth criteria the Commission will consider in determining what is in the public interest.

Response—The Commission's experience with recall notices and identification of retailers is that such information helps consumers to determine whether or not they may have the defective product. Accordingly, the rule provides four circumstances under which identifying a retailer may be helpful to consumers to identify a product: (i) An exclusive retailer; (ii) a retailer that is also an importer of the product; (iii) a retailer with national and/or regionally located stores; and (iv) a retailer that holds or sold a significant number of the defective products. The rule also provides the Commission, or a court, with the flexibility to determine that although a retailer may not fall into one of the four enumerated categories, circumstances may arise whereby designation of the retailer as "significant" for a particular mandatory recall would help consumers identify the product. The final rule maintains this flexibility because: (i) It is not possible to anticipate every circumstance where listing a particular retailer may become helpful to consumers beforehand; and (ii) the Commission, under sections 15(c) and (d) of the CPSA, and a court, pursuant to section 12 of the CPSA, already have final authority over the form and content of mandatory recall notices. Such authority is not altered by section 15(i) of the CPSA and the Commission declines to do so in the final rule.

Comment 38—Some commenters state that the Commission failed to define "regional retailer," or "regionally-located." Accordingly, these commenters argue that the rule is too vague.

Response—The term "regional" should be understood based on its ordinary and customary usage. For example, a regional chain could be located in one region of the state of California, it could comprise affiliated stores existing in an entire state, or it could comprise affiliated stores located in a group of states, or finally, stores located in one or more regions of the United States.

Comment 39—Some commenters note that there are many situations where regional chains or "mom and pop" stores sell the majority of the products and collectively outsell a national retailer, but the national retailer may end up being named as a "significant retailer" because, compared to any one store, it may have sold more products. Several commenters observe that the rule, as

proposed, will likely result in a small number of national retailers being named in virtually every recall notice, which will dilute the purpose of the information. One commenter suggests addressing this problem by changing § 1115.27(i)(4) from "a significant number of the total manufactured" to "a majority of the total manufactured." This commenter believes that naming one retailer where a majority of the products were sold would be more helpful to the consumer than listing every "significant retailer."

Response—With regard to the idea that listing some, but not all, retailers will cause consumer confusion, this has not been the Commission's experience. For example, a recall notice can list major retail outlets, but also explain that the list of retailers is not exhaustive. In a situation where Store A sold 40% of the defective product and more than 50 smaller home centers and hardware stores sold the remaining 60%, a recall notice could employ additional, helpful language describing the types of stores where the product was sold without causing the notice to become unduly long and unreadable: "Product was sold nationwide at Store A and at home centers and hardware stores nationwide."

The Commission declines to adopt the suggestion that the required statutory term "significant" be modified to mean a "majority" of the products. The statute itself requires identification of "significant" retailers. Many situations arise where there may be two or three retailers that sell 60% to 80% of the products. While no retailer individually sold a majority of the products, listing these retailers is helpful to consumers to determine whether or not they may have the defective product.

Comment 40—One commenter would expand the description of retailers to include contractors, so that contractors must notify consumers when the materials were used in building projects. The commenter cited, as an example, the drywall situation, where the nature of the product makes it difficult for consumers to discern whether the defective product is in their home.

Response—The Commission declines to include the term "contractors" in the description of retailers, but this does not preclude the fact that there may be situations when contractors may be considered to be retailers. Even if the Commission were to include contractors in the description of retailers, it would not address the commenter's primary concern that contractors notify homeowners about the materials used in building projects. The statute at issue here, section 15(i) of the CPSA, does not impose any specific obligation on a retailer to notify consumers. Being listed as a "significant retailer" does not create any obligation on the part of retailers so listed; the information is present solely to assist consumers with product identification.

Comment 41—One commenter opines that the dates of manufacture and sale under proposed § 1115.27(j) (now renumbered as § 1115.27(k) in the final rule) are too expansive. Manufacturers date code products by the date of manufacture, not the date of sale. Manufacturers often do not know the date a product first hits retail shelves. Providing more than manufacturing dates may be confusing to consumers. The current system of citing manufacturing dates by date code, or date of sale if known, has been successful.

Response—Section 15(i)(2)(F) of the CPSA requires that a mandatory recall notice include "[t]he dates between which the product was manufactured and sold." The statute thus requires both the dates of manufacture and the dates of sale. If a manufacturer does not have this information, it is expected that, where available, it may be provided by retailers or distributors.

Comment 42—A few commenters suggest expanding the price requirement in proposed § 1115.27(k) (now renumbered as § 1115.27(l) in the final rule). One commenter would require suggested retail price, prices known to the manufacturer, and the highest and lowest retail price known. Another commenter suggests that the approximate price range is not helpful enough, and that the price range should be made specific for geographic locations.

One commenter opines that a price should only be required when the remedy is a purchase price refund. Otherwise, this information is unhelpful and clutters the recall notice.

Response—The Commission typically requires approximate price information in all recall notices to assist with product identification. We decline to require every price known to the manufacturer in every mandatory recall notice; the approximate price range is sufficient for product identification purposes, and to assist the consumer in understanding what the price refund may be. Further, providing a price range for each specific geographic location in every recall situation is not always practical. It is unclear whether such information will add sufficient value to the recall notice to offset the use of resources in every recall situation. The Commission retains the flexibility, however, to require more information on price if it would assist consumers.

Comment 43—One commenter states that proposed § 1115.27(n) (now renumbered as § 1115.27(o) in the final rule) regarding "other information" that the Commission or a court may deem appropriate for inclusion in a recall notice should state what types of additional information may be required to put firms on notice. The commenter argues that without such clarification an aggrieved party may later argue that a requirement placed on it is burdensome and not contemplated by the rule. Accordingly, the commenter suggests that the rule clarify that § 1115.27 is exhaustive as can be currently contemplated, but that other requirements will be included as the situation demands. At a minimum, the rule should state that future requirements will be based on a fair assessment of the situation.

Response—Section 15(i)(2)(I) of the CPSA provides that a mandatory recall notice must include "[o]ther information the Commission deems appropriate." Moreover, when a mandatory recall notice is ordered by a court or the Commission, it has authority over the final form and content of the recall notice and can require additional information deemed appropriate in particular cases pursuant to sections 12, 15(c) and 15(d) of the CPSA. Thus, the authority to include any other information the Commission deems appropriate in a mandatory recall notice does not solely originate from section 15(i) of the CPSA. The rule reflects the Commission or a court's inherent authority with regard to the form and content of mandatory recall notices, and the Commission declines to limit its own authority in the rule.

6. Section 1115.28—Multiple Products or Models

Proposed § 1115.28 would require the notice for each product or model covered by a recall notice to meet the requirements of this subpart.

We received no comments on this provision and have finalized it without change.

7. Section 1115.29—Final Determination Regarding Form and Content

Comment 44—Most commenters support § 1115.29 which states that the Commission or the Court has the final determination as to the form and content of a recall notice. Consumer groups, in particular, support this rule to level the influence that firms have traditionally had over form and content. One commenter suggests imposing a

deadline on firms for disseminating the recall notice after Commission approval and immediate posting on the CPSC's Web site after approval. One commenter, however, feels that the rule is vague and allows the CPSC excessive discretion with regard to recall form and content. This commenter suggests more specificity and criteria be inserted into the rule to create more uniform expectations for firms. Another commenter suggests imposing a deadline on the Commission's approval process, and allowing firms to disseminate a recall notice if the Commission has not rejected or approved the proposed recall notice within the time frame in order to get recall information out to the public as soon as possible.

Response—The Commission and/or a court have statutory authority to control the final form and content of mandatory recall notices. Mandatory recall notices must be approved by the Commission before they are disseminated. Sections 15(c)(1) and 15(d)(2) of the CPSA. Nothing in section 15(i) of the CPSA or the final rule changes this control; the statute merely requires that the Commission provide guidance on a uniform set of information that firms can expect to find in a mandatory recall notice, as well as sets forth certain requirements for mandatory recall notices which can be altered by the Commission in particular recall scenarios as necessary or appropriate. Thus, the date of dissemination by both the CPSC and the firm is directed by the CPSC, and the CPSC posts all recall press notices on its Web site at *http://www.CPSC.gov* after approval by the Commission.

IV. Environmental Impact

Generally, the Commission's regulations are considered to "have little or no potential for affecting the human environment," and environmental assessments and impact statements are not usually prepared. *See* 16 CFR 1021.5(c). The final rule establishes requirements and guidelines for mandatory recall notices is not expected to have an adverse impact on the environment. Thus, the Commission concludes that no environmental assessment or environmental impact statement is required in this proceeding.

V. Paperwork Reduction Act of 1995

The rule does not impose information collection requirements. Rather, the rule sets forth a uniform set of information categories that are either statutorily required or provided as guidelines by the Commission for use in recall notices that are ordered by the Commission or a United States district court in individual enforcement actions under sections 12, 15(c) or 15(d) of the CPSA. Additionally, under 5 CFR 1320.4(a)(2), the Paperwork Reduction Act requirements do not apply to collections of information "during the conduct of a civil action to which the United States or any official or agency thereof is a party, or during the conduct of an administrative action * * * against specific individuals or entities." Accordingly, it is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 through 3520.

VI. Executive Order 12988

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations. The requirements and guidelines contained in the rule do not impact the States, as they only apply to mandatory recalls ordered by the Commission or a United States district court. Moreover, section 26 of the CPSA with regard to preemption only addresses the preemptive effect of consumer product safety standards under the CPSA. The current rule is not a consumer product safety standard under the Act. Accordingly, the Commission has determined that this rule does not contain requirements or guidelines that impact the States.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") generally requires that agencies review proposed rules for their potential economic impact on small entities, including small businesses. Section 603 of the RFA calls for agencies to prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities and identifying impact-reducing alternatives. 5 U.S.C. 603. Section 605(b) of the RFA, however, states that this requirement does not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, and the agency provides an explanation for that conclusion.

This final rule will have little or no effect on small businesses. First, this rule consists of guidelines (which do not require a regulatory flexibility analysis) and recall notice content requirements that are largely dictated by the CPSIA. Second, these guidelines and requirements apply in the context of an administratively adjudicated order to a specific party to issue a recall notice. Such mandatory recalls have occurred infrequently in the Commission's history. Finally, the substantive authority for a court or the Commission to order that a mandatory recall notice issue comes from existing law, sections 12, 15(c) and 15(d) of the CPSA, rather than the final rule. Therefore, the Commission concludes that the final rule will not have a significant economic impact on a substantial number of small entities.

VIII. Effective Date

In the preamble to the proposed rule, the Commission indicated that the final rule would be effective upon publication in the **Federal Register** based upon good cause shown (74 FR 11885). However, in its vote to approve the issuance of the final rule, the Commission voted to follow the APA standard, codified at 5 U.S.C. 553(d), such that the effective date of the final rule is 30 days after publication in the **Federal Register.**

List of Subjects in 16 CFR Part 1115

Administrative practice and procedure, Business and industry, Consumer protection, Reporting and recordkeeping requirements.

■ For the reasons stated above, the Commission amends chapter II of title 16 of the Code of Federal Regulations as follows:

PART 1115—SUBSTANTIAL PRODUCT HAZARD REPORTS

■ 1. The authority citation for part 1115 continues to read as follows:

Authority: 15 U.S.C. 2061, 2064, 2065, 2066(a), 2068, 2069, 2070, 2071, 2073, 2076, 2079, and 2080.

■ 2. Add a new Subpart C to read as follows:

Subpart C—Guidelines and Requirements for Mandatory Recall Notices

Sec.

Subpart C—Guidelines and Requirements for Mandatory Recall Notices

§ 1115.23 Purpose.

(a) The Commission establishes these guidelines and requirements for recall notices as required by section 15(i) of the Consumer Product Safety Act, as amended (CPSA) (15 U.S.C. 2064(i)). The guidelines and requirements set

forth the information to be included in a notice required by an order under sections 12, 15(c), or 15(d) of the CPSA (15 U.S.C. 2061, 2064(c), or 2064(d)). Unless otherwise ordered by the Commission under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or by a United States district court under section 12 of the CPSA (15 U.S.C. 2061), the content information required in this subpart must be included in every such notice.

(b) The Commission establishes these guidelines and requirements to ensure that every recall notice effectively helps consumers and other persons to:

(1) Identify the specific product to which the recall notice pertains;

(2) Understand the product's actual or potential hazards to which the recall notice pertains, and information relating to such hazards; and

(3) Understand all remedies available to consumers concerning the product to which the recall notice pertains.

§ 1115.24 Applicability.

This subpart applies to manufacturers (including importers), retailers, and distributors of consumer products as those terms are defined herein and in the CPSA.

§ 1115.25 Definitions.

In addition to the definitions given in section 3 of the CPSA (15 U.S.C. 2052), the following definitions apply:

(a) *Recall* means any one or more of the actions required by an order under sections 12, 15(c), or 15(d) of the CPSA (15 U.S.C. 2061, 2064(c), or 2064(d)).

(b) *Recall notice* means a notification required by an order under sections 12, 15(c), or 15(d) of the CPSA (15 U.S.C. 2061, 2064(c), or 2064(d)).

(c) *Direct recall notice* means a notification required by an order under sections 12, 15(c), or 15(d) of the CPSA (15 U.S.C. 2061, 2064(c), or 2064(d)), that is sent directly to specifically-identified consumers.

(d) *Firm* means a manufacturer (including an importer), retailer, or distributor as those terms are defined in the CPSA.

(e) *Other persons* means, but is not limited to, consumer safety advocacy organizations, public interest groups, trade associations, industry advocacy organizations, other State, local, and Federal government agencies, and the media.

§ 1115.26 Guidelines and policies.

(a) *General.* (1) A recall notice should provide sufficient information and motivation for consumers and other persons to identify the product and its actual or potential hazards, and to respond and take the stated action. A recall notice should clearly and concisely state the potential for injury or death.

(2) A recall notice should be written in language designed for, and readily understood by, the targeted consumers or other persons. The language should be simple and should avoid or minimize the use of highly technical or legal terminology.

(3) A recall notice should be targeted and tailored to the specific product and circumstances. In determining the form and content of a recall notice, the manner in which the product was advertised and marketed should be considered.

(4) A direct recall notice is the most effective form of a recall notice.

(5) At least two of the recall notice forms listed in subsection (b) should be used.

(b) Form of recall notice—(1) Possible forms. A recall notice may be written, electronic, audio, visual, or in any other form ordered by the Commission in an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or by a United States district court under section 12 of the CPSA (15 U.S.C. 2061). The forms of, and means for communicating, recall notices include, but are not limited to:

(i) Letter, Web site posting, electronic mail, RSS feed, or text message;

(ii) Computer, radio, television, or other electronic transmission or medium;

(iii) Video news release, press release, recall alert, Web stream, or other form of news release;

(iv) Newspaper, magazine, catalog, or other publication; and

(v) Advertisement, newsletter, and service bulletin.

(2) *Direct recall notice.* A direct recall notice should be used for each consumer for whom a firm has direct contact information, or when such information is obtainable, regardless of whether the information was collected for product registration, sales records, catalog orders, billing records, marketing purposes, warranty information, loyal purchaser clubs, or other such purposes. Direct contact information includes, but is not limited to, name and address, telephone number, and electronic mail address. Forms of direct recall notice include, but are not limited to, United States mail, electronic mail, and telephone calls. A direct recall notice should prominently show its importance over other consumer notices or mail by including "Safety Recall" or other appropriate terms in an electronic mail subject line, and, in large bold red typeface, on the front of an envelope and in the body of a recall notice.

(3) *Web site recall notice.* A Web site recall notice should be on a Web site's first entry point such as a home page, should be clear and prominent, and should be interactive by permitting consumers and other persons to obtain recall information and request a remedy directly on the Web site.

(c) *Languages.* Where the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or a United States district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), determines that it is necessary or appropriate to adequately inform and protect the public, a recall notice may be required to be in languages in addition to English. For example, it may be necessary or appropriate to require a recall notice be in a language in addition to English when a product label is in a language in addition to English, when a product is marketed in a language in addition to English, or when a product is marketed or available in a geographic location where English is not the predominant language.

§ 1115.27 Recall notice content requirements.

Except as provided in § 1115.29, every recall notice must include the information set forth below:

(a) *Terms.* A recall notice must include the word "recall" in the heading and text.

(b) *Date.* A recall notice must include its date of release, issuance, posting, or publication.

(c) *Description of product.* A recall notice must include a clear and concise statement of the information that will enable consumers and other persons to readily and accurately identify the specific product and distinguish it from similar products. The information must enable consumers to readily determine whether or not they have, or may be exposed to, the product. To the extent applicable to a product, descriptive information that must appear on a recall notice includes, but is not limited to:

(1) The product's names, including informal and abbreviated names, by which consumers and other persons should know or recognize the product;

(2) The product's intended or targeted use population (*e.g.*, infants, children, or adults);

(3) The product's colors and sizes;

(4) The product's model numbers, serial numbers, date codes, stock keeping unit (SKU) numbers, and tracking labels, including their exact locations on the product;

(5) Identification and exact locations of product tags, labels, and other identifying parts, and a statement of the specific identifying information found on each part; and

(6) Product photographs. A firm must provide photographs. Each photograph must be electronic or digital, in color, of high resolution and quality, and in a format readily transferable with high quality to a Web site or other appropriate medium. As needed for effective notification, multiple photographs and photograph angles may be required.

(d) *Description of action being taken.* A recall notice must contain a clear and concise statement of the actions that a firm is taking concerning the product. These actions may include, but are not limited to, one or more of the following: Stop sale and distribution in commerce; recall to the distributor, retailer, or consumer level; repair; request return and provide a replacement; and request return and provide a refund.

(e) *Statement of number of product units.* A recall notice must state the approximate number of product units covered by the recall, including all product units manufactured, imported, and/or distributed in commerce.

(f) *Description of substantial product hazard.* A recall notice must contain a clear and concise description of the product's actual or potential hazards that result from the product condition or circumstances giving rise to the recall. The description must enable consumers and other persons to readily identify the reasons that a firm is conducting a recall. The description must also enable consumers and other persons to readily identify and understand the risks and potential injuries or deaths associated with the product conditions and circumstances giving rise to the recall. The description must include:

(1) The product defect, fault, failure, flaw, and/or problem giving rise to the recall; and

(2) The type of hazard or risk, including, by way of example only, burn, fall, choking, laceration, entrapment, and/or death.

(g) *Identification of recalling firm.* A recall notice must identify the firm conducting the recall by stating the firm's legal name and commonly known trade name, and the city and state of its headquarters. The notice must state whether the recalling firm is a manufacturer (including importer), retailer, or distributor.

(h) *Identification of manufacturers.* A recall notice must identify each manufacturer (including importer) of the product and the country of manufacture. Under the definition in section 3(a)(11) of the CPSA (15 U.S.C. 2052(a)(11)), a manufacturer means "any person who manufactures or imports a consumer product." If a product has been manufactured outside of the United States, a recall notice must identify the foreign manufacturer and the United States importer. A recall notice must identify the manufacturer by stating the manufacturer's legal name and the city and state of its headquarters, or, if a foreign manufacturer, the foreign manufacturer's legal name and the city and country of its headquarters.

(i) *Identification of significant retailers.* A recall notice must identify each significant retailer of the product. A recall notice must identify such a retailer by stating the retailer's commonly known trade name. Under the definition in section 3(a)(13) of the CPSA (15 U.S.C. 2052(a)(13)), a retailer means "a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer." A product's retailer is "significant" if, upon the Commission's information and belief, and in the sole discretion of the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or in the sole discretion of a United States district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), any one or more of the circumstances set forth below is present (the Commission may require manufacturers (including importers), retailers, and distributors to provide information relating to these circumstances):

(1) The retailer was the exclusive retailer of the product;

(2) The retailer was an importer of the product;

(3) The retailer has stores nationwide or regionally-located;

(4) The retailer sold, or held for purposes of sale or distribution in commerce, a significant number of the total manufactured, imported, or distributed units of the product; or

(5) Identification of the retailer is in the public interest.

(j) *Region.* Where necessary or appropriate to assist consumers in determining whether they have the product at issue, a description of the region where the product was sold, or held for purposes of sale or distribution in commerce, must be provided.

(k) *Dates of manufacture and sale.* A recall notice must state the month and year in which the manufacture of the product began and ended, and the month and year in which the retail sales of the product began and ended. These dates must be included for each make and model of the product.

(l) *Price.* A recall notice must state the approximate retail price or price range of the product.

(m) *Description of incidents, injuries, and deaths.* A recall notice must contain a clear and concise summary description of all incidents (including, but not limited to, property damage), injuries, and deaths associated with the product conditions or circumstances giving rise to the recall, as well as a statement of the number of such incidents, injuries, and deaths. The description must enable consumers and other persons to readily understand the nature and extent of the incidents and injuries. A recall notice must state the ages of all persons injured and killed. A recall notice must state the dates or range of dates on which the Commission received information about injuries and deaths.

(n) *Description of remedy.* A recall notice must contain a clear and concise statement, readily understandable by consumers and other persons, of:

(1) Each remedy available to a consumer for the product conditions or circumstances giving rise to the recall. Remedies include, but are not limited to, refunds, product repairs, product replacements, rebates, coupons, gifts, premiums, and other incentives.

(2) All specific actions that a consumer must take to obtain each remedy, including, but not limited to, instructions on how to participate in the recall. These actions may include, but are not limited to, contacting a firm, removing the product from use, discarding the product, returning part or all of the product, or removing or disabling part of the product.

(3) All specific information that a consumer needs in order to obtain each remedy and to obtain all information about each remedy. This information may include, but is not limited to, the following: Manufacturer, retailer, and distributor contact information (such as name, address, telephone and facsimile numbers, e-mail address, and Web site address); whether telephone calls will be toll-free or collect; and telephone number days and hours of operation including time zone.

(o) *Other information.* A recall notice must contain such other information as the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or a United States district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), deems appropriate and orders.

§ 1115.28 Multiple products or models.

For each product or model covered by a recall notice, the notice must meet the requirements of this subpart.

§ 1115.29 Final determination regarding form and content.

(a) *Commission or court discretion.* The recall notice content required by this subpart must be included in a recall notice whether or not the firm admits the existence of a defect or of an actual or potential hazard, and whether or not the firm concedes the accuracy or applicability of all of the information contained in the recall notice. The Commission will make the final determination as to the form and content of the recall notice for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), and a United States district court will make the final determination as to the form and content of a recall notice for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061).

(b) *Recall notice exceptions.* The Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), or a United States district court for purposes of an order under section 12 of the CPSA (15 U.S.C. 2061), may determine that one or more of the recall notice requirements set forth in this subpart is not required, and will not be included, in a recall notice.

(c) *Commission approval.* Before a firm may publish, broadcast, or otherwise disseminate a recall notice to be issued pursuant to an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), the Commission must review and agree in writing to all aspects of the notice.

Dated: January 13, 2010.

Todd A. Stevenson,

Secretary, United States Consumer Product Safety Commission.

[FR Doc. 2010–873 Filed 1–20–10; 8:45 am]

BILLING CODE 6355–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 12

Commission Guidance Concerning the Rules of Practice Relating to Reparations

AGENCY: Commodity Futures Trading Commission.

ACTION: Statement of policy.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is issuing this policy statement to clarify and provide guidance to Commission staff and affected parties that Commission Rule 12.1(a), 17 CFR 12.1(a), requires that all rules of practice relating to reparation proceedings under 17 CFR part 12 "shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties."

DATES: *Effective Date:* This Statement of Policy is effective January 21, 2010.

FOR FURTHER INFORMATION CONTACT: Edwin J. Yoshimura, Office of General Counsel, Commodity Futures Trading Commission, 525 West Monroe Street, Suite 1100, Chicago, IL 60661. Telephone: (312) 596–0562. E-mail: *eyoshimura@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Under Section 14(a) of the Commodity Exchange Act, as amended, ("Act"), 7 U.S.C. 18(a), any person complaining of a violation of the Act or any rule, regulation, or order thereunder, by any person registered or required to be registered with the Commission, may file a complaint with the Commission seeking an award of damages.[1]

On January 22, 1976, the Commission issued its original "Rules Relating to Reparation Proceedings." [2] 17 CFR part 12. These rules originally were intended to conform to the procedural requirements of the Administrative Procedure Act ("APA"), as well as the guidelines established by section 14 of the Act.[3]

On January 11, 1983, Section 14(b) of the Act, 7 U.S.C. 18(b) was amended, effective May 11, 1983, to authorize the Commission to "promulgate such rules, regulations and orders as it deems necessary or appropriate for the efficient administration of this section." Congress conferred this broad discretion upon the Commission "[t]o enable the Commission to simplify its rules of procedure regarding reparations and streamline the process," H.R. Rep. No. 565, 97th Cong., 2d Sess. 55 (1982). In addition, the amendments to Section 14(b) were intended to authorize the Commission "to use its best judgment in fashioning appropriate procedures that will be both fair and efficient." *Id.*

II. Statement of Policy

Currently, Rule 12.1(a), 17 CFR 12.1(a), provides that "[t]he rules in [17 CFR Part 12] shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties."

The Commission generally has maintained a longstanding policy of liberally construing its Part 12 Reparation Rules. We have restated that policy in several decisions:

As we said in *Wade* v. *Chevalier*, [2007–2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,781 at 61,680 (CFTC Feb. 27, 2008), "Congress created the reparation forum as an informal venue and decreed that parties are not to be subjected to strict rules found in the courts." In *Sommer* v. *Conticommodity Services, Inc.*, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,244 at 35,106 (CFTC May 20, 1988), we also said, that "Congress[] inten[ded] that the reparations program provide a more flexible and informal forum than that available in court * * *." Further, in *Cook* v. *Monex International, Ltd.*, [1984–1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,532 at 30,295 (CFTC Mar. 19, 1985) (citations to legislative history omitted), we held that "[a]s remedial legislation, the reparations procedure should be liberally interpreted to effectuate that congressional purpose."

We stated elsewhere that the complexities and formalities of district court litigation are not involved in the reparation program. *Nelson* v. *Chilcott Commodities Corp.*, [1982–1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,934 at 28,033 (CFTC Dec. 12, 1983). Furthermore, "[t]o remain inexpensive, the reparations forum must, at a minimum, remain hospitable to the participation of pro se parties." *Hall* v. *Diversified Trading Systems, Inc.*, [1992–1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,131 at 41,751 (CFTC July 7, 1994). "As a result, we have recognized that allowances must be made for pro se status in interpreting and applying procedural requirements." *Id.*

Recently, we said in *Moss-Thomas* v. *East Coast Commodities*:

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[1] Section 14 of the Act establishes the Commission's reparations program, which provides an "expeditious, inexpensive, and easy to use dispute resolution process, available to as many customers as possible." Marianne K. Smythe, *The Reparations Program of the Commodity Futures Trading Commission: Reducing Formality in Agency Adjudication*, 2 Admin. L.J. 39, 40 (1988) (*quoting* Government Accounting Office Report, *Reparations and Other Presently Available Forums for Resolution of Customer Claims, reprinted in CFTC Oversight:* Hearings before the Subcomm. on Commerce, Consumer, and Monetary Affairs on the House Comm. on Government Operations, 97th Cong., 2d Sess. 861 app. 5 (1982)).

[2] Kenneth M. Raisler & Edward S. Geldermann, *The CFTC's New Reparation Rules: In Search of a Fair, Responsive, and Practical Forum for Resolving Commodity-Related Disputes,* 40 Bus. Law 537, 540 (1985).

[3] *Id.*

[A] presiding officer's exercise of his authority under the reparation rules must "be guided by his general responsibility for the 'fair and orderly conduct of a formal decisional proceeding.' " *Jenne* v. *Paine Webber, Inc.*, [1987–1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,329 at 35,424 (CFTC Aug. 31, 1988) (*quoting* Commission Regulation 12.304(a)). * * * The principles of fairness and orderliness must be understood in light of Congress's intent that our procedures provide an "inexpensive" and expeditious alternative to the courts and arbitration. *Anderson* v. *Beach*, [2007–2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 30,763 at 61,607 (CFTC Feb. 14, 2008).

[Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,322 at 62,685 (CFTC Mar. 3, 2009).

Notwithstanding this guidance, we have noticed that parties in some matters have been held to an unusually strict interpretation of the rules of practice, including nonsubstantive rules relating to document formatting. As a result, it is necessary and appropriate to issue this policy statement to clarify and provide further guidance to Commission staff and affected parties.

Rule 12.1(a), 17 CFR 12.1(a), requires that rules of practice relating to reparation proceedings under 17 CFR part 12 "shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties."

For example, the requirement in Rule 12.11, 17 CFR12.11, for documents filed with the Proceedings Clerk to be signed in ink should not be applied literally to documents filed by e-mail or facsimile. The formatting requirements need not be strictly enforced, as long as pleadings are legible. This policy statement does not affect the existing right of pro se parties to file handwritten pleadings. 17 CFR 12.11(c).

In another example, the forum does not require claimants to cite specific provisions of the Act, despite language in Rule 12.13(b)(iv)(A) requiring complainants to allege "each and every act or omission which it is claimed constitutes a violation of the Act." 17 CFR 12.13(b)(iv)(A). The discussion of these rules is meant to be illustrative, not exhaustive. We expect the Commission's presiding officers, all of whom have extensive experience in this forum, to apply the Part 12 Rules generally in accordance with Rule 12.1(a).

III. Related Matters

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

The Commission has determined that this policy statement is exempt from the provisions of the APA, 5 U.S.C. 553, which generally requires notice of proposed rulemaking and provides opportunity for public participation. In accord with the exemptive language of 5 U.S.C. 553, this policy statement gives guidance to staff members and affected parties pertaining to the administration of reparation proceedings under 17 CFR part 12. In addition, this policy statement relates solely to "rules of agency * * * practice." Therefore, the notice requirements under 5 U.S.C. 553 are not applicable.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, requires agencies with rulemaking authority to consider the impact those rules will have on small businesses. With respect to persons involved in reparations proceedings, the interpretive rule imposes no additional burden, and in fact provides greater flexibility in complying with Part 12. Thus, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that this policy statement will not have a significant economic impact on a substantial number of small businesses.

C. Paperwork Reduction Act

This policy statement concerning Part 12 does not impose a burden within the meaning and intent of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

D. Cost-Benefit Analysis

Section 15(a) of the Act, 7 U.S.C. 19(a), requires the Commission to consider the costs and benefits of its actions before issuing a new regulation. The Commission understands that by its terms, Section 15(a) does not require it to quantify the costs and benefits of a new regulation or to determine whether the benefits of the regulation outweigh its costs. Nor does it require that each rule be analyzed in isolation when that rule is a component of a larger package of rules or rule revisions. Rather, Section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission can, in its discretion, give greater weight to any one of the five enumerated areas of concern, and can, in its discretion determine that notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest, or to effectuate any of the provisions, or accomplish any of the purposes, of the Commodity Exchange Act.

This policy statement will not create any significant change in the Commission's reparation proceedings. This statement will enhance the protection of market participants and the public by providing greater flexibility in complying with Part 12. This statement will make it easier for parties to participate in reparations proceedings, either as complainants or respondents. The cost-benefit factors are not influenced by this policy statement, which simply articulates and clarifies applicable law and precedent in reparation proceedings.

Issued in Washington, DC, on January 14, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–1101 Filed 1–20–10; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2009–1072]

RIN 1625–AA00

Safety Zone: Congress Street Bridge, Pequonnock River, Bridgeport, CT

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the waters surrounding the Congress Street Bridge over the Pequonnock River in Bridgeport, Connecticut. This zone is necessary to protect vessels transiting in the area from hazards imposed by construction barges and equipment that are being utilized for partial demolition of the Congress Street Bridge. Entry into this zone is prohibited unless authorized by the Captain of the Port Long Island Sound, New Haven, Connecticut.

DATES: This rule is effective from 11:59 p.m. on January 31, 2010, through 11:59 p.m. on April 16, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2009–1072 and are available online by going

to *http://www.regulations.gov,* inserting USCG–2009–1072 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail, Chief Petty Officer Christie Dixon, Prevention Department, USCG Sector Long Island Sound at 203–468–4459, *Christie.M.Dixon@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action is necessary to protect the public from the dangers inherent in the bridge demolition project. Also, establishing a safety zone on the Pequonnock River at this time of year should not hinder any appreciable recreational traffic and commercial traffic does not transit the portion of the river that will be impacted by the closure. The need for immediate action to protect the public makes a comment period impractical as a delay in the bridge demolition is contrary to public interest.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. In addition to the reasons stated above, any delay encountered in the temporary rule's effective date would be contrary to the public interest given the immediate need to minimize danger to mariners prior to, during, and after demolition.

Background and Purpose

The Congress Street Bridge, owned by the City of Bridgeport, was closed in January 1999 due to deterioration of the structural and mechanical/electrical components. It is approximately 419 feet from abutment face to abutment face and consists of a center movable span and two fixed spans on each approach. The center movable span is a double leaf rolling bascule span. The bascule span was opened to allow marine traffic to pass and the leaves locked into the open position.

From January 1, 2010 through May 15, 2010 the City of Bridgeport's Engineering Department will be removing both bascule spans and the associated operating machinery of the Bridge. The existing fender system will remain in place and power will be re-routed on the bridge to allow the existing navigation lights to continue to function during and after construction. Mariners are advised to transit the area with extreme caution during this time.

The Coast Guard is establishing a safety zone in all waters of the Pequonnock River within 100-yards to either side of the Congress Street Bridge from February 1, 2010 through April 16, 2010 during the removal of the bascule spans. This portion of the Pequonnock River will be closed to all marine traffic due to construction hazards posed to recreational vessels attempting to transit the waterway. This safety zone is necessary to protect the safety of the boating community who wish to utilize the Pequonnock River during demolition. With the exception of the Bridgeport Fire Rescue Boats, entry into this zone is prohibited unless authorized by the Captain of the Port, Long Island Sound.

Discussion of Rule

This regulation establishes a temporary safety zone on the waters of the Pequonnock River, at mile 0.4 within 100-yards to either side of the Congress Street Bridge. This action is intended to prohibit vessel traffic in a portion of the Pequonnock River in the City of Bridgeport, Connecticut to provide for the safety of the boating community due to the hazards posed by significant construction equipment and barges located in the waterway for the partial demolition of the bridge. The safety zone is being established from 11:59 p.m. on January 31, 2010, to 11:59 p.m. on April 16, 2010. Marine traffic may continue to transit the area during the January 1 to January 31 and April 17 to May 15 portions of the project. While the channel is open and the safety zone is not in place, mariners are still advised to transit the area with extreme caution. In the event of an emergency, a ten (10) foot wide passage will be maintained for the duration of the project exclusively for the passage of Bridgeport Fire Rescue boats. With the exception of these Fire Rescue boats, entry into this zone is prohibited unless authorized by the Captain of the Port, Long Island Sound.

Any violation of the safety zone described herein is punishable by, among other things, civil and criminal penalties, *in rem* liability against the offending vessel, and the initiation of suspension or revocation proceedings against Coast Guard-issued merchant mariner credentials.

Regulatory Analyses

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

Regulatory Analyses

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

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation is unnecessary.

This regulation may have some impact on the public, but the potential impact will be minimal for the following reasons: We do not anticipate that there will be any appreciable recreational traffic during the time the project will be taking place and commercial traffic does not transit the portion of the Pequonnock River that will be impacted by the closure. Vessels may transit in all areas of the Pequonnock River other than the area delineated for the safety zone.

Small Entities

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

governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in those portions of the Pequonnock River in the city of Bridgeport, Connecticut covered by the safety zone. For the reasons outlined in the Regulatory Evaluation section above, this rule will not have a significant impact on a substantial number of small entities.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact, Chief Petty Officer Christie Dixon, Prevention Department, USCG Sector Long Island Sound at 203–468–4459, *christie.m.dixon@uscg.mil*. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

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

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

Environment

We have analyzed this temporary final rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule involves creation of a regulation that establishes a safety zone and therefore is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5;

Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–1072 to read as follows:

§ 165.T01–1072 Safety Zone: Congress Street Bridge, Pequonnock River, Bridgeport, Connecticut.

(a) *Location.* The following area is a safety zone: All navigable waters of the Pequonnock River in Bridgeport, Connecticut, from surface to bottom, within 100 yards to either side of the Congress Street Bridge.

(b) *Definitions.* The following definitions apply to this section: *Designated on-scene patrol personnel,* means any commissioned, warrant, and petty officers of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, and local, State, and Federal law enforcement vessels who have been authorized to act on the behalf of the Captain of the Port, Long Island Sound.

(c) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) In accordance with the general regulations in § 165.23 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port (COTP), Long Island Sound.

(3) All persons and vessels must comply with the Coast Guard Captain of the Port or designated on-scene patrol personnel.

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

(5) Persons and vessels may request permission to enter the zone on VHF–16 or via phone at (203) 468–4401.

(d) *Effective dates.* The safety zone is being established from 11:59 p.m. on January 31, 2010, to 11:59 p.m. on April 16, 2010. Marine traffic may continue to transit the area during the January 1 to January 31 and April 17 to May 15 portions of the project. While the channel is open and the safety zone is not in place, mariners are still advised to transit the area with extreme caution.

Dated: December 29, 2009.

D.A. Ronan,

Captain, U.S. Coast Guard, Captain of the Port Long Island Sound.

[FR Doc. 2010–1003 Filed 1–20–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Subtitle B, Chapter II

[Docket ID ED–2009–OESE–0010]

RIN 1810–AB06

School Improvement Grants; American Recovery and Reinvestment Act of 2009 (ARRA); Title I of the Elementary and Secondary Education Act of 1965, as Amended (ESEA)

ACTION: Interim final requirements for School Improvement Grants authorized under section 1003(g) of Title I of the ESEA; request for comments.

SUMMARY: The U.S. Secretary of Education (Secretary) amends the final requirements for School Improvement Grants (SIG) authorized under section 1003(g) of Title I of the ESEA and funded through both the Consolidated Appropriations Act, 2009 (Pub. L. 111–8) and the ARRA to incorporate new authority included in the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) applicable to fiscal year (FY) 2010 SIG funds and FY 2009 ARRA SIG funds. Specifically, the Consolidated Appropriations Act, 2010 expands the group of schools that are eligible to receive SIG funds. In addition, the Consolidated Appropriations Act, 2010 raises the maximum amount of SIG funds that a State educational agency (SEA) may award to a local educational agency (LEA) for each participating school from $500,000 to $2,000,000. This notice incorporates these changes into the final SIG requirements that the Department published on December 10, 2009.

DATES: These requirements are effective February 8, 2010. We must receive your comments by February 22, 2010.

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments by fax or by e-mail. Please submit your comments only one time, in order to ensure that we do not receive duplicate copies. In addition, please include the Docket ID at the top of your comments.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "How To Use This Site."
- *Postal Mail, Commercial Delivery, or Hand Delivery:* If you mail or deliver your comments about these interim final requirements, address them to Dr. Zollie Stevenson, Jr., U.S. Department of Education, 400 Maryland Avenue, SW., room 3W320, Washington, DC 20202.

Privacy Note: The Department's policy for comments received from members of the public (including those comments submitted by mail, commercial delivery, or hand delivery) is to make these submissions available for public viewing in their entirety on the Federal eRulemaking Portal at *http://www.regulations.gov.* Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available on the Internet.

FOR FURTHER INFORMATION CONTACT: Dr. Zollie Stevenson, Jr. Telephone: 202–260–0826 or by e-mail: *Zollie.Stevenson@ed.gov.*

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

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION:

Invitation to Comment:

We invite you to submit comments regarding these interim final requirements. To ensure that your comments have maximum effect in developing the final requirements, we urge you to identify clearly the specific section or sections of the interim final requirements that each of your comments addresses and to arrange your comments in the same order as the interim final requirements.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from these interim final requirements. Please let us know of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the SIG program.

During and after the comment period you may inspect all public comments about these interim final requirements by accessing Regulations.gov. You may also inspect the comments, in person, in room 3W100, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record: On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Background: The Secretary published final requirements for the SIG program in the **Federal Register** on December 10, 2009 (74 FR 65618). Subsequently, on December 16, 2009, the President signed into law the Consolidated Appropriations Act, 2010, which contains FY 2010 appropriations for the Department, and which also includes two provisions applicable to the use of both FY 2010 SIG funds and FY 2009 ARRA SIG funds. First, the Consolidated Appropriations Act, 2010 expands eligibility for participation in the SIG program by permitting an SEA to award SIG funds for, and for an LEA to use those funds to serve, any school that is eligible to receive assistance under Title I, Part A and that: (1) Has not made adequate yearly progress (AYP) for at least two years; or (2) is in the State's lowest quintile of performance based on proficiency rates. With respect to secondary schools, the Consolidated Appropriations Act, 2010 gives priority to high schools with graduation rates below 60 percent. Second, the Consolidated Appropriations Act, 2010 raises the maximum subgrant size for a participating school from $500,000 to $2,000,000.[1]

These interim final requirements incorporate this new authority into the final SIG requirements that were published on December 10, 2009. Although the interim final requirements give an SEA discretion to expand the group of schools that are eligible to receive SIG funds, the purpose of the SIG program remains the same: to provide funds to LEAs that demonstrate the greatest need for the funds and the strongest commitment to use the funds to turn around their persistently lowest-achieving schools and significantly raise student achievement in those schools.

Waiver of Rulemaking and Delayed Effective Date: Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department is generally required to publish a notice of proposed rulemaking and provide the public with an opportunity to comment on proposed regulations prior to establishing a final rule. However, we are waiving the notice-and-comment rulemaking requirements under the APA. Section 553(b) of the APA provides that an agency is not required to conduct notice-and-comment rulemaking when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. Although these requirements are subject to the APA's notice-and-comment requirements, the Secretary has determined that it would be impracticable, unnecessary, and contrary to the public interest to conduct notice-and-comment rulemaking.

As noted above, these interim final requirements are needed to incorporate the new SIG authority provided by the Consolidated Appropriations Act, 2010 into the final SIG requirements published on December 10, 2009. Those final requirements take effect on February 8, 2010, also the date by which State applications for SIG funds are due to the Department. The Department must award FY 2009 SIG funds to SEAs by September 30, 2010 or the funds will lapse. Even on an extremely expedited timeline, it is impracticable for the Department to conduct notice-and-comment rulemaking and then promulgate final requirements in time to make grant awards to States by the September 30 deadline. Publishing a notice of proposed rulemaking, reviewing the public comments, and issuing final regulations normally takes at least six months. We are concerned that, when added to the time the Department will need to receive, review, and approve State applications for SIG funds, the Department may not be able to allocate FY 2009, including ARRA, SIG funds to all States by September 30, 2010. With $3.5 billion at stake, it would be impracticable and contrary to the public interest for the Department to take this risk. Issuing these interim final requirements permits the Department to maintain the current State application timeline.

Additionally, the Department has recently concluded notice-and-comment rulemaking on the final SIG requirements. These interim final requirements incorporate the new authority in the Consolidated Appropriations Act, 2010 into the existing final SIG requirements with only minimal, necessary changes. Accordingly, and in order to make timely grant awards for FY 2009, the Secretary is issuing these interim final requirements without first publishing proposed requirements for public comment.

Although the Department is adopting these requirements on an interim final basis, the Department requests public comment on these requirements. After consideration of public comments, the Secretary will publish final requirements.

The APA also requires that a substantive rule be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). For the reasons outlined in the preceding paragraphs, the Secretary has determined that a delayed effective date for these interim final requirements would be unnecessary and contrary to the public interest, and that good cause exists to waive the requirement for a delayed effective date.

Summary of the Interim Final Requirements:

We discuss substantive changes to the final SIG requirements published on December 10, 2009 under the sections of the interim final requirements to which they pertain.

Section I.A.1—defining "greatest need":

Statute: Section 1003(g) of the ESEA limits eligibility for school improvement funds to Title I schools in improvement, corrective action, or restructuring. The Consolidated Appropriations Act, 2010 expands the group of schools eligible to be served with SIG funds to include any school that is eligible to receive Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not) and that (1) has not made AYP for at least two years, or (2) is in the State's lowest quintile of performance based on proficiency rates. In the case of secondary schools, the Consolidated Appropriations Act, 2010 requires that priority be given to those schools with graduation rates below 60 percent.

Current final requirements: Section I.A.1 defines three tiers of schools. A

[1] These two provisions apply only to FY 2009 ARRA SIG funds and FY 2010 SIG funds; they do not apply to SIG funds made available through the Consolidated Appropriations Act, 2009 (*i.e.,* the regular FY 2009 SIG funds). Therefore, prior to October 1, 2010, regular FY 2009 SIG funds cannot be spent pursuant to the flexibility in these provisions. Regular FY 2009 SIG funds, however, become subject to the requirements applicable to FY 2010 SIG funds on October 1, 2010 when they become carryover funds. See section 421(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1225(b)(2)(A)). Accordingly, in order to ensure compliance with the Consolidated Appropriations Act, 2010, we will consider LEAs' obligations of SIG funds in the State as a whole prior to October 1, 2010 to come from the State's allocation of FY 2009 ARRA SIG funds, which we believe in every State will be more than sufficient to cover those obligations. Beginning October 1, 2010, LEAs may use all SIG funds, including regular FY 2009 SIG funds, pursuant to the flexibility in these provisions, consistent with the final requirements as amended.

Tier I school is any Title I school in improvement, corrective action, or restructuring that is identified by the SEA as a "persistently lowest-achieving school." As such, the school is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring in the State (or the lowest-achieving five such schools) or is a Title I high school that has had a graduation rate that is less than 60 percent over a number of years.

A Tier II school is any secondary school that is eligible for, but does not receive, Title I, Part A funds and that is identified by the SEA as a "persistently lowest-achieving school." As such, the school is among the lowest-achieving five percent of such secondary schools in the State (or the lowest-achieving five such secondary schools) or is a high school that has had a graduation rate that is less than 60 percent over a number of years.

A Tier III school is any Title I school in improvement, corrective action, or restructuring that is not a Tier I school.

Interim final requirements: The interim final requirements amend the definitions of Tier I, Tier II, and Tier III schools to incorporate the expanded eligibility provided for in the Consolidated Appropriations Act, 2010. The interim final requirements do not change the definition of "persistently lowest-achieving schools" as that definition is used to define Tier I and Tier II schools. An SEA must use this definition to identify the persistently lowest-achieving schools in the State, which will comprise at least part of the schools in Tier I and Tier II. The SEA must also identify the schools in Tier III—*i.e.,* the Title I schools in improvement, corrective action, or restructuring that are not in Tier I. The interim final requirements permit an SEA, at its option, to identify additional schools in each tier.

With respect to Tier I, in addition to the Title I schools in improvement, corrective action, or restructuring that an SEA has identified as persistently lowest-achieving schools, the SEA may identify any elementary school that (1) is eligible to receive Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not); (2) either has not made AYP for at least two consecutive years or is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (3) is no higher achieving on the State's assessments combined than the highest-achieving Tier I school that the SEA has identified under paragraph (a)(1)(i) of the definition of "persistently lowest-achieving schools." These newly eligible schools may be Title I schools that are not identified for improvement, corrective action, or restructuring or schools eligible for, but not receiving, Title I, Part A funds, provided they meet the criteria in section I.A.1(a)(ii) of the interim final requirements.

With respect to Tier II, in addition to the secondary schools that are eligible for, but do not receive, Title I, Part A funds and that an SEA has identified as persistently lowest-achieving schools, the SEA may identify any secondary school that (1) is eligible to receive Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not); (2) either has not made AYP for at least two consecutive years or is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (3) either is no higher achieving on the State's assessments combined than the highest-achieving Tier II school that the SEA has identified under paragraph (a)(2)(i) of the definition of "persistently lowest-achieving schools" or is a high school that has had a graduation rate that is less than 60 percent over a number of years. Tier II secondary schools that an SEA has identified as persistently lowest-achieving schools—*i.e.,* secondary schools that are eligible for, but do not receive, Title I, Part A funds—are eligible without the need for an SEA or LEA to obtain a waiver of section 1003(g)'s limitation on serving only Title I schools in improvement, corrective action, or restructuring. Tier II also may now include Title I secondary schools that are or are not in improvement, corrective action, or restructuring if those schools meet the criteria in section I.A.1(b)(ii) of the interim final requirements and are not already captured in Tier I.

With respect to Tier III, in addition to any Title I school in improvement, corrective action, or restructuring that is not a Tier I school, an SEA may identify any school that (1) is eligible for Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not); (2) has not made AYP for at least two years or is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (3) does not meet the requirements to be a Tier I or Tier II school. Thus, a Tier III school may be a Title I school in improvement, corrective action, or restructuring, a school that receives Title I, Part A funds that is not in improvement, or a school that is eligible for, but does not receive, Title I, Part A funds, provided the school meets one of the two criteria in section I.A.1(c)(ii)(A).

To illustrate further the changes we are making with respect to how an SEA identifies a newly eligible school as a Tier I, Tier II, or Tier III school, we are providing the following chart. The left column represents the schools an SEA must identify in each of Tiers I, II, and III; the right column represents the newly eligible schools based on the Consolidated Appropriations Act, 2010 that an SEA may, but is not required to, identify in Tiers I, II, and III.

	Schools an SEA MUST identify in each tier	Newly eligible schools an SEA MAY identify in each tier
Tier I	Schools that meet the criteria in paragraph (a)(1) in the definition of "persistently lowest-achieving schools." [1]	Title I eligible [2] elementary schools that are no higher achieving than the highest-achieving school that meets the criteria in paragraph (a)(1)(i) in the definition of "persistently lowest-achieving schools" *and* that are: • In the bottom 20% of all schools in the State based on proficiency rates; *or* • Have not made AYP for two consecutive years.
Tier II	Schools that meet the criteria in paragraph (a)(2) in the definition of "persistently lowest-achieving schools."	Title I eligible secondary schools that are (1) no higher achieving than the highest-achieving school that meets the criteria in paragraph (a)(2)(i) in the definition of "persistently lowest-achieving schools" or (2) high schools that have had a graduation rate of less than 60 percent over a number of years *and* that are:

	Schools an SEA MUST identify in each tier	Newly eligible schools an SEA MAY identify in each tier
		• In the bottom 20% of all schools in the State based on proficiency rates; *or* • Have not made AYP for two consecutive years.
Tier III	Title I schools in improvement, corrective action, or restructuring that are not in Tier I.[3]	Title I eligible schools that do not meet the requirements to be in Tier I or Tier II *and* that are: • In the bottom 20% of all schools in the State based on proficiency rates; *or* • Have not made AYP for two years.

Notes to Chart:

[1] "*Persistently lowest-achieving schools*" means, as determined by the State—

(a)(1) Any Title I school in improvement, corrective action, or restructuring that—

(i) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and

(2) Any secondary school that is eligible for, but does not receive, Title I funds that—

(i) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

[2] For the purposes of schools that *may* be added to Tier I, Tier II, or Tier III, "Title I eligible" schools may be schools that are eligible for, but do not receive, Title I, Part A funds *or* schools that are Title I participating (*i.e.,* schools that are eligible for and do receive Title I, Part A funds).

[3] Certain Title I schools in improvement, corrective action, or restructuring that are not in Tier I may be in Tier II rather than Tier III. In particular, Title I secondary schools in improvement, corrective action, or restructuring that are not in Tier I may be in Tier II if they meet the criteria in section I.A.1(b)(ii)(A)(*2*) and (B) and an SEA chooses to include them in Tier II.

Reasons: These changes are needed to incorporate into the final SIG requirements the expanded authority in the Consolidated Appropriations Act, 2010 with respect to eligible schools. It is important to note that an SEA has the option to add these newly eligible schools to its lists of Tier I, Tier II, and Tier III schools in accordance with these interim final requirements, but the SEA is not required to do so. Moreover, if an SEA chooses to add newly eligible schools at all, it has the flexibility to add only a subset of those schools to its lists of Tier I, Tier II, and Tier III schools. For example, an SEA might choose to add newly eligible schools to Tier I and Tier II but not to Tier III, or it might add to Tier III only newly eligible schools that are in the lowest decile (rather than quintile) of schools in the State based on proficiency rates.

An LEA may apply to serve only schools that are included in an SEA's definition of Tier I, Tier II, and Tier III schools.

We note that the Consolidated Appropriations Act, 2010 also requires that, "in the case of secondary schools, priority shall be given to those schools with graduation rates below 60 percent." This priority is accounted for in the definition of "persistently lowest-achieving schools," which requires an SEA to identify any Title I high school in improvement, corrective action, or restructuring and any secondary school that is eligible for, but does not receive, Title I, Part A funds that has a graduation rate of less than a 60 percent over a number of years.

Sections I.B.2 and I.B.3—waivers for Tier I and Tier II Title I participating schools:

Statute: Section 1116(b) of the ESEA prescribes a school improvement timeline for a Title I school that misses AYP for at least two consecutive years. Section 1114(a) of the ESEA authorizes a Title I school with a poverty percentage of at least 40 percent to operate a schoolwide program; a school that does not meet that poverty threshold may provide Title I services only to identified students who are failing, or most at risk of failing, to meet State standards.

Current final requirements: Section I.B.2 permits an SEA to seek a waiver of the school improvement timeline in section 1116(b) of the ESEA for any Tier I school—*i.e.,* a Title I school in improvement, corrective action, or restructuring—that implements a turnaround or restart model as defined in section I.A.2(a) and (b). Section I.B.3 permits an SEA to seek a waiver of the poverty threshold in section 1114(a) for any Tier I school below that threshold in order that the school may implement one of the school intervention models defined in section I.A.2 through a schoolwide program.

Interim final requirements: The interim final requirements amend section I.B.2 to clarify that an SEA may seek a waiver of the school improvement timeline in section 1116(b) with respect to a Tier I or Tier II Title I participating school that implements a turnaround or restart model. The interim final requirements also amend section I.B.3 to clarify that an SEA may seek a waiver of the schoolwide program poverty threshold in section 1114(a) with respect to a Tier I or Tier II Title I participating school below that threshold in order that the school may implement one of the school intervention models through a schoolwide program.

Reasons: In expanding eligibility, the Consolidated Appropriations Act, 2010 created the possibility of identifying as Tier II schools secondary schools that receive Title I, Part A funds. It also created the possibility of identifying as Tier I schools elementary schools that are eligible for, but do not receive, Title I, Part A funds. Accordingly, we are clarifying in sections I.B.2 and I.B.3 that waivers of sections 1116(b) and 1114(a) of the ESEA would be appropriate for Tier II schools that receive Title I, Part A funds as well as for Tier I schools that receive Title I, Part A funds. The phrase "Title I participating school"—*i.e.,* a school that receives Title I, Part A funds—has been added in both sections; waivers are not necessary for non-Title I schools in either Tier I or Tier II because the requirements in sections 1116 and 1114 do not apply to those schools.

Section I.B.4—waiver to serve a Tier II school:

Statute: Section 1003(g) of the ESEA requires an SEA to award SIG funds only to LEAs with one or more Title I schools in improvement, corrective action, or restructuring. The Consolidated Appropriations Act, 2010 expands the group of schools eligible to be served with SIG funds to include any school that is eligible to receive Title I, Part A funds, including Tier II

secondary schools that are eligible for, but do not receive, those funds.

Current final requirements: Section I.B.4 permits an SEA to seek a waiver from the Secretary to enable an LEA to use SIG funds to serve a Tier II secondary school that is eligible for, but does not receive, Title I, Part A funds.

Interim final requirements: The interim final requirements remove section I.B.4.

Reasons: Section I.B.4 is no longer needed. Because the Consolidated Appropriations Act, 2010 authorizes an SEA and LEA to use SIG funds to serve secondary schools that are eligible for, but do not receive, Title I, Part A funds, an SEA no longer needs a waiver to do so.

Section II.A.1—LEA eligibility:

Statute: Section 1003(g) of the ESEA requires an SEA to award SIG funds only to LEAs with Title I schools in improvement, corrective action, or restructuring. The Consolidated Appropriations Act, 2010 expands this eligibility to permit an SEA to award SIG funds to LEAs that have a school eligible to receive assistance under Title I, Part A that has not made AYP for at least two years or is in the State's lowest quintile of performance based on proficiency rates.

Current final requirements: Section II.A.1 makes clear that, to apply for a SIG grant, an LEA must have one or more schools in Tier I or Tier III. In other words, the current requirements provide that, to be eligible for SIG funds, an LEA must have one or more Title I schools in improvement, corrective action, or restructuring.

Interim final requirements: The interim final requirements amend section II.A.1 to make clear that an LEA may apply for a SIG grant if the LEA receives Title I, Part A funds and has one or more schools that qualify under the State's definition of a Tier I, Tier II, or Tier III school.

Reasons: Based on the expanded eligibility authorized by the Consolidated Appropriations Act, 2010, an LEA may apply for a SIG grant even if it does not have any Title I schools in improvement, corrective action, or restructuring, provided the LEA has one or more schools that are eligible for Title I, Part A funds and meet the criteria in section I.A.1(a) (definition of Tier I schools), (b) (definition of Tier II schools), or (c) (definition of Tier III schools) as defined by the SEA. Accordingly, to be eligible, an LEA must have one or more schools that meet the SEA's definition of a Tier I, Tier II, or Tier III school.

Sections II.A.4 and II.A.5—LEA's budget:

Statute: Section 1003(g)(5) of the ESEA requires an SEA to allocate to an LEA "not less than $50,000 and not more than $500,000 for each participating school." The Consolidated Appropriations Act, 2010 raises the maximum amount per participating school from $500,000 to $2,000,000.

Current final requirements: Sections II.A.4 and II.A.5 recognize that an LEA's budget will likely need to exceed the statutory maximum of $500,000 for most Tier I and Tier II schools in order for the LEA to implement fully and effectively three of the four school intervention models. Under the current final SIG requirements, additional funds needed to implement school intervention models in Tier I and Tier II schools would be generated by Tier III schools. Section II.A.5 provides that services for a Tier III school do not need to be commensurate with the funds an SEA allocates to the LEA for the school.

Interim final requirements: The interim final requirements remove language that is no longer necessary from sections II.A.4 and II.A.5 regarding an LEA's budget. In section II.A.4, we are removing the last two sentences. We are amending section II.A.5 to read "The LEA's budget for each Tier III school it commits to serve must include the services it will provide the school, particularly if the school meets additional criteria established by the SEA."

Reasons: Because the Consolidated Appropriations Act, 2010 raises the maximum amount for each participating school from $500,000 to $2,000,000, an LEA's budget can reflect more accurately the actual amount needed to implement one of the four school intervention models in each Tier I and Tier II school the LEA commits to serve. Moreover, the LEA may budget more accurately for its Tier III schools without concern that they generate funds for the LEA's Tier I and Tier II schools.

Section II.A.6—SIG funds are supplemental:

Statute: Section 1114(a)(2)(B) of the ESEA requires an LEA to allocate to a Title I school operating a schoolwide program "the amount of funds that would, in the absence of [Title I, Part A funds], be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency."

Current final requirements: None.

Interim final requirements: The interim final requirements add section II.A.6, which requires an LEA that commits to serve one or more Tier I, Tier II, or Tier III schools that do not receive Title I, Part A funds to ensure that each of those schools receives all of the State and local funds it would have received in the absence of the SIG funds.

Reasons: Under the current final SIG requirements, a Tier I school must be a Title I school operating a schoolwide program in order to implement one of the school intervention models. Accordingly, under section 1114(a)(2)(B) of the ESEA, the LEA must provide the school all of the non-Federal funds that would have been available to the school in the absence of Title I, Part A funds. Thus, both Title I, Part A funds and SIG funds are supplemental to the State and local funds the school receives. To ensure that SIG funds are also supplemental in Tier II schools, which are not Title I schools under the final SIG requirements and, thus, are not covered by section 1114(a)(2)(B), we intended to condition a waiver permitting an LEA to serve Tier II schools on the LEA's providing all State and local funds to those schools that they otherwise would have received. Now that the Consolidated Appropriations Act, 2010 has made non-Title I schools eligible as Tier I, Tier II, and Tier III schools without need for a waiver, we cannot ensure that SIG funds will be supplemental to State and local funds without establishing the requirement in section II.A.6.

Sections II.B.4 and II.B.7—priority for funding Tier I and Tier II schools:

Statute: Section 1003(g)(6) of the ESEA requires an SEA to give priority, in awarding SIG grants, to LEAs that demonstrate the greatest need for the funds and the strongest commitment to ensuring that the funds are used to provide adequate resources to enable the lowest-achieving schools to raise student achievement.

Current final requirements: Section II.B.4 requires an SEA to give priority to LEAs that apply to serve both Tier I and Tier II schools and then give priority to LEAs that apply to serve Tier I, but not Tier II, schools. Section II.B.7 requires an SEA to award funds to LEAs that apply to serve only Tier III schools only after it funds all LEAs that apply to serve Tier I or Tier II schools.

Interim final requirements: The interim final requirements amend sections II.B.4 and II.B.7 (as well as various other sections—*e.g.,* sections I.A.4(a), II.A.1, II.A.3) to give equal status to Tier I and Tier II schools. Accordingly, sections II.B.4 and II.B.7 make clear that an LEA that applies to serve either Tier I or Tier II schools receives priority before an LEA that

applies to serve only Tier III schools. Moreover, as section II.B.7 makes clear, an SEA must award SIG funds to each LEA to serve the Tier I and Tier II schools that the SEA has approved the LEA to serve before awarding any funds to an LEA to serve a Tier III school. In other words, an SEA must ensure that all Tier I and Tier II schools are funded before it funds the Tier III schools identified in its LEAs' applications.

Reasons: These provisions incorporate the expanded eligibility provisions in the Consolidated Appropriations Act, 2010 to best carry out the statutory priority in the ESEA requiring an SEA to award SIG funds to LEAs with the lowest-achieving schools that demonstrate the greatest need for the funds and the strongest commitment to use the funds to raise student achievement substantially.

Section II.B.9—2010 SIG appropriations:

Statute: The Consolidated Appropriations Act, 2010 appropriated $546 million for SIG grants in FY 2010.

Current final requirements: Section II.B.9 requires certain SEAs and permits other SEAs to carry over 25 percent of their FY 2009 SIG funds and to combine those funds with FY 2010 funds "(depending on the availability of appropriations)."

Interim final requirements: The interim final requirements remove the phrase "(depending on the availability of appropriations)" in section II.B.9(a) and (b).

Reasons: Because the Consolidated Appropriations Act, 2010 appropriated SIG funds for FY 2010, this language is no longer necessary.

Section II.C—renewal for additional one-year periods:

Statute: Section 1003(g)(5)(C) of the ESEA permits an SEA to renew an LEA's SIG grant if schools are meeting the goals under section 1116 of the ESEA.

Current final requirements: Section II.C requires an SEA to renew the SIG grant for each LEA for one-year periods if the LEA demonstrates that its Tier I and Tier II schools are meeting the requirements in section II.A.7 of the final SIG requirements and that its Tier III schools are meeting their goals under section 1116.

Interim final requirements: The interim final requirements amend section II.C(a)(i) to require Tier III schools that receive SIG funds to meet "goals established by the LEA and approved by the SEA."

Reasons: Under the expanded eligibility authority in the Consolidated Appropriations Act, 2010, non-Title I schools may now be served as Tier III schools if they have missed AYP for at least two years or are in the lowest quintile in the State in terms of proficiency on a State's reading/language arts and mathematics assessments combined. Because those schools are not subject to meeting goals under section 1116 of the ESEA, the interim final requirements include a provision addressing accountability for those schools. This provision in the interim final requirements, therefore, treats all Tier III schools the same; however, to the extent they apply, an LEA may use as the goals for a Tier III school the goals in its school improvement plan under section 1116 of the ESEA.

Interim Final Requirements:

For the reasons discussed previously, the Secretary amends the final SIG requirements published in the **Federal Register** on December 10, 2009 (74 FR 65618) as follows:

1. Section I.A.1 is amended to read as follows:

1. *Greatest need.* An LEA with the greatest need for a School Improvement Grant must have one or more schools in at least one of the following tiers:

(a) *Tier I schools:* (i) A Tier I school is a Title I school in improvement, corrective action, or restructuring that is identified by the SEA under paragraph (a)(1) of the definition of "persistently lowest-achieving schools."

(ii) At its option, an SEA may also identify as a Tier I school an elementary school that is eligible for Title I, Part A funds that—

(A)(*1*) Has not made adequate yearly progress for at least two consecutive years; or

(*2*) Is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(B) Is no higher achieving than the highest-achieving school identified by the SEA under paragraph (a)(1)(i) of the definition of "persistently lowest-achieving schools."

(b) *Tier II schools:* (i) A Tier II school is a secondary school that is eligible for, but does not receive, Title I, Part A funds and is identified by the SEA under paragraph (a)(2) of the definition of "persistently lowest-achieving schools."

(ii) At its option, an SEA may also identify as a Tier II school a secondary school that is eligible for Title I, Part A funds that—

(A)(*1*) Has not made adequate yearly progress for at least two consecutive years; or

(*2*) Is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(B)(*1*) Is no higher achieving than the highest-achieving school identified by the SEA under paragraph (a)(2)(i) of the definition of "persistently lowest-achieving schools;" or

(*2*) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

(c) *Tier III schools:* (i) A Tier III school is a Title I school in improvement, corrective action, or restructuring that is not a Tier I school.

(ii) At its option, an SEA may also identify as a Tier III school a school that is eligible for Title I, Part A funds that—

(A)(*1*) Has not made adequate yearly progress for at least two years; or

(*2*) Is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(B) Does not meet the requirements to be a Tier I or Tier II school.

(iii) An SEA may establish additional criteria to use in setting priorities among LEA applications for funding and to encourage LEAs to differentiate among Tier III schools in their use of school improvement funds.

2. The introductory language in section I.A.4 is amended to read as follows:

4. *Evidence of strongest commitment.* (a) In determining the strength of an LEA's commitment to ensuring that school improvement funds are used to provide adequate resources to enable Tier I and Tier II schools to improve student achievement substantially, an SEA must consider, at a minimum, the extent to which the LEA's application demonstrates that the LEA has taken, or will take, action to—

* * * * *

3. Section I.B.2 is amended to read as follows:

2. An SEA may seek a waiver from the Secretary of the requirements in section 1116(b) of the ESEA in order to permit a Tier I or Tier II Title I participating school implementing an intervention that meets the requirements under section I.A.2(a) or 2(b) of these requirements in an LEA that receives a School Improvement Grant to "start over" in the school improvement timeline. Even though a school implementing the waiver would no longer be in improvement, corrective

action, or restructuring, it may receive school improvement funds.

4. Section I.B.3 is amended to read as follows:

3. An SEA may seek a waiver from the Secretary to enable a Tier I or Tier II Title I participating school that is ineligible to operate a Title I schoolwide program and is operating a Title I targeted assistance program to operate a schoolwide program in order to implement an intervention that meets the requirements under section I.A.2(a), 2(b), or 2(d) of these requirements.

5. Section I.B.4 is removed.

6. Sections I.B.5 and 6 are redesignated as sections I.B.4 and 5, respectively.

7. Section I.B.5, as redesignated, is amended to read as follows:

5. If an SEA does not seek a waiver under section I.B.2, 3, or 4, an LEA may seek a waiver.

8. Section II.A.1 is amended to read as follows:

A. *LEA requirements.*

1. An LEA may apply for a School Improvement Grant if it receives Title I, Part A funds and has one or more schools that qualify under the State's definition of a Tier I, Tier II, or Tier III school.

9. Section II.A.3 is amended to read as follows:

3. The LEA must serve each Tier I school unless the LEA demonstrates that it lacks sufficient capacity (which may be due, in part, to serving Tier II schools) to undertake one of these rigorous interventions in each Tier I school, in which case the LEA must indicate the Tier I schools that it can effectively serve. An LEA may not serve with school improvement funds awarded under section 1003(g) of the ESEA a Tier I or Tier II school in which it does not implement one of the four interventions identified in section I.A.2 of these requirements.

10. Section II.A.4 is amended to read as follows:

4. The LEA's budget for each Tier I and Tier II school it commits to serve must be of sufficient size and scope to ensure that the LEA can implement one of the rigorous interventions identified in section I.A.2 of these requirements. The LEA's budget must cover the period of availability of the school improvement funds, taking into account any waivers extending the period of availability received by the SEA or LEA.

11. Section II.A.5 is amended to read as follows:

5. The LEA's budget for each Tier III school it commits to serve must include the services it will provide the school, particularly if the school meets additional criteria established by the SEA.

12. Sections II.A.6, 7, and 8 are redesignated as sections II.A.7, 8, and 9, respectively, and a new section II.A.6 is added to read as follows:

6. An LEA that commits to serve one or more Tier I, Tier II, or Tier III schools that do not receive Title I, Part A funds must ensure that each such school it serves receives all of the State and local funds it would have received in the absence of the school improvement funds.

13. Section II.B.4 is amended to read as follows:

4. If an SEA does not have sufficient school improvement funds to award, for up to three years, a grant to each LEA that submits an approvable application, the SEA must give priority to LEAs that apply to serve Tier I or Tier II schools.

14. Section II.B.5 is amended to read as follows:

5. An SEA must award a School Improvement Grant to an LEA in an amount that is of sufficient size and scope to support the activities required under section 1116 of the ESEA and these requirements. The LEA's total grant may not be less than $50,000 or more than $2,000,000 per year for each Tier I, Tier II, and Tier III school that the LEA commits to serve.

15. Section II.B.6 is removed.

16. Sections II.B.7, 8, 9, 10, 11, 12, and 13 are redesignated as sections II.B.6, 7, 8, 9, 10, 11, and 12, respectively.

17. Section II.B.7, as redesignated, is amended to read as follows:

7. An SEA must award funds to serve each Tier I and Tier II school that its LEAs commit to serve, and that the SEA determines its LEAs have the capacity to serve, prior to awarding funds to its LEAs to serve any Tier III schools. If an SEA has awarded school improvement funds to its LEAs for each Tier I and Tier II school that its LEAs commit to serve in accordance with these requirements, the SEA may then, consistent with section II.B.9, award remaining school improvement funds to its LEAs for the Tier III schools that its LEAs commit to serve.

18. Section II.B.9, as redesignated, is amended to read as follows:

9. (a) If not every Tier I school in a State is served with FY 2009 school improvement funds, an SEA must carry over 25 percent of its FY 2009 funds, combine those funds with FY 2010 school improvement funds, and award those funds to eligible LEAs consistent with these requirements. This requirement does not apply in a State that does not have sufficient school improvement funds to serve all the Tier I schools in the State.

(b) If each Tier I school in a State is served with FY 2009 school improvement funds, an SEA may reserve up to 25 percent of its FY 2009 allocation and award those funds in combination with its FY 2010 funds consistent with these requirements.

19. Section II.C is amended to read as follows:

C. *Renewal for additional one-year periods.*

(a) If an SEA or an individual LEA requests and receives a waiver of the period of availability of school improvement funds, an SEA—

(i) Must renew the School Improvement Grant for each affected LEA for additional one-year periods commensurate with the period of availability if the LEA demonstrates that its Tier I and Tier II schools are meeting the requirements in section II.A.8, and that its Tier III schools are meeting the goals established by the LEA and approved by the SEA; and

(ii) May renew an LEA's School Improvement Grant if the SEA determines that the LEA's schools are making progress toward meeting the requirements in section II.A.8 or the goals established by the LEA.

(b) If an SEA does not renew an LEA's School Improvement Grant because the LEA's participating schools are not meeting the requirements in section II.A.8 or the goals established by the LEA, the SEA may reallocate those funds to other eligible LEAs, consistent with these requirements.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or local programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal

mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is significant under section 3(f) of the Executive order.

Potential Costs and Benefits

Under Executive Order 12866, we have assessed the potential costs and benefits of this regulatory action and have determined that this rule will not impose additional costs to SEA applicants, SEA grantees, or the Federal government. The Department is regulating only to incorporate two new legislative provisions into the existing final SIG requirements, both of which add flexibility to the final requirements. One provision raises the maximum subgrant size for a participating school. The other provision permits an SEA or LEA, at its discretion, to serve schools not covered by the final SIG requirements. However, because this regulatory action makes additional LEAs eligible to apply for and receive SIG funds, it may result in additional costs to these newly eligible LEAs. As shown below in the section on the Paperwork Reduction Act, we estimate that an additional 500 LEAs may apply for SIG funds, at a total cost of $750,000 ($1,500 per applicant). We also estimate that approximately 200 additional successful applicants would spend a total of $200,000 ($1,000 per applicant) to meet SIG reporting requirements. The Department notes that these estimates assume that SEAs and LEAs will, in fact, exercise the discretion provided in these interim final requirements to serve additional LEAs and schools and that these LEAs and schools will qualify for SIG awards under the requirements and priorities governing the SIG program. It is possible that very few of these newly eligible LEAs will apply for and compete successfully for SIG funds. For those that do, the benefits of participating in the SIG program exceed the costs by a wide margin, as the program is specifically designed to provide sufficient resources (as much as $2,000,000 annually over a three-year period) to turn around an LEA's persistently lowest-achieving schools. Similarly, the benefits of this regulatory action far outweigh any unforeseen administrative costs to the Federal government in administering the SIG program. The Department has also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Clarity of the Requirements

Executive Order 12866 and the Presidential memorandum on "Plain Language in Government Writing" require each agency to write regulations that are easy to understand. The Secretary invites comments on how to make these interim final requirements easier to understand, including answers to questions such as the following:

- Are the interim final requirements clearly stated?
- Do the interim final requirements contain technical terms or other wording that interferes with their clarity?
- Does the format of the interim final requirements (grouping and order of sections, use of heading, paragraphing, *etc.*) aid or reduce their clarity?
- Would the interim final requirements be easier to understand if we divided them into more (but shorter) sections?
- Could the description of the interim final requirements in the "Supplementary Information" section of this preamble be more helpful in making the interim final requirements easier to understand? If so, how?
- What else could we do to make the interim final requirements easier to understand?

To send any comments that concern how the Department could make these interim final requirements easier to understand, see the instructions in the **ADDRESSES** section of this preamble.

Regulatory Flexibility Act Certification

The Secretary certifies that these interim final requirements will not have a significant economic impact on a substantial number of small entities. Under the U.S. Small Business Administration's Size Standards, small entities include small governmental jurisdictions such as cities, towns, or school districts (LEAs) with a population of less than 50,000. Approximately 11,900 LEAs that receive Title I, Part A funds qualify as small entities under this definition. However, the small entities that the interim final requirements will affect are small LEAs receiving SIG funds under section 1003(g) of the ESEA—*i.e.,* a small LEA that has one or more schools eligible to receive SIG funds and that meets the SEA's priorities for greatest need for those funds and demonstrates the strongest commitment to use the funds to provide adequate resources to their lowest-achieving schools to raise substantially the achievement of their students.

SEAs will develop their own definitions for their Tier I, Tier II, and Tier III schools, consistent with these interim final requirements, but preliminary data analyses by the Department suggest that 15–25 percent of the lowest-achieving schools in the Nation are located in rural areas, which are likely to contain most of the targeted schools that are operated by small LEAs. Assuming a maximum of 1,100 Tier I and Tier II schools nationwide, and that few if any rural LEAs will contain more than one of their State's lowest-achieving schools, there would be a range of 165 to 275 small LEAs affected by these interim final requirements, including a limited number of small suburban and urban LEAs.

These interim final requirements will not have a significant economic impact on these small LEAs because (1) the costs of implementing the required interventions would be covered by the grants received by successful applicants, and (2) the costs of submitting applications would not be higher than the costs that would be incurred in applying for SIG grants under the existing final SIG requirements.

Successful LEAs will receive up to three years of funding under section 1003(g) of the ESEA to implement their proposed interventions, consistent with the current final SIG requirements that SEAs ensure that awards are of sufficient size and duration to turn around the Nation's persistently lowest-achieving schools.

Small LEAs may incur costs to develop and submit applications for turning around their lowest-achieving schools but, in general, such costs would be similar to those incurred to apply for SIG funding under existing statutory and regulatory requirements. Moreover, because most of the schools included in the applications submitted by small LEAs will be schools that already are in improvement status, these LEAs will be able to incorporate existing data analysis and planning into their applications at little additional cost. Also, small LEAs may receive technical assistance and other support from their SEAs in developing their applications for SIG funds.

In addition, the Department believes the benefits provided under these interim final requirements will outweigh the burdens on small LEAs of complying with the requirements. In particular, the interim final requirements potentially make available to eligible small LEAs significant resources to make the fundamental changes needed to turn around their lowest-achieving schools, resources that otherwise may not be available to small and often geographically isolated LEAs.

The Secretary invites comments from small LEAs as to whether they believe these interim final requirements will have a significant economic impact on them and, if so, requests evidence to support that belief.

Paperwork Reduction Act of 1995

The interim final requirements contain information collection requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The Department had received previously emergency approval for the information collections in the final SIG requirements published on December 10, 2009, under OMB Control Number 1810–0682. The Department will submit to OMB a Paperwork Reduction Act Change Worksheet for this collection that will include the changes described below.

In the interim final requirements, the Department is increasing its estimates of the number of LEAs that will apply for and have to report on using SIG funds from the estimates included in the December 10, 2009, final SIG requirements. This change factors in the provision in the Consolidated Appropriations Act, 2010 regarding which schools are eligible to receive SIG funds, which will likely increase the number of LEAs that apply to their SEA for these funds. The Department used its data on the number of LEAs receiving Title I, Part A funds and the proportion of LEAs with identified schools to estimate the new figures. The estimates for SEAs remain the same because the Consolidated Appropriations Act, 2010 changes do not affect the number of SEAs that can apply.

A description of the specific information collection requirements is provided in the following tables along with estimates of the annual recordkeeping burden for these requirements. The estimates include time for an SEA and an LEA to prepare their respective applications (including requests for waivers), an SEA to review an LEA's application, and an LEA to report data to an SEA and the SEA to report those data to the Department. The first table shows the estimated burden for SEAs and the second table shows the estimated burden for LEAs.

STATE EDUCATIONAL AGENCY ESTIMATES*

SIG activity	Number of SEAs	Hours/ activity	Hours	Cost/hour	Cost
Complete SEA application (including requests for waivers)	52	100	5,200	$30	$156,000
Review and post LEA applications	52	800	41,600	30	1,248,000
Collect and report school-level data to the Department **	52	80	4,160	30	124,800
Total			50,960	30	1,528,800

* The SEA estimates remain the same from the December 10, 2009, final SIG requirements.
** These are data the Department does not currently collect through ED*Facts*.

LOCAL EDUCATIONAL AGENCY ESTIMATES

SIG activity	Number of LEAs	Hours/ activity	Hours	Cost/hour	Cost
Complete LEA application (including requests for waivers if the SEA does not so request)	3,050	60	183,000	$25	$4,575,000
Report data to SEA*	1,200	40	48,000	25	1,200,000
Total			231,000	25	5,775,000

* These are data the Department does not currently collect through ED*Facts*.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR 79.

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Dated: January 13, 2010.

Arne Duncan,

Secretary of Education.

[FR Doc. 2010–1048 Filed 1–20–10; 8:45 am]

BILLING CODE 4000–01–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. MC2010–7 and CP2010–7; Order No. 361]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adding Express Mail Contract 7 to the Competitive Product List. This action is consistent with a postal reform law. Republication of the lists of market dominant and competitive products is also consistent with statutory requirements.

DATES: Effective January 21, 2010 and is applicable beginning December 15, 2009.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 or *stephen.sharfman@prc.gov*.

SUPPLEMENTARY INFORMATION: *Regulatory History*, 74 FR 57538 (November 6, 2009).

I. Introduction

The Postal Service seeks to add a new product identified as Express Mail

Contract 7 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

II. Background

At the end of October 2009, the Postal Service filed a formal request and associated supporting information pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Express Mail Contract 7 to the Competitive Product List.[1] The Postal Service asserts that the Express Mail Contract 7 product is a competitive product "not of general applicability" within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2010–7.

The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. The contract has been assigned Docket No. CP2010–7.

In support of its Request, the Postal Service filed the following materials: (1) A redacted version of the Governors' Decision authorizing certain types of Express Mail contracts;[2] (2) a redacted version of the contract;[3] (3) a requested change in the Mail Classification Schedule product list;[4] (4) a Statement of Supporting Justification as required by 39 CFR 3020.32;[5] (5) a certification of compliance with 39 U.S.C. 3633(a);[6] and (6) an application for non-public treatment of the materials filed under seal.[7] The redacted version of the contract provides that the contract is terminable on 30 days' notice by either party, but could continue for 3 years from the effective date subject to annual price adjustments. Request, Attachment B.

In the Statement of Supporting Justification, Mary Prince Anderson, Acting Manager, Sales and Communications, Expedited Shipping, asserts that the service to be provided under the contract will cover its attributable costs, make a positive contribution to coverage of institutional costs, and will increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. Request, Attachment D, at 1. W. Ashley Lyons, Manager, Regulatory Reporting and Cost Analysis, Finance Department, certifies that the contract complies with 39 U.S.C. 3633(a). *Id.*, Attachment E.

The Postal Service filed much of the supporting materials, including the supporting data and the unredacted contract, under seal. The Postal Service maintains that the contract and related financial information, including the customer's name and the accompanying analyses that provide prices, certain terms and conditions, and financial projections, should remain confidential. *Id.*, Attachment F, at 2–3.[8]

In Order No. 331, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[9] On November 2, 2009, Chairman's Information Request No. 1 (CHIR No. 1) was filed. The due date for responding to CHIR No. 1 was set as November 9, 2009. On November 13, 2009, the Postal Service filed a partial response to CHIR No. 1.[10] Seeking clarification of information contained in the Postal Service's November 13, 2009 partial response, Chairman's Information Request No. 2 (CHIR No. 2) was filed on November 16, 2009.[11] The Postal Service responded to CHIR No. 2 on November 19, 2009.[12] On December 9, 2009, the Postal Service filed its response to the outstanding questions in CHIR No. 1.[13]

III. Comments

Comments were timely filed by the Public Representative on November 9, 2009.[14] No comments were submitted by other interested parties. The Public Representative states that the Postal Service's filing meets the pertinent provisions of title 39 and the relevant Commission rules. *Id.* at 1–3. He further states that the agreement is fair to the parties and employs pricing terms favorable to the customer, the Postal Service, and thereby, the public. *Id.* at 4–5. The Public Representative also believes that the Postal Service has provided appropriate justification for maintaining confidentiality in this case. *Id.* at 3.

IV. Commission Analysis

The Commission has reviewed the Request, the contract, the financial analysis provided under seal that accompanies the Request, the responses to CHIR Nos. 1 and 2, and the comments filed by the Public Representative.

Statutory requirements. The Commission's statutory responsibilities in this instance entail assigning Express Mail Contract 7 to either the Market Dominant Product List or to the Competitive Product List. 39 U.S.C. 3642. As part of this responsibility, the Commission also reviews the proposal for compliance with the Postal Accountability and Enhancement Act (PAEA) requirements. This includes, for proposed competitive products, a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

Product list assignment. In determining whether to assign Express Mail Contract 7 as a product to the Market Dominant Product List or the Competitive Product List, the Commission must consider whether the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products. 39 U.S.C. 3642(b)(1). If so, the product will be categorized as market dominant. The competitive category of products consists of all other products.

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[1] Request of the United States Postal Service to Add Express Mail Contract 7 to Competitive Product List and Notice of Filing (Under Seal) of Contract and Supporting Data, October 28, 2009 (Request). On October 29, 2009, the Postal Service filed errata to its Request. *See* Notice of the United States Postal Service of Filing Errata to Request and Notice, October 29, 2009. Accordingly, the filing of the entire set of documents related to this Request was not completed until October 29, 2009.

[2] Attachment A to the Request, reflecting Governors' Decision No. 09–14, October 26, 2009.

[3] Attachment B to the Request.

[4] Attachment C to the Request.

[5] Attachment D to the Request.

[6] Attachment E to the Request.

[7] Attachment F to the Request.

[8] In its application for non-public treatment, the Postal Service requests an indefinite extension of non-public treatment of customer-identifying information. *Id.* at 7. For the reasons discussed in PRC Order No. 323, that request is denied. *See*, *e.g.*, Docket No. MC2010–1 and CP2010–1, Order Concerning Priority Mail Contract 19 Negotiated Service Agreement, October 26, 2009 (Order No. 323).

[9] PRC Order No. 331, Notice and Order Concerning Express Mail Contract 7 Negotiated Service Agreement, October 30, 2009 (Order No. 331).

[10] Notice of the United States Postal Service of Filing Responses to Chairman's Information Request No. 1, Question 1, Subparts (b)-(d), Under Seal, November 13, 2009 (Partial Response to CHIR No. 1). With its Partial Response to CHIR No. 1, the Postal Service also filed a motion for late acceptance which contained an explanation of the reason for the delay and the issues with responding to the remaining information requests. Motion of the United States Postal Service for Late Acceptance of Responses to Chairman's Information Request No. 1, November 13, 2009. The motion is granted.

[11] Notice of Filing of Chairman's Information Request No. 2 Under Seal, November 16, 2009.

[12] Notice of the United States Postal Service of Filing Response to Chairman's Information Request No. 2, Under Seal, November 19, 2009.

[13] Notice of the United States Postal Service of Filing Response to Chairman's Information Request No. 1, Question 1(a), Under Seal, December 9, 2009 (Remaining Response to CHIR No. 1). With its Remaining Response to CHIR No. 1, the Postal Service filed a motion for late acceptance of that response. Motion of the United States Postal Service for Late Acceptance of Response to Chairman's Information Request No. 1, Question 1(a), December 9, 2009. The motion is granted, although the Postal Service should be aware that the significant delay in the Commission's decision in this case is directly related to the delay in the Postal Service's filing of this response.

[14] Public Representative Comments in Response to United States Postal Service Request to Add Express Mail Contract 7 to the Competitive Product List, November 9, 2009 (Public Representative Comments).

The Commission is further required to consider the availability and nature of enterprises in the private sector engaged in the delivery of the product, the views of those who use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3).

The Postal Service asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services, thus precluding it from taking unilateral action to increase prices without the risk of losing volume to private companies. Request, Attachment D, para. (d). The Postal Service also contends that it may not decrease quality or output without risking the loss of business to competitors that offer similar expedited delivery services. *Id.* It further states that the contract partner supports the addition of the contract to the Competitive Product List to effectuate the negotiated contractual terms. *Id.*, para. (g). Finally, the Postal Service states that the market for expedited delivery services is highly competitive and requires a substantial infrastructure to support a national network. It indicates that large carriers serve this market. Accordingly, the Postal Service states that it is unaware of any small business concerns that could offer comparable service for this customer. *Id.*, para. (h).

No commenter opposes the proposed classification of Express Mail Contract 7 as competitive. Having considered the statutory requirements and the support offered by the Postal Service, the Commission finds that Express Mail Contract 7 is appropriately classified as a competitive product and should be added to the Competitive Product List.

Cost considerations. In its initial filings, the Postal Service presented an incomplete financial analysis of Express Mail Contract 7. The incomplete initial filings did not allow the Commission to undertake the required analysis of Express Mail Contract 7 until the Postal Service fully responded to CHIR Nos. 1 and 2. Because the Postal Service did not fully respond to CHIR No. 1 until December 9, 2009, the Commission could not begin its analysis until that time. Even then, further informal follow-up to the Postal Service's responses to CHIR No. 1 was necessary for a complete understanding of the data.

Based on the data and explanations submitted, the Commission finds that Express Mail Contract 7 should cover its attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, an initial review of proposed Express Mail Contract 7 indicates that it comports with the provisions applicable to rates for competitive products. The Commission's analysis is provided in Library Reference PRC-CP2010–7–NP-LR1 which is being filed under seal.

Other considerations. The Postal Service shall notify the Commission if termination occurs prior to the scheduled termination date. Following the scheduled termination date of the agreement, the Commission will remove the product from the Competitive Product List.

Further, while the Commission currently believes that the contract is expected to comply with the applicable requirements of 39 U.S.C. 3633, the Commission seeks to ensure that it is provided with the proper level of detail to make appropriate findings in the FY 2010 Annual Compliance Determination (ACD) with respect to this contract. To that end, the Postal Service should view Library Reference PRC-CP2010–7–NP-LR1 as illustrative of the granularity of the information to be reported with respect to this contract.

In conclusion, the Commission approves Express Mail Contract 7 as a new product. The revision to the Competitive Product List is shown below the signature of this order and is effective upon issuance of this order.

V. Ordering Paragraphs

It is ordered:

1. Express Mail Contract 7 (MC2010–7 and CP2010–7) is added to the Competitive Product List as a new product under Negotiated Service Agreements, Domestic.

2. The Postal Service shall notify the Commission if termination occurs prior to the scheduled termination date.

3. The Postal Service shall view Library Reference PRC-CP2010–7–NP-LR1 as illustrative of the level of detail of information that the Commission seeks with respect to this contract in connection with its FY 2010 Annual Compliance Determination proceeding.

4. The Secretary shall arrange for the publication of this order in the **Federal Register**.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure; Postal Service.

By the Commission.

Judith M. Grady,

Acting Secretary.

■ For the reasons discussed in the preamble, the Postal Regulatory Commission amends chapter III of title 39 of the Code of Federal Regulations as follows:

PART 3020—PRODUCT LISTS

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to Subpart A of Part 3020–Mail Classification Schedule to read as follows:

Appendix A to Subpart A of Part 3020—Mail Classification Schedule

Part A—Market Dominant Products

1000 Market Dominant Product List
First-Class Mail
- Single-Piece Letters/Postcards
- Bulk Letters/Postcards
- Flats
- Parcels
- Outbound Single-Piece First-Class Mail International
- Inbound Single-Piece First-Class Mail International

Standard Mail (Regular and Nonprofit)
- High Density and Saturation Letters
- High Density and Saturation Flats/Parcels
- Carrier Route
- Letters
- Flats
- Not Flat-Machinables (NFMs)/Parcels

Periodicals
- Within County Periodicals
- Outside County Periodicals

Package Services
- Single-Piece Parcel Post
- Inbound Surface Parcel Post (at UPU rates)
- Bound Printed Matter Flats
- Bound Printed Matter Parcels
- Media Mail/Library Mail

Special Services
- Ancillary Services
- International Ancillary Services
- Address List Services
- Caller Service
- Change-of-Address Credit Card Authentication
- Confirm
- International Reply Coupon Service
- International Business Reply Mail Service
- Money Orders
- Post Office Box Service

Negotiated Service Agreements
- HSBC North America Holdings Inc. Negotiated Service Agreement
- Bookspan Negotiated Service Agreement
- Bank of America Corporation Negotiated Service Agreement
- The Bradford Group Negotiated Service Agreement
- Inbound International
  - Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Market Dominant Services

Market Dominant Product Descriptions
First-Class Mail
[Reserved for Class Description]

- Single-Piece Letters/Postcards
- [Reserved for Product Description]
- Bulk Letters/Postcards
- [Reserved for Product Description]
- Flats
- [Reserved for Product Description]
- Parcels
- [Reserved for Product Description]
- Outbound Single-Piece First-Class Mail International
- [Reserved for Product Description]
- Inbound Single-Piece First-Class Mail International
- [Reserved for Product Description]

Standard Mail (Regular and Nonprofit)
[Reserved for Class Description]
- High Density and Saturation Letters
- [Reserved for Product Description]
- High Density and Saturation Flats/Parcels
- [Reserved for Product Description]
- Carrier Route
- [Reserved for Product Description]
- Letters
- [Reserved for Product Description]
- Flats
- [Reserved for Product Description]
- Not Flat-Machinables (NFMs)/Parcels
- [Reserved for Product Description]

Periodicals
[Reserved for Class Description]
- Within County Periodicals
- [Reserved for Product Description]
- Outside County Periodicals
- [Reserved for Product Description]

Package Services
[Reserved for Class Description]
- Single-Piece Parcel Post
- [Reserved for Product Description]
- Inbound Surface Parcel Post (at UPU rates)
- [Reserved for Product Description]
- Bound Printed Matter Flats
- [Reserved for Product Description]
- Bound Printed Matter Parcels
- [Reserved for Product Description]
- Media Mail/Library Mail
- [Reserved for Product Description]

Special Services
[Reserved for Class Description]
- Ancillary Services
- [Reserved for Product Description]
- Address Correction Service
- [Reserved for Product Description]
- Applications and Mailing Permits
- [Reserved for Product Description]
- Business Reply Mail
- [Reserved for Product Description]
- Bulk Parcel Return Service
- [Reserved for Product Description]
- Certified Mail
- [Reserved for Product Description]
- Certificate of Mailing
- [Reserved for Product Description]
- Collect on Delivery
- [Reserved for Product Description]
- Delivery Confirmation
- [Reserved for Product Description]
- Insurance
- [Reserved for Product Description]
- Merchandise Return Service
- [Reserved for Product Description]
- Parcel Airlift (PAL)
- [Reserved for Product Description]
- Registered Mail
- [Reserved for Product Description]
- Return Receipt
- [Reserved for Product Description]
- Return Receipt for Merchandise
- [Reserved for Product Description]
- Restricted Delivery
- [Reserved for Product Description]
- Shipper-Paid Forward
- [Reserved for Product Description]
- Signature Confirmation
- [Reserved for Product Description]
- Special Handling
- [Reserved for Product Description]
- Stamped Envelopes
- [Reserved for Product Description]
- Stamped Cards
- [Reserved for Product Description]
- Premium Stamped Stationery
- [Reserved for Product Description]
- Premium Stamped Cards
- [Reserved for Product Description]
- International Ancillary Services
- [Reserved for Product Description]
- International Certificate of Mailing
- [Reserved for Product Description]
- International Registered Mail
- [Reserved for Product Description]
- International Return Receipt
- [Reserved for Product Description]
- International Restricted Delivery
- [Reserved for Product Description]
- Address List Services
- [Reserved for Product Description]
- Caller Service
- [Reserved for Product Description]
- Change-of-Address Credit Card Authentication
- [Reserved for Product Description]
- Confirm
- [Reserved for Product Description]
- International Reply Coupon Service
- [Reserved for Product Description]
- International Business Reply Mail Service
- [Reserved for Product Description]
- Money Orders
- [Reserved for Product Description]
- Post Office Box Service
- [Reserved for Product Description]

Negotiated Service Agreements
[Reserved for Class Description]
- HSBC North America Holdings Inc. Negotiated Service Agreement
- [Reserved for Product Description]
- Bookspan Negotiated Service Agreement
- [Reserved for Product Description]
- Bank of America Corporation Negotiated Service Agreement
- The Bradford Group Negotiated Service Agreement

Part B—Competitive Products
2000 Competitive Product List
Express Mail
- Express Mail
- Outbound International Expedited Services
- Inbound International Expedited Services
  - Inbound International Expedited Services 1 (CP2008–7)
  - Inbound International Expedited Services 2 (MC2009–10 and CP2009–12)

Priority Mail
- Priority Mail
- Outbound Priority Mail International
- Inbound Air Parcel Post
  - Royal Mail Group Inbound Air Parcel Post Agreement

Parcel Select
Parcel Return Service
International
- International Priority Airlift (IPA)
- International Surface Airlift (ISAL)
- International Direct Sacks—M—Bags
- Global Customized Shipping Services
- Inbound Surface Parcel Post (at non-UPU rates)
  - Canada Post—United States Postal Service Contractual Bilateral Agreement for Inbound Competitive Services (MC2009–8 and CP2009–9)
- International Money Transfer Service
- International Ancillary Services

Special Services
- Premium Forwarding Service

Negotiated Service Agreements
- Domestic
  - Express Mail Contract 1 (MC2008–5)
  - Express Mail Contract 2 (MC2009–3 and CP2009–4)
  - Express Mail Contract 3 (MC2009–15 and CP2009–21)
  - Express Mail Contract 4 (MC2009–34 and CP2009–45)
  - Express Mail Contract 5 (MC2010–5 and CP2010–5)
  - Express Mail Contract 6 (MC2010–6 and CP2010–6)
  - Express Mail Contract 7 (MC2010–7 and CP2010–7)
  - Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
  - Express Mail & Priority Mail Contract 2 (MC2009–12 and CP2009–14)
  - Express Mail & Priority Mail Contract 3 (MC2009–13 and CP2009–17)
  - Express Mail & Priority Mail Contract 4 (MC2009–17 and CP2009–24)
  - Express Mail & Priority Mail Contract 5 (MC2009–18 and CP2009–25)
  - Express Mail & Priority Mail Contract 6 (MC2009–31 and CP2009–42)
  - Express Mail & Priority Mail Contract 7 (MC2009–32 and CP2009–43)
  - Express Mail & Priority Mail Contract 8 (MC2009–33 and CP2009–44)
  - Parcel Select & Parcel Return Service Contract 1 (MC2009–11 and CP2009–13)
  - Parcel Select & Parcel Return Service Contract 2 (MC2009–40 and CP2009–61)
  - Parcel Return Service Contract 1 (MC2009–1 and CP2009–2)
  - Priority Mail Contract 1 (MC2008–8 and CP2008–26)
  - Priority Mail Contract 2 (MC2009–2 and CP2009–3)
  - Priority Mail Contract 3 (MC2009–4 and CP2009–5)

- Priority Mail Contract 4 (MC2009–5 and CP2009–6)
- Priority Mail Contract 5 (MC2009–21 and CP2009–26)
- Priority Mail Contract 6 (MC2009–25 and CP2009–30)
- Priority Mail Contract 7 (MC2009–25 and CP2009–31)
- Priority Mail Contract 8 (MC2009–25 and CP2009–32)
- Priority Mail Contract 9 (MC2009–25 and CP2009–33)
- Priority Mail Contract 10 (MC2009–25 and CP2009–34)
- Priority Mail Contract 11 (MC2009–27 and CP2009–37)
- Priority Mail Contract 12 (MC2009–28 and CP2009–38)
- Priority Mail Contract 13 (MC2009–29 and CP2009–39)
- Priority Mail Contract 14 (MC2009–30 and CP2009–40)
- Priority Mail Contract 15 (MC2009–35 and CP2009–54)
- Priority Mail Contract 16 (MC2009–36 and CP2009–55)
- Priority Mail Contract 17 (MC2009–37 and CP2009–56)
- Priority Mail Contract 18 (MC2009–42 and CP2009–63)
- Priority Mail Contract 19 (MC2010–1 and CP2010–1)
- Priority Mail Contract 20 (MC2010–2 and CP2010–2)
- Priority Mail Contract 21 (MC2010–3 and CP2010–3)
- Priority Mail Contract 22 (MC2010–4 and CP2010–4)
- Priority Mail Contract 23 (MC2010–9 and CP2010–9)

Outbound International
- Direct Entry Parcels Contracts
  - Direct Entry Parcels 1 (MC2009–26 and CP2009–36)
- Global Direct Contracts (MC2009–9, CP2009–10, and CP2009–11)
- Global Expedited Package Services (GEPS) Contracts
  - GEPS 1 (CP2008–5, CP2008–11, CP2008–12, CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23, and CP2008–24)
  - Global Expedited Package Services 2 (CP2009–50)
- Global Plus Contracts
  - Global Plus 1 (CP2008–8, CP2008–46 and CP2009–47)
  - Global Plus 2 (MC2008–7, CP2008–48 and CP2008–49)

Inbound International
- Inbound Direct Entry Contracts with Foreign Postal Administrations
  - Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and MC2008–15)
  - Inbound Direct Entry Contracts with Foreign Postal Administrations 1 (MC2008–6 and CP2009–62)
  - International Business Reply Service Competitive Contract 1 (MC2009–14 and CP2009–20)
- Competitive Product Descriptions
  - Express Mail
  - [Reserved for Group Description]
  - Express Mail
  - [Reserved for Product Description]
  - Outbound International Expedited Services
  - [Reserved for Product Description]
  - Inbound International Expedited Services
  - [Reserved for Product Description]
  - Priority
  - [Reserved for Product Description]
  - Priority Mail
  - [Reserved for Product Description]
  - Outbound Priority Mail International
  - [Reserved for Product Description]
  - Inbound Air Parcel Post
  - [Reserved for Product Description]
  - Parcel Select
  - [Reserved for Group Description]
  - Parcel Return Service
  - [Reserved for Group Description]
  - International
  - [Reserved for Group Description]
  - International Priority Airlift (IPA)
  - [Reserved for Product Description]
  - International Surface Airlift (ISAL)
  - [Reserved for Prduct Description]
  - International Direct Sacks—M–Bags
  - [Reserved for Product Description]
  - Global Customized Shipping Services
  - [Reserved for Product Description]
  - International Money Transfer Service
  - [Reserved for Product Description]
  - Inbound Surface Parcel Post (at non-UPU rates)
  - [Reserved for Product Description]
  - International Ancillary Services
  - [Reserved for Product Description]
  - International Certificate of Mailing
  - [Reserved for Product Description]
  - International Registered Mail
  - [Reserved for Product Description]
  - International Return Receipt
  - [Reserved for Product Description]
  - International Restricted Delivery
  - [Reserved for Product Description]
  - International Insurance
  - [Reserved for Product Description]
  - Negotiated Service Agreements
  - [Reserved for Group Description]
  - Domestic
  - [Reserved for Product Description]
  - Outbound International
  - [Reserved for Group Description]
- Part C—Glossary of Terms and Conditions [Reserved]
- Part D—Country Price Lists for International Mail [Reserved]

[FR Doc. 2010–1055 Filed 1–20–10; 8:45 am]

BILLING CODE 7710–FW–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R10–OAR–2009–0111; FRL–9095–9]

Outer Continental Shelf Air Regulations Consistency Update for Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing the update of the Outer Continental Shelf ("OCS") Air Regulations proposed in the **Federal Register** on March 3, 2009. Requirements applying to OCS sources located within 25 miles of States' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area ("COA"), as mandated by section 328(a)(1) of the Clean Air Act ("the Act"). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources operating off of the State of Alaska. The intended effect of approving the OCS requirements for the State of Alaska is to regulate emissions from OCS sources in a manner consistent with the requirements onshore. The change to the existing requirements discussed below is incorporated by reference into the regulations and is listed in the appendix to the OCS air regulations.

DATES: *Effective Date:* The final rule portion of this rulemaking is effective on February 22, 2010.

This incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of February 22, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2009–0111. The index to the docket is available electronically at *http://www.regulations.gov* or in hard copy at the Office of Air, Waste and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington 98101. While all documents in the docket are listed in the index, some information may be publically available only at the hard copy location (*e.g.*, copyrighted materials), and some may not be publicly available in either location (*e.g.*, Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Natasha Greaves, Federal and Delegated

Air Programs Unit, Office of Air, Waste, and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: AWT–107, Seattle, WA 98101; telephone number: (206) 553–7079; e-mail address: *greaves.natasha@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms "we," "us," and "our" refer to the U.S. EPA. Organization of this document: The following outline is provided to aid in locating information in this preamble.

Table of Contents

I. Background Information

On September 4, 1992, EPA promulgated 40 CFR part 55,[1] which established requirements to control air pollution from OCS sources in order to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I of the Act. Part 55 applies to all OCS sources offshore of the States except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the Act requires that for such sources located within 25 miles of a State's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

On March 3, 2009, (74 FR 1980), EPA proposed to approve requirements into the OCS Air Regulations pertaining to the State of Alaska. These requirements are being promulgated in response to the submittal of a Notice of Intent on January 9, 2009, by Shell Offshore, Inc. of Houston, Texas. EPA has evaluated the proposed requirements to ensure that they are rationally related to the attainment or maintenance of Federal or State ambient air quality standards or part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS, and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure that they are not arbitrary or capricious. 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA's State Implementation Plan ("SIP") guidance or certain requirements of the Act. Consistency updates may result in the inclusion of State or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

II. Public Comment and EPA Response

EPA's March 3, 2009, proposed action provided a 30-day public comment period which closed on April 2, 2009. On April 2, 2009, the North Slope Borough submitted a summary of comments on EPA's proposed rules and also requested an extension of the public comment period in order to prepare and submit more detailed comments. On April 29, 2009, EPA reopened the public comment period for an additional 14 days. The reopened public comment period closed on May 13, 2009. During this period, we received one comment on the proposed action. This comment was submitted by the North Slope Borough by letter dated May 13, 2009.

Comment: The North Slope Borough seeks clarification on how the rules are rationally related to attainment or maintenance of Federal or State ambient air quality standards without data to support EPA's claim.

Response: EPA is required to perform consistency updates to maintain consistency with onshore regulations. In order to be considered for inclusion in the OCS rule, State and local requirements must have been formally adopted by the regulatory agency. Before a rule can apply to an OCS source, it must be incorporated into part 55 by formal rulemaking. EPA incorporates those onshore rules that comply with the statutory requirements of section 328 of the Clean Air Act that are rationally related to the attainment and maintenance of national or State ambient air quality standards and the prevention of significant deterioration of air quality. EPA must adopt the COA rules into part 55 as they exist onshore. This prevents EPA from making substantive changes to the rules it incorporates. In addition, rules incorporated cannot be used for the purpose or preventing exploration or development of the OCS.

For the proposed rule, EPA reviewed the ACC as amended through November 9, 2008 to identify which rules applicable to OCS sources are rationally related to the attainment or maintenance of Federal or State ambient air quality standards. These rules were incorporated into part 55. Rules that are arbitrary or capricious, administrative or procedural, regulate toxics, and/or designed to prevent exploration and development on the OCS were excluded from incorporation. Section 328 of the Act requires that the requirements for sources located within 25 miles of a State's seaward boundary, shall be the same as would be applicable if the source were located on the COA. EPA's action specifies the OCS requirements that will apply to any OCS source for which Alaska is the COA. The intended effect of approving the OCS requirements is to regulate emissions from OCS sources in accordance with the requirements onshore; to the extent those requirements are applicable to OCS sources and as modified by the requirements of section 328 and 40 CFR part 55. EPA determined that each of the Alaska rules proposed to be incorporated relate to the regulation of criteria pollutants or their precursors and therefore are related to the Federal or State air quality standards or relate to the prevention of significant deterioration. For example, this final rule includes the State of Alaska regulations regarding ambient air quality management including other provisions regarding major and minor stationary source permit, but does not include provisions unrelated to OCS sources or activities. Because EPA must adopt the COA rules into part 55 as they exist onshore, EPA does not make substantive changes to the rules it incorporates. After reviewing Alaska's rules, EPA determined that they are rationally related to the attainment or maintenance of Federal or State ambient air quality standards or part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS and that they are applicable to OCS sources.

Comment: The North Slope Borough requested clarification regarding changes made to the following AAC

[1] The reader may refer to the Notice of Proposed Rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792) for further background and information on the OCS regulations.

provisions, that were proposed to be incorporated by reference into part 55: 18 AAC 50.040 Federal Standards Adopted by Reference; 18 AAC 50.055 Industrial Processes and Fuel-Burning Equipment; 18 AAC 50.070 Marine Vessel Visible Emission Standards; 18 AAC 50.260 Best Available Retrofit Technology Under Regional Haze Rule; 18 AAC 50.321 Case-by-Case Maximum Achievable Control Technology; 18 AAC 50.502 Minor Permit for Air Quality Protection; and 18 AAC 50.542 Minor Permit Review and Issuance.

Response: The Alaska Department of Environmental Conservation ("ADEC") Public Comment Draft dated November 21, 2007, is a marked-up copy detailing the changes it proposed for 18 AAC 50.040, 18 AAC 50.055, 18 AAC 50.502, and 18 AAC 50.542. This document entitled, the "Regulation Hygiene Regulations Explanation of Proposed Changes" identifies changes and rational for each change made in the rules. These changes include updating incorporations by reference; adoption clarifications to existing regulations to fix typos, incorrect references, and internal regulation conflicts; and changes to regulations to eliminate confusion with or misinterpretations of 18 AAC 50. ADEC's proposed rules "Regulation Hygiene Regulations Explanation of Proposed Changes" is included in the docket for this EPA action. The final changes made to 18 AAC 50.040, 18 AAC 50.055, 18 AAC 50.502, and 18 AAC 50.542 were the same as explained in the State proposal. The amended provisions were published in register 187 and were State effective on November 25, 2008.

ADEC's Public Comment Draft for changes made to 18 AAC 50.260 Best Available Retrofit Technology Under Regional Haze Rule, explains the changes the State made to that rule and is also part of the docket for this EPA action.

The North Slope Borough also requested clarification on changes made to 18 AAC 50.070 Marine Vessel Visible Emission Standards and 18 AAC 50.321 Case-by-Case Maximum Achievable Control Technology. EPA's review of these standards did not note any changes since the last final consistency update on February 8, 2007. 18 AAC 50.070 was last amended on June 21, 1998 and 18 AAC 50.321 was last amended on December 1, 2004.

Comment: The North Slope Borough requested an explanation of each change made to part 55, with a rational for each change.

Response: The changes to the regulations are explained above. This comment requesting that the rational for each change be explained is beyond the scope of this part 55 consistency update. In a consistency update, EPA updates part 55 as necessary to maintain consistency with the requirements of the onshore area in order to attain and maintain Federal and State ambient air quality standards and comply with part C of title I of the Act. EPA adopts the applicable COA rules into part 55 as they exist onshore and does not make substantive changes to the rules it incorporates. EPA does not, and is not required to, evaluate or consider the State's rational for each change.

Comment: The North Slope Borough requested an explanation as to why Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, and the potential environmental justice implications of the proposed action is not discussed.

Response: This rulemaking action implements the legal requirements set forth in section 328 of the Act and EPA is required to take the action and has no discretion to do otherwise. Moreover, even if EPA had some legal discretion, there is no reason to believe that the action would constitute a denial of fair treatment or meaningful participation to any person such as to have environmental justice implications. This final rule simply updates the existing OCS rules to make them consistent with the current COA requirements. The OCS rules already apply onshore in the COA and there is no evidence to suggest that the incorporation of the same rules into part 55 will cause any change. In those circumstances, there is no need for any additional review or analysis under Executive Order 12898.

Comment: The North Slope Borough requests clarification on why EPA's action is not significant.

Response: The consistency update simply updates the existing requirements for controlling air pollution from OCS sources to make them consistent with rules in the COA as specifically required by section 328 of the Act. This action does not involve the exercise of policy discretion on the part of EPA. Therefore, as explained in more detail in Section IV below, this action is not likely to have the type of effect or impact or involve the requisite issues to be a significant regulatory action within the meaning of Executive Order 12866, Regulatory Planning and Review.

Additionally, since the consistency update is not a significant regulatory action under Executive Order 12866, it is not a significant energy action under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. Even if the consistency update were a significant regulatory action under Executive Order 12866, EPA has no reason to believe that updating the existing requirements for controlling air pollution from OCS to make them consistent with rules already applied to sources in the COA would be "likely to have a significant adverse effect on the supply, distribution, or use of energy: Within the meaning of section 4(b)(1)(ii) of Executive Order 13211." Therefore, even if the consistency update were a significant regulatory action under Executive Order 12866, which it is not, it would not be a significant energy action under Executive Order 13211.

Comment: The North Slope Borough wants to know how EPA will comply with the National Environmental Policy Act ("NEPA").

Response: Congress expressly exempted EPA actions under the Act from NEPA requirements when it passed the Energy Supply and Environmental Coordination Act of 1974 ("ESECA"). The exemption provides: "No action taken under the Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of National Environmental Policy Act * * *" (15 U.S.C. 793(c)(1)). Since section 328 of the Act requires EPA to establish requirements to control air pollution from OCS sources, and the ESECA exempts action taken under the Act from being deemed a major Federal action, NEPA requirements do not apply to this action.

Comment: The North Slope Borough would like to know how local laws and regulations, such as the North Slope Borough's Title 19 are considered in the consistency update.

Response: The North Slope Borough's Title 19 includes rules for the creation of the Department of Planning and Community Service (Chapter 19.05), General Provision (Chapter 19.10), and Definitions (Chapter 19.20). The Department of Planning and Community Service is responsible for administering the North Slope Borough's planning and zoning ordinances, the Costal Zone Management Plan, and the Barrow Zoning Ordinance; ensuring compliance with local, State, and Federal law regarding land use; providing review and comment on development issues; providing for a geographical database covering the entire North Slope Borough including mapping and graphic services; gathering information and developing a comprehensive capital improvement program plans for the North Slope Borough; providing

teleconferencing facilities; gathering and preserving data regarding Inupiat history, language, and culture; and supporting the Simeon Paneak Museum in Anaktuvuk Pass.

As stated in title 19, the purpose of the General Provisions is to: (1) Achieve the goals and objectives, and implement the policies of, the North Slope Borough Comprehensive Plan, including its Costal Management Program; (2) ensure that the future growth and development of the Borough is in accordance with the values of its residents; (3) identify and secure, for present and future residents, the beneficial impacts of development; (4) identify and avoid, mitigate, or prohibit the negative impacts of development; and (5) ensure that future development is of the proper type, design and location, and is served by a proper range of public services and facilities. (Chapter 19.10.010)

After receiving the comment, EPA reviewed the North Slope Borough's Title 19 and determined that these rules are not related to the attainment or maintenance of the Federal or State ambient air quality standards or necessary to assure compliance with the provisions of Part C of subchapter I of the Act. Therefore, EPA determined that these rules are not appropriate for inclusion into part 55.

Comment: The North Slope Borough would like EPA to identify how part 55 will provide for the consideration of greenhouse gases.

Response: The comment goes beyond the scope of this rulemaking. As explained above, this rulemaking simply updates Part 55 by incorporating into those regulations the existing COA requirements related to the attainment or maintenance of the Federal or State ambient air quality standards and the standards necessary to assure compliance with the provisions of Part C of subchapter I of the Act. We take this action pursuant to section 328 of the Act. We believe we will, through this action, have incorporated all of the relevant requirements of the COA.

Comment: The North Slope Borough requested that EPA clarify what version of the State rules is being adopted into 40 CFR part 55 Appendix A.

Response: EPA reviewed the applicable dates in Appendix A and noted that some of the proposed rules contained out-of-date State effective dates. These have been corrected and all the rules listed in the Appendix now reflect current effective dates. A marked up copy of the changes are available in the docket.

Comment: The North Slope Borough requests that EPA clearly explain how the agency will ensure that the increments established to prevent significant deterioration ("PSD") of air quality will be protected within 25 miles of Alaska's seaward boundary. The North Slope Borough specifically asks EPA to clarify the applicable baseline areas and baseline dates for OCS sources nearest Alaska and to clearly explain the requirements for new and modified OCS sources with respect to PSD increment analyses.

Response: The comment raises questions that go beyond the scope of this rulemaking. As previously explained, the purpose of this rulemaking is to update the OCS rules applicable to OCS sources located within 25 miles of Alaska's seaward boundary so that they remain consistent with the onshore rules. Section 328 of the Act requires EPA to establish requirements to control air pollution from OCS sources to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I (the provisions regarding prevention of significant deterioration). For OCS sources located within 25 miles of a State's seaward boundaries, these requirements are to be the same as would be applicable if the source were located in the COA.

EPA has met this requirement by incorporating the COA rules into the Federal rules for OCS sources, specifically into 40 CFR 55.14. In the case of the Alaska OCS, these rules include, among other things, the State's PSD permitting rule (18 AAC 50.306), the State rule that documents the PSD baseline areas and baseline dates for the COA (18 AAC 50.020) and the requirement for a PSD source to demonstrate that the allowable emissions from the new source or modification would not cause or contribute to a violation of an applicable PSD increment (see 40 CFR 52.21(k)(2)), incorporated by reference into ADEC's rules at 18 AAC 50.040(h). This update incorporates the current onshore rules regarding increment to make them consistent with the existing requirements in the COA.

Comment: The North Slope Borough also incorporated into its comments a letter it had previously sent to the Minerals Management Service ("MMS") regarding the MMS' air quality analysis for the Beaufort Sea and the Chukchi Sea Planning Areas Oil and Gas lease sales 209, 212, 217 and 221 Draft Environmental Impact Statement OCS EIS/EA MMS 2008–0055.

Response: The comments contained in the letter to the MMS relate to the analysis the MMS conducted on the air impacts that could occur as a result of the actions authorized under the Draft Environmental Impact Statement. These comments do not relate to the proposed EPA action which is simply to incorporate the applicable onshore regulations into part 55. These comments are therefore beyond the scope of this rulemaking.

III. EPA Action

In this document, EPA takes final action to incorporate the changes proposed on March 3, 2009 except for 18 AAC 50.410 into 40 CFR part 55. Subsequent to EPA's March 3, 2009 proposed changes to 40 CFR part 55, the State of Alaska adopted regulation changes in Title 18, Chapter 50 of the Alaska Administrative Code ("ACC"). More specifically, as amended through June 18, 2009, Alaska revised the Air Emission User Fee provision in 18 AAC 50.410 to extend the date through which the current emission fee rates apply to stationary sources permitted under AS 46.14 from to June 30, 2009 to June 30, 2010 and clarified that the fee applies annually. EPA is taking direct final action, under Docket ID No. EPA–R10–OAR–2009–0799, to incorporate 18 AAC 50.410 as amended through June 18, 2009 rather than the version referenced on March 3, 2009 proposal, into 40 CFR part 55.

As described above, EPA is approving the action under section 328(a)(1) of the Act, 42 U.S.C. 7627. Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA incorporates applicable onshore rules into part 55 as they exist onshore.

IV. Administrative Requirements

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore air control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the Clean Air Act. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of policy discretion by EPA. For that reason, this action:

• Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

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

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

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

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

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

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

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

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, nor does it impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. Notice of OMB's approval of EPA Information Collection Request ("ICR") No. 1601.07 was published in the **Federal Register** on February 17, 2009 (74 FR 7432). The approval expires January 31, 2012. As EPA previously indicated (70 FR 65897–65898 (November 1, 2005)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 549 hours per response, using the definition of burden provided in 44 U.S.C. 3502(2).

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

Under section 307(b)(1) of the Clean Air, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 22, 2010. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedures, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 14, 2009.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

■ Title 40, chapter I of the Code of Federal Regulations, is amended as follows:

PART 55—[AMENDED]

■ 1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Act (42 U.S.C. 7401, *et seq.*) as amended by Public Law 101–549.

■ 2. Section 55.14 is amended by revising paragraph (e)(2)(i)(A) to read as follows:

§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(A) State of Alaska Requirements Applicable to OCS Sources, November 9, 2009.

* * * * *

■ 3. Appendix A to CFR part 55 is amended by revising paragraph (a)(1) under the heading "Alaska" to read as follows:

Appendix A to Part 55—Listing of State and Local Requirements Incorporated by Reference Into Part 55, by State

* * * * *

Alaska

(a) * * *

(1) The following State of Alaska requirements are applicable to OCS Sources, November 9, 2009, Alaska Administrative Code—Department of Environmental Conservation. The following sections of Title 18, Chapter 50:

Article 1. Ambient Air Quality Management

18 AAC 50.005. Purpose and Applicability of Chapter (effective 10/01/2004)

18 AAC 50.010. Ambient Air Quality Standards (effective 10/01/2004)

18 AAC 50.015. Air Quality Designations, Classification, and Control Regions (effective 10/10/2004) except (d)(2)

Table 1. Air Quality Classifications

18 AAC 50.020. Baseline Dates and Maximum Allowable Increases (effective 07/25/2008)

Table 2. Baseline Dates

Table 3. Maximum Allowable Increases

18 AAC 50.025. Visibility and Other Special Protection Areas (effective 06/21/1998)

18 AAC 50.030. State Air Quality Control Plan (effective 11/09/2008)

18 AAC 50.035. Documents, Procedures, and Methods Adopted by Reference (effective 11/09/2008)

18 AAC 50.040. Federal Standards Adopted by Reference (effective 07/25/2008) except (a)(H), (a)(I), (a)(N) through (a)(P), (a)(R) through (a)(U), (a)(W), (a)(Y), (a)(AA), (a)(CC) through (a)(EE), (a)(II), (a)(KK), (c)(4), (c)(5), (c)(12), (c)(14) through (c)(16), (c)(18), (c)(20), (c)(25), (c)(26) through (c)(29), (c)(30), (c)(31) and (g)

18 AAC 50.045. Prohibitions (effective 10/01/2004)

18 AAC 50.050. Incinerator Emissions Standards (effective 07/25/2008)

Table 4. Particulate Matter Standards for Incinerators

18 AAC 50.055. Industrial Processes and Fuel-Burning Equipment (effective 07/25/2008) except (a)(3) through (a)(9), (b)(2)(A), (b)(4) through (b)(6), (e) and (f)
18 AAC 50.065. Open Burning (effective 01/18/1997)
18 AAC 50.070. Marine Vessel Visible Emission Standards (effective 06/21/1998)
18 AAC 50.075. Wood-Fired Heating Device Visible Emission Standards (effective 01/18/1997)
18 AAC 50.080. Ice Fog Standards (effective 01/18/1997)
18 AAC 50.085. Volatile Liquid Storage Tank Emission Standards (effective 01/18/1997)
18 AAC 50.090. Volatile Liquid Loading Racks and Delivery Tank Emission Standards (effective 07/25/2008)
18 AAC 50.100. Nonroad Engines (effective 10/01/2004)
18 AAC 50.110. Air Pollution Prohibited (effective 05/26/1972)

Article 2. Program Administration

18 AAC 50.200. Information Requests (effective 10/01/2004)
18 AAC 50.201. Ambient Air Quality Investigation (effective 10/01/2004)
18 AAC 50.205. Certification (effective 10/01/2004)
18 AAC 50.215. Ambient Air Quality Analysis Methods (effective 07/25/2008)

Table 5. Significant Impact Levels (SILs)

18 AAC 50.220. Enforceable Test Methods (effective 10/01/2004)
18 AAC 50.225. Owner-Requested Limits (effective 07/25/2008) except (c) through (g)
18 AAC 50.230. Preapproved Emission Limits (effective 01/29/2005) except (d)
18 AAC 50.235. Unavoidable Emergencies and Malfunctions (effective 10/01/2004)
18 AAC 50.240. Excess Emissions (effective 10/01/2004)
18 AAC 50.245. Air Episodes and Advisories (effective 10/01/2004)

Table 6. Concentrations Triggering an Air Episode

18 AAC 50.260. Guidance for Best Available Retrofit Technology under the Regional Haze Rule (effective 12/30/2007)

Article 3. Major Stationary Source Permits

18 AAC 50.301. Permit Continuity (effective 10/01/2004) except (b)
18 AAC 50.302. Construction Permits (effective 10/01/2004)
18 AAC 50.306. Prevention of Significant Deterioration (PSD) Permits (effective 07/25/2008) except (c)(2) and (e)
18 AAC 50.311. Nonattainment Area Major Stationary Source Permits (effective 10/01/2004) except (c)
18 AAC 50.316. Preconstruction Review for Construction or Reconstruction of a Major Source of Hazardous Air Pollutants (effective 12/01/2004) except (c)
18 AAC 50.321. Case-By-Case Maximum Achievable Control Technology (effective 12/01/2004)
18 AAC 50.326. Title V Operating Permits (effective12/01/2004) except (c)(1), (h), (i)(3), (j)(5), (j)(6), (k)(1)(k)(3), (k)(5), and (k)(6)
18 AAC 50.345. Construction, Minor and Operating Permits: Standard Permit Conditions (effective 11/09/2008)
18 AAC 50.346. Construction and Operating Permits: Other Permit Conditions (effective 11/09/2008)

Table 7. Standard Operating Permit Condition

Article 4. User Fees

18 AAC 50.400. Permit Administration Fees (effective 07/25/2008) except (c)(1) through (c)(3), (c)(6), (k)(3) and (m)(3)
18 AAC 50.403. Negotiated Service Agreements (effective 12/03/2005)
18 AAC 50.405. Transition Process for Permit Fees (effective 01/29/2005)
18 AAC 50.499. Definition for User Fee Requirements (effective 01/29/2005)

Article 5. Minor Permits

18 AAC 50.502. Minor Permits for Air Quality Protection (effective 07/25/2008) except (b)(1) through (b)(3), (b)(5), (d)(1) and (d)(2)
18 AAC 50.508. Minor Permits Requested by the Owner or Operator (effective 07/25/2008)
18 AAC 50.509. Construction of a Pollution Control Project Without a Permit (effective 07/25/2008)
18 AAC 50.540. Minor Permit: Application (effective 07/25/2008)
18 AAC 50.542. Minor Permit: Review and Issuance (effective 07/25/2008) except (a), (b)(1), (b)(2), (b)(4), (b)(5), and (d)
18 AAC 50.544. Minor Permits: Content (effective 11/09/2008)
18 AAC 50.546. Minor Permits: Revisions (effective 07/25/2008)
18 AAC 50.560. General Minor Permits (effective 10/01/2004) except (b)

Article 9. General Provisions

18 AAC 50.990. Definitions (effective 07/25/2008)

* * * * *

[FR Doc. 2010–1110 Filed 1–20–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R10–OAR–2009–0799; FRL–9095–8]

Outer Continental Shelf Air Regulations Consistency Update for Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to include in the regulations the revised applicability dates in the emissions user fees provision in 18 AAC 50.410. Requirements applying to Outer Continental Shelf ("OCS") sources located within 25 miles of States' seaward boundaries must be updated periodically to remain consistent with the emission user fee requirements of the corresponding onshore area ("COA"), as mandated by section 328(a)(1) of the Clean Air Act ("the Act"). The portion of the OCS air regulations that is being updated pertains to the requirements for OCS sources operating off of the State of Alaska. The intended effect of approving the OCS requirements for the State of Alaska is to regulate emissions from OCS sources in a manner consistent with the requirements onshore. The change to the existing requirements discussed below is incorporated by reference into the regulations and is listed in the appendix to the OCS air regulations.

DATES: *Effective Date:* This direct final rule will be effective March 22, 2010, without further notice, unless EPA receives adverse comment by February 22, 2010. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

This incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of March 22, 2010.

ADDRESSES: Submit your comments on the direct final portion of this action, identified by Docket ID No. EPA–R10–OAR–2009–0799, by any of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: greaves.natasha@epa.gov.*
- *Mail:* Natasha Greaves, EPA Region 10, Office of Air, Waste and Toxics, Mail Stop AWT–107, 1200 Sixth Avenue, Suite 900, Seattle WA, 98101.
- *Hand Delivery/Courier:* EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle WA, 98101. Attention: Natasha Greaves, Office of Air, Waste and Toxics, AWT—107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2009–0799. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

EPA has established a docket for the direct final action under Docket ID No. EPA–R10–OAR–2009–0799. The index to the docket is available electronically at *http://www.regulations.gov* or in hard copy at the Office of Air, Waste and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, Washington 98101. While all documents in the docket are listed in the index, some information may be publically available only at the hard copy location (*e.g.,* copyrighted materials), and some may not be publicly available in either location (*e.g.,* Confidential Business Information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFROMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Natasha Greaves, Federal and Delegated Air Programs Unit, Office of Air, Waste, and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: AWT–107, Seattle, WA 98101; telephone number: (206) 553–7079; e-mail address: *greaves.natasha@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the terms "we," "us," and "our" refer to the U.S. EPA. Organization of this document: The following outline is provided to aid in locating information in this preamble

Table of Contents

I. Background Information

On September 4, 1992, EPA promulgated 40 CFR part 55,[1] which established requirements to control air pollution from OCS sources in order to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I of the Act. Part 55 applies to all OCS sources offshore of the States except those located in the Gulf of Mexico west of 87.5 degrees longitude. Section 328 of the Act requires that for such sources located within 25 miles of a State's seaward boundary, the requirements shall be the same as would be applicable if the sources were located in the COA. Because the OCS requirements are based on onshore requirements, and onshore requirements may change, section 328(a)(1) requires that EPA update the OCS requirements as necessary to maintain consistency with onshore requirements.

Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55. This limits EPA's flexibility in deciding which requirements will be incorporated into part 55 and prevents EPA from making substantive changes to the requirements it incorporates. As a result, EPA may be incorporating rules into part 55 that do not conform to all of EPA's State Implementation Plan ("SIP") guidance or certain requirements of the Act. Consistency updates may result in the inclusion of State or local rules or regulations into part 55, even though the same rules may ultimately be disapproved for inclusion as part of the SIP. Inclusion in the OCS rule does not imply that a rule meets the requirements of the Act for SIP approval, nor does it imply that the rule will be approved by EPA for inclusion in the SIP.

On March 3, 2009, (74 FR 1980), EPA proposed to approve requirements into the OCS Air Regulations pertaining to the State of Alaska. These requirements were promulgated in response to the submittal of a Notice of Intent on January 9, 2009, by Shell Offshore, Inc. of Houston, Texas. Subsequent to EPA's March 3, 2009 proposed changes to 40 CFR part 55, the State of Alaska adopted regulation changes in Title 18, Chapter 50 of the Alaska Administrative Code ("ACC"). More specifically, as amended through June 18, 2009, Alaska revised the Air Emission User Fee provision in 18 AAC 50.410 to extend the date through which the current emission fee rates apply to stationary sources permitted under AS 46.14 from to June 30, 2009 to June 30, 2010 and clarified that the fee applies annually. This direct final action relates only to the air emission user fee provision in 18 AAC 50.410.

EPA has evaluated the proposed requirements to ensure that they are rationally related to the attainment or maintenance of federal or state ambient air quality standards or part C of title I of the Act, that they are not designed expressly to prevent exploration and development of the OCS, and that they are applicable to OCS sources. 40 CFR 55.1. EPA has also evaluated the rules to ensure that they are not arbitrary or capricious. 40 CFR 55.12(e). In addition, EPA has excluded administrative or procedural rules.

Today EPA is taking direct final action to incorporate 18 AAC 50.410 as amended through June 18, 2009. This direct final rule will be effective March 22, 2010, without further notices, unless EPA receives adverse comment by February 22, 2010. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule incorporating 18 AAC 50.410 as amended through June 18, 2009 in the **Federal Register** informing the public that the rule will not take effect.

II. EPA Action

In this document, EPA takes direct final action to incorporate 18 AAC 50.410, as amended through June 18, 2009, into 40 CFR part 55. As described above, EPA is approving the action under section 328(a)(1) of the Act, 42 U.S.C. 7627. Section 328(a) of the Act requires that EPA establish requirements to control air pollution from OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. To comply with this statutory mandate, EPA incorporates applicable onshore rules into part 55 as they exist onshore.

III. Administrative Requirements

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore air control

[1] The reader may refer to the Notice of Proposed Rulemaking, December 5, 1991 (56 FR 63774), and the preamble to the final rule promulgated September 4, 1992 (57 FR 40792) for further background and information on the OCS regulations.

requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the Clean Air Act. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of policy discretion by EPA. For that reason, this action:

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, nor does it impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. Notice of OMB's approval of EPA Information Collection Request ("ICR") No. 1601.07 was published in the **Federal Register** on February 17, 2009 (74 FR 7432). The approval expires January 31, 2012. As EPA previously indicated (70 FR 65897–65898 (November 1, 2005)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 549 hours per response, using the definition of burden provided in 44 U.S.C. 3502(2).

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

Under section 307(b)(1) of the Clean Air, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 22, 2010. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2.))

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedures, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 14, 2009.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

■ Title 40, chapter I of the Code of Federal Regulations, is amended as follows:

PART 55—[AMENDED]

■ 1. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Act (42 U.S.C. 7401, *et seq.*) as amended by Pub. L. 101–549.

■ 2. Section 55.14 is amended by revising paragraph (e)(2)(i)(A) to read as follows:

§ 55.14 Requirements that apply to OCS sources located within 25 miles of States' seaward boundaries, by State.

* * * * *

(e) * * *

(2) * * *

(i) * * *

(A) State of Alaska Requirements Applicable to OCS Sources, June 18, 2009.

* * * * *

■ 3. Appendix A to CFR part 55 is amended under "Alaska" by revising paragraph (a)(1) introductory text and by revising the entry for "18 AAC 50.410" under article 4 to read as follows:

APPENDIX A TO PART 55—LISTING OF STATE AND LOCAL REQUIREMENTS INCORPORATED BY REFERENCE INTO PART 55, BY STATE

* * * * *

Alaska

(a) * * *

(1) The following State of Alaska requirements are applicable to OCS Sources, June 18, 2009, Alaska Administrative Code—Department of Environmental Conservation. The following sections of Title 18, Chapter 50:

* * * * *

Article 4. User Fees

* * * * *

18 AAC 50.410. Emission Fees (effective 06/18/2009).

* * * * *

[FR Doc. 2010–1120 Filed 1–20–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 21 and 22

[FWS–R9–MB–2009–0002; 91200–1231–9BPP]

RIN 1018–AW44

Migratory Bird Permits; Changes in the Regulations Governing Falconry

Correction

In rule document 2010–12 beginning on page 927 in the issue of Thursday, January 7, 2010, make the following corrections:

1. On page 929, in the first column, under the **Revisions to the Falconry Regulations** heading, in the third line, "(d)(1)(ii)(A)(4)" should read "(d)(1)(ii)(A)(*4*)".

2. On the same page, in the second column, in paragraph (5), in the second line, "§21.29(d)(1)(ii)(A)(4)" should read "§21.29(d)(1)(ii)(A)(*4*)".

§21.29 [Corrected]

3. On page 931, in §21.29, in the first column, in amendatory instruction 3., in paragraph a., in the third line, "(c)(3)(i)(C)(1), (2), and (3)" should read "(c)(3)(i)(C)(*1*), (*2*), and (*3*)".

4. On the same page, in the same section, in the same column, in amendatory instruction 3., in paragraph e., in the third line, "(c)(3)(iv)(A)(1) and (2)" should read "(c)(3)(iv)(A)(*1*) and (*2*)".

5. On the same page, in the same section, in the same column, in amendatory instruction 3., in paragraph f., in the second line, "(c)(3)(iv)(A)(2)" should read "(c)(3)(iv)(A)(*2*)".

6. On the same page, in the same section, in the same column, in amendatory instruction 3., in paragraph k., in the third and fourth lines, "(d)(1)(ii)(A)(1), (2), (3), and (4)" should read "(d)(1)(ii)(A)(*1*), (*2*), (*3*), and (*4*)".

7. On the same page, in the same section, in the same column, in amendatory instruction 3., in paragraph m., in the third line, "(d)(1)(ii)(B)(1) and (2)" should read "(d)(1)(ii)(B)(*1*) and (*2*)".

8. On the same page, in the same section, in the same column, in amendatory instruction 3., in paragraph m., in the fifth line, "(d)(1)(ii)(D)(1), (2), and (3)" should read "(d)(1)(ii)(D)(*1*), (*2*), and (*3*)".

9. On the same page, in the same section, in the second column, in paragraph s., in the third line, "(e)(3)(vi)(C)(1) and (2)" should read "(e)(3)(vi)(C)(*1*) and (*2*)".

10. On the same page, in the same section, in the third column, in paragraph (4), in the first line, "(4)" should read "(*4*)".

[FR Doc. C1–2010–12 Filed 1–20–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

RIN 0648–AW80

Taking and Importing Marine Mammals; U.S. Naval Surface Warfare Center Panama City Division Mission Activities

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

ACTION: Final rule.

SUMMARY: NMFS, upon application from the U.S. Navy (Navy), is issuing regulations to govern the unintentional taking of marine mammals incidental to activities conducted at the Naval Surface Warfare Center Panama City Division (NSWC PCD) for the period of January 2010 through January 2015. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA). These regulations, which allow for the issuance of "Letters of Authorization" (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective January 21, 2010, through January 21, 2015.

ADDRESSES: A copy of the Navy's application (which contains a list of the references used in this document), NMFS' Record of Decision (ROD), and other documents cited herein may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephone via the contact listed here (*see* **FOR FURTHER INFORMATION CONTACT**). Additionally, the Navy's LOA application may be obtained by visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 713–2289, ext. 137.

SUPPLEMENTARY INFORMATION: Extensive supplementary information was provided in the proposed rule for this activity, which was published in the **Federal Register** on Thursday, April 30, 2009 (74 FR 20156). This information will not be reprinted here in its entirety; rather, all sections from the proposed rule will be represented herein and will contain either a summary of the material presented in the proposed rule or a note referencing the page(s) in the proposed rule where the information may be found. Any information that has changed since the proposed rule was published will be addressed herein. Additionally, this final rule contains a section that responds to the comments received during the public comment period.

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as:

> An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The NDAA (Pub. L. 108–136) removed the "small numbers" and "specified geographical region" limitations and amended the definition of "harassment" as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA):

> (i) Any act that injures or has the significant potential to injure a marine

mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On April 1, 2008, NMFS received an application, which was subsequently amended on February 12, 2009 with additional information, from the Navy requesting authorization for the take of 10 species of cetaceans incidental to the NSWC PCD's Research, Development, Test and Evaluation (RDT&E) mission activities over the course of 5 years. These RDT&E activities are classified as military readiness activities. The Navy states that these RDT&E activities may cause various impacts to marine mammal species in the proposed action area (e.g., mortality, Level A and B harassment). The Navy requests an authorization to take individuals of these cetacean species by Level B Harassment. Further, the Navy requests authorization to take 2 bottlenose dolphins, 2 Atlantic spotted dolphins, 1 pantropical spotted dolphin, and 1 spinner dolphin per year by Level A harassment (injury), as a result of the proposed mission activities. Please refer to Tables 6–3, 6–4, 6–6, 6–7, 6–8, and 6–9 of the Letter of Authorization (LOA) Addendum for detailed information of the potential marine mammal exposures from the NSWC PCD mission activities per year. However, due to the proposed mitigation and monitoring measures, NMFS estimates that the take of marine mammals is likely to be lower than the amount requested. Although the Navy requests authorization to take marine mammals by mortality, NMFS does not expect any animals to be killed, and NMFS is not proposing to authorize any mortality (severe lung injury) incidental to the Navy's NSWC PCD mission activities.

Background of Navy Request

The proposed rule contains a description of the Navy's mission, their responsibilities pursuant to Title 10 of the United States Code, and the specific purpose and need for the activities for which they requested incidental take authorization. The description contained in the proposed rule has not changed (74 FR 20156; April 30, 2009; pages 20156–20157).

Description of the Specified Activities

The proposed rule contains a complete description of the Navy's specified activities that are covered by these final regulations, and for which the associated incidental take of marine mammals will be authorized in the related LOAs. The proposed rule describes the nature and levels of the RDT&E activities. These RDT&E activities consist of surface operations, sonar operations, and ordnance operations. The narrative description of the action contained in the proposed rule has not changed. Tables 1 and 2 summarize the nature and levels of the sonar and ordnance operations. The level of the surface operations remains 7,443 hours per year, and is qualitatively described in the proposed rule (74 FR 20157; April 30, 2009) with no changes.

TABLE 1—HOURS OF SONAR OPERATIONS BY REPRESENTATIVE SYSTEM PER YEAR

System	Annual operating hours (territorial water)	Annual operating hours (non-territorial water)
AN/SQS–53/56 Kingfisher	3	1
Sub-bottom profiler (2–9 kHz)	21	1
REMUS SAS–LF	12	0
REMUS Modem	25	12
Sub-bottom profiler (2–16 kHz)	24	1
AN/SQQ–32	30	1
REMUS–SAS–LF	20	0
SAS–LF	35	15
AN/WLD–1 RMS–ACL	33.5	5
BPAUV Sidescan	25	38
TVSS	15	16.5
F84Y	15	15
BPAUV Sidescan	25	0
REMUS–SAS–HF	10	25
SAS–HF	11.5	15
AN/AQS–20	545	15
AN/WLD–11 RMS Navigation	15	0
BPAUV Sidescan	30	25

Table 2. Description of NSWC PCD Proposed Action

	Territorial Waters							Non-Territorial Waters							Total
Sonar Ops (hrs/yr)	Mid (1-10 kHz)			High (>10 kHz)				Mid (1-10 kHz)				High (>10 kHz)			Hrs/yr
	73			822				4				181			1,080*
Ordnance Ops (dets/yr) (line/yr)	Detonations							Detonations							Item/yr
	Range 1 (0-10 lb) (dets/yr)		Range 2 (11-75 lb) (dets/yr)		Range 3 (76-600 lb) (dets/yr)			Range 1 (0-10 lb) (dets/yr)		Range 2 (11-75 lb) (dets/yr)		Range 3 (76-600 lb) (dets/yr)			Item/yr
	51		3		0			0		0		16			70
	Line charges**							Line charges**							Item/yr
	3							0							3
Projectile firing (rnds/yr)	5 in	40 mm	30 mm	20 mm	76 mm	25 mm	Small arms	5 in	40 mm	30 mm	20 mm	76 mm	25 mm	Small arms	Item/yr
	0	0	0	0	0	0	0	60	480	600	2,967	240	525	6,000	10,872

dets = detonations; hrs = hours; lb = pounds; rnds = rounds; ops = operations; yr = year; kHz = kilohertz; kg = kilogram

*An additional 150 hours (144 territorial hrs/6 non-territorial hours) for jamming and mechanical minesweeping devices occurring over broad frequency ranges are not included in this estimate. These systems were not included in the analysis because no power source is used to generate the acoustic output and the mechanical device generates the acoustic output similar to Navy vessels. Movement of vessels through the water is not associated with acoustic impact on marine mammals; mechanical devices would not affect marine mammals.

**Line charges = 794 kg (1,750 lb) net explosive weight, which is evenly distributed along a 107-m (350-ft) detonation cord.

Description of Marine Mammals in the Area of the Specified Activities

There are 30 marine mammal species with possible or confirmed occurrence in the NSWC PCD Study Area. As indicated in Table 3, there are 29 cetacean species (7 mysticetes and 22 odontocetes) and one sirenian species. Table 3 also includes the federal status of these marine mammal species. Seven marine mammal species listed as federally endangered under the Endangered Species Act (ESA) occur in the study area: the humpback whale, North Atlantic right whale, sei whale, fin whale, blue whale, sperm whale, and West Indian manatee. Of these 30 species with occurrence records in the NSWC PCD Study Area, 22 species regularly occur here. These 22 species are: Bryde's whale, sperm whale, pygmy sperm whale, dwarf sperm whale, Cuvier's beaked whale, Gervais' beaked whale, Sowerby's beaked whale, Blainville's beaked whale, killer whale, false killer whale, pygmy killer whale, short-finned pilot whale, Risso's dolphin, melon-headed whale, rough-toothed dolphin, bottlenose dolphin, Atlantic spotted dolphin, pantropical spotted dolphin, striped dolphin, spinner dolphin, Clymene dolphin, and Fraser's dolphin. The remaining 8 species (i.e., North Atlantic right whale, humpback whale, sei whale, fin whale, blue whale, minke whale, True's beaked whale, and West Indian manatee) are extralimital and are excluded from further consideration of impacts from the NSWC PCD testing mission. The Description of Marine Mammals in the Area of the Specified Activities section has not changed from what was in the proposed rule (74 FR 20156; pages 20160–20161).

TABLE 3—MARINE MAMMAL SPECIES FOUND IN THE NSWC PCD STUDY AREA

Family and scientific name	Common name	Federal status
Order Cetacea		
Suborder Mysticeti (baleen whales)		
Eubalaena glacialis	North Atlantic right whale	Endangered.
Megaptera novaeangliae	Humpback whale	Endangered.
Balaenoptera acutorostrata	Minke whale.	
B. brydei	Bryde's whale.	
B. borealis	Sei whale	Endangered.
B. physalus	Fin whale	Endangered.
B. musculus	Blue whale	Endangered.
Suborder Odontoceti (toothed whales)		
Physeter macrocephalus	Sperm whale	Endangered.
Kogia breviceps	Pygmy sperm whale.	
K. sima	Dwarf sperm whale.	
Ziphius cavirostris	Cuvier's beaked whale.	
Mesoplodon europaeus	Gervais' beaked whale.	
M. mirus	True's beaked whale.	
M. bidens	Sowerby's beaked whale.	
M. densirostris	Blainville's beaked whale.	

TABLE 3—MARINE MAMMAL SPECIES FOUND IN THE NSWC PCD STUDY AREA—Continued

Family and scientific name	Common name	Federal status
Steno bredanensis	Rough-toothed dolphin	
Tursiops truncatus	Bottlenose dolphin.	
Stenella attenuate	Pantropical spotted dolphin.	
S. frontalis	Atlantic spotted dolphin.	
S. longirostris	Spinner dolphin.	
S. clymene	Clymene dolphin.	
S. coeruleoalba	Striped dolphin.	
Lagenodephis hosei	Fraser's dolphin.	
Grampus griseus	Risso's dolphin.	
Peponocephala electra	Melon-headed whale.	
Feresa attenuate	Pygmy killer whale.	
Pseudorca crassidens	False killer whale.	
Orcinus orca	Killer whale.	
G. macrorhynchus	Short-finned pilot whale.	
Order Sirenia		
Trichechus manatus	West Indian manatee	Endangered.

A Brief Background on Sound

An understanding of the basic properties of underwater sound is necessary to comprehend many of the concepts and analyses presented in this document. A detailed description of this topic was provided in the proposed rule (74 FR 20156; pages 20161–20162) and is, therefore, not repeated herein.

Potential Impacts to Marine Mammal Species

With respect to the MMPA, NMFS' effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment (behavioral harassment), Level A Harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities in the NSWC PCD Study Area); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Potential Impacts to Marine Mammal Species section of the proposed rule, NMFS included a qualitative discussion of the different ways that sonar and underwater explosive detonations from ordnance operations and projectile firing may potentially affect marine mammals (See 74 FR 20156; April 30, 2009; pages 20162–20178). Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. The information contained in Potential Impacts to Marine Mammal Species section from sonar operations and underwater detonation from ordnance operations and projectile firing from the proposed rule has not changed.

Additional analyses on potential impacts to marine mammals from vessel movement within the NSWC PCD Study Area are added below.

Vessel Movement

There are limited data concerning marine mammal behavioral responses to vessel traffic and vessel noise, and a lack of consensus among scientists with respect to what these responses mean or whether they result in short-term or long-term adverse effects. In those cases where there is a busy shipping lane or where there is large amount of vessel traffic, marine mammals may experience acoustic masking (Hildebrand, 2005) if they are present in the area (e.g., killer whales in Puget Sound; Foote *et al.,* 2004; Holt *et al.,* 2008). In cases where vessels actively approach marine mammals (e.g., whale watching or dolphin watching boats), scientists have documented that animals exhibit altered behavior such as increased swimming speed, erratic movement, and active avoidance behavior (Bursk, 1983; Acevedo, 1991; Baker and MacGibbon, 1991; Trites and Bain, 2000; Williams *et al.,* 2002; Constantine *et al.,* 2003), reduced blow interval (Ritcher *et al.,* 2003), disruption of normal social behaviors (Lusseau, 2003; 2006), and the shift of behavioral activities which may increase energetic costs (Constantine *et al.,* 2003; 2004)). A detailed review of marine mammal reactions to ships and boats is available in Richardson *et al.* (1995). For each of the marine mammal's taxonomy groups, Richardson *et al.* (1995) provided the following assessment regarding cetacean reactions to vessel traffic:

Toothed whales: "In summary, toothed whales sometimes show no avoidance reaction to vessels, or even approach them. However, avoidance can occur, especially in response to vessels of types used to chase or hunt the animals. This may cause temporary displacement, but we know of no clear evidence that toothed whales have abandoned significant parts of their range because of vessel traffic."

Baleen whales: "When baleen whales receive low-level sounds from distant or stationary vessels, the sounds often seem to be ignored. Some whales approach the sources of these sounds. When vessels approach whales slowly and nonaggressively, whales often exhibit slow and inconspicuous avoidance maneuvers. In response to strong or rapidly changing vessel noise, baleen whales often interrupt their normal behavior and swim rapidly away. Avoidance is especially strong when a boat heads directly toward the whale."

It is important to recognize that behavioral responses to stimuli are complex and influenced to varying degrees by a number of factors such as species, behavioral contexts, geographical regions, source characteristics (moving or stationary, speed, direction, etc.), prior experience of the animal, and physical status of the animal. For example, studies have shown that beluga whales reacted differently when exposed to vessel noise and traffic. In some cases, naïve beluga

whales exhibited rapid swimming from ice-breaking vessels up to 80 km away, and showed changes in surfacing, breathing, diving, and group composition in the Canadian high Arctic where vessel traffic is rare (Finley *et al.,* 1990). In other cases, beluga whales were more tolerant of vessels, but differentially responsive by reducing their calling rates, to certain vessels and operating characteristics (especially older animals) in the St. Lawrence River where vessel traffic is common (Blane and Jaakson, 1994). In Bristol Bay, Alaska, beluga whales continued to feed when surrounded by fishing vessels and resisted dispersal even when purposefully harassed (Fish and Vania, 1971).

In reviewing more than 25 years of whale observation data, Watkins (1986) concluded that whale reactions to vessel traffic were "modified by their previous experience and current activity: Habituation often occurred rapidly, attention to other stimuli or preoccupation with other activities sometimes overcame their interest or wariness of stimuli." Watkins noticed that over the years of exposure to ships in the Cape Cod area, minke whales (*Balaenoptera acutorostrata*) changed from frequent positive (such as approaching vessels) interest to generally uninterested reactions; finback whales (*B. physalus*) changed from mostly negative (such as avoidance) to uninterested reactions; right whales (*Eubalaena glacialis*) apparently continued the same variety of responses (negative, uninterested, and positive responses) with little change; and humpbacks (*Megaptera novaeangliae*) dramatically changed from mixed responses that were often negative to often strongly positive reactions. Watkins (1986) summarized that "whales near shore, even in regions with low vessel traffic, generally have become less wary of boats and their noises, and they have appeared to be less easily disturbed than previously. In particular locations with intense shipping and repeated approaches by boats (such as the whale-watching areas of Stellwagen Bank), more and more whales had P [positive] reactions to familiar vessels, and they also occasionally approached other boats and yachts in the same ways."

In the case of the NSWC PCD Study Area, naval vessel traffic is expected to be much lower than in areas where there are large shipping lanes and large numbers of fishing vessels and/or recreational vessels. Nevertheless, the proposed action area is well traveled by a variety of commercial and recreational vessels, so marine mammals in the area are expected to be habituated to vessel noise.

As described in the proposed rule, typical vessel movement occurring at the surface includes the deployment or towing of mine counter-measure equipment, retrieval of equipment, and clearing and monitoring for non-participating vessels. The Navy estimates a total of up to 7,443 hours (310 vessel days) of surface operations per year. These operations are widely dispersed throughout the NSWC PCD Study Area.

Moreover, naval vessels transiting the study area or engaging in RDT&E activities will not actively or intentionally approach a marine mammal or change speed drastically.

The final rule contains additional mitigation measures requiring Navy vessels to keep at least 500 yards (460 m) away from any observed whale and at least 200 yards (183 m) from marine mammals other than whales, and avoid approaching animals head-on. Although the radiated sound from the vessels will be audible to marine mammals over a large distance, it is unlikely that animals will respond behaviorally to low-level distant shipping noise as the animals in the area are likely to be habituated to such noises (Nowacek *et al.,* 2004). In light of these facts, NMFS does not expect the Navy's vessel movements to result in Level B harassment.

Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must prescribe regulations setting forth the "permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance." The NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that "least practicable adverse impact" shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the "military readiness activity." The NSWC PCD's RDT&E activities are considered military readiness activities.

NMFS reviewed the Navy's proposed NSWC PCD's RDT&E activities and the proposed NSWC PCD's mitigation measures presented in the Navy's application to determine whether the activities and mitigation measures were capable of achieving the least practicable adverse effect on marine mammals.

Any mitigation measure prescribed by NMFS should be known to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals (2), (3), and (4) may contribute to this goal).

(2) A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to (1), above, or to reducing harassment takes only).

(3) A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to (1), above, or to reducing harassment takes only).

(4) A reduction in the intensity of exposures (either total number or number at biologically important time or location) to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to (1), above, or to reducing the severity of harassment takes only).

(5) A reduction in adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation (shut-down zone, etc.).

NMFS reviewed the Navy's proposed mitigation measures, which included a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the "military-readiness activity."

The Navy's proposed mitigation measures were described in detail in the proposed rule (74 FR 20156, pages 20183–20185). The Navy's measures address personnel training, lookout and watchstander responsibilities, operating procedures for RDT&E activities using sonar and underwater detonations of explosives and projectile firing, and

mitigation related to vessel traffic. No changes have been made to the mitigation measures described in the proposed rule except the following.

In the Personnel Training section, bullet number 3 is revised to read as:

• Marine Observers shall be trained in marine mammal recognition. Marine Observer training shall include completion of the Marine Species Awareness Training, instruction on governing laws and policies, and overview of the specific Gulf of Mexico species present, and observer roles and responsibilities.

This change is to reflect the NSWC PCD's RDT&E activities that use Marine Observers instead of watchstanders and lookouts in the range complexes training. In addition, a Personal Qualification Standard Program mentioned in the proposed rule (74 FR 20156; April 30, 2009; page 20184) does not exist for civilian Marine Observers.

In response to a comment from the Marine Mammal Commission on the Navy's Virginia Capes Range Complex training activities, NMFS will require the Navy to suspend its activities immediately if a marine mammal is injured or killed as a result of the proposed Navy RDT&E activities (*e.g.,* instances in which it is clear that munitions explosions caused the injury or death), the Navy shall suspend its activities immediately and report such incident to NMFS.

In addition, a general condition is added to the Operating Procedures section to read: "The Test Director or the Test Director's designee shall maintain the logs and records documenting RDT&E activities should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a RDT&E mission activity."

Also, since the term "Aircraft Control Units" is a fleet specific term and is not used during RDT&E activities, bullet number 7 of the Operating Procedures section in the proposed rule (74 FR 20156; April 30, 2009; page 20184) has been changed to read:

• Marine mammal detections shall be immediately reported to the Test Director or the Test Director's designee for further dissemination to vessels in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the vessel will likely result in a closing of the distance to the detected marine mammal.

The following conditions under the Operating Procedures section, which appeared in the proposed rule (74 FR 20156; April 30, 2009; page 20184), have been removed because the Navy indicated that sonobuoys and helicopter dipping sonar are no longer part of the NSWC PCD RDT&E activities.

• Aircraft with deployed sonobuoys will use only the passive capability of sonobuoys when marine mammals are detected within 200 yards of the sonobuoy.

• Helicopters shall observe/survey the vicinity of mission activities for 10 minutes before the first deployment of active (dipping) sonar in the water.

• Helicopters shall not dip their sonar within 200 yards (183 m) of a marine mammal and shall cease pinging if a marine mammal closes within 200 yards (183 m) after pinging has begun.

The section titled "Proposed Mitigation Measures for Surface Operations and Other Activities" is changed to "Proposed Mitigation Measures for Surface Operations" to clarify the section (74 FR 20156; April 30, 2009; page 20185). One condition under this section, "(h) All vessels will maintain logs and records documenting RDT&E activities should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a RDT&E mission activity," is deleted as the Navy points out that small vessels do not have the capability to maintain records. Instead, RDT&E activity records will be maintained by the Test Directors as discussed above.

NMFS has determined that these mitigation measures are adequate means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat while also considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Monitoring

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for LOAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(1) An increase in the probability of detecting marine mammals, both within the safety zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below.

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of HFAS/MFAS (or explosives or other stimuli) that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS.

(3) An increase in our understanding of how marine mammals respond to HFAS/MFAS (at specific received levels), explosives, or other stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

• Behavioral observations in the presence of HFAS/MFAS compared to observations in the absence of sonar (need to be able to accurately predict received level and report bathymetric conditions, distance from source, and other pertinent information).

• Physiological measurements in the presence of HFAS/MFAS compared to observations in the absence of sonar (need to be able to accurately predict received level and report bathymetric conditions, distance from source, and other pertinent information), and/or

• Pre-planned and thorough investigation of stranding events that occur coincident to naval activities.

• Distribution and/or abundance comparisons in times or areas with concentrated HFAS/MFAS versus times or areas without HFAS/MFAS.

(4) An increased knowledge of the affected species.

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

Monitoring Plan for the NSWC PCD Study Area

As NMFS indicated in the proposed rule, the Navy has (with input from NMFS) fleshed out the details of and made improvements to the NSWC PCD Monitoring Plan. Additionally, NMFS and the Navy have incorporated a suggestion from the public, which recommended the Navy hold a peer review workshop to discuss the Navy's Monitoring Plans for the multiple range complexes and training exercises in which the Navy would receive ITAs (see Monitoring Workshop section). The final NSWC PCD Monitoring Plan, which is summarized below, may be viewed at *http://www.nmfs.noaa.gov/*

pr/permits/incidental.htm#applications. The Navy plans to implement all of the components of the Monitoring Plan; however, only the marine mammal components (not the sea turtle components) will be required by the MMPA regulations and associated LOAs.

A summary of the monitoring methods required for use during RDT&E activities in the NSWC PCD Study Area are described below. These methods include a combination of individual elements that are designed to allow a comprehensive assessment.

Visual Surveys—Vessel, Aerial and Shore-Based

The Navy shall visually survey a minimum of 2 HFAS/MFAS activities and 2 explosive events per year. If the 53C sonar was being operated, such activity must be monitored as one of the HFAS/MFAS activities. For explosive events, one of the monitoring measures shall be focused on a multiple detonation event.

For underwater detonations, the size of the survey area shall be pre-determined based upon the type of explosive event planned and the amount of NEW used. As a conservative measure, the largest zone of influence (ZOI) associated with the upper limit of each NEW shall be surveyed during the RDT&E activities. For example, the Navy would be required to observe the following ZOIs and ensure they are clear of marine mammals prior to conducting explosive ordnance RDT&E activities: 2,863 m for NEW between 76–600 lb; 997 m for NEW between 11–75 lb; and 345 m for NEW less than 11 lb.

If animal(s) are observed prior to or during an explosion, a focal follow of that individual or group shall be conducted to record behavioral responses. The Navy will not begin activities if animals are observed within these ZOIs of the events listed above.

The visual survey team shall collect the same data that are collected by Navy marine observers, including but not limited to: (1) Location of sighting; (2) species; (3) number of individuals; (4) number of calves present, if any; (5) duration of sighting; (6) behavior of marine animals sighted; (7) direction of travel; (8) environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and (9) when in relation to the Navy RDT&E activities did the sighting occur (before, during or after RDT&E activities). Animal sightings and relative distance from a particular detonation site shall be used post-survey to estimate the number of marine mammals exposed to different received levels (energy and pressure of discharge based on distance to the source, bathymetry, oceanographic conditions and the type and size of detonation) and their corresponding behavior. For vessel-based surveys a passive acoustic system (hydrophone or towed array) or sonobuoys shall be used if operationally feasible to help determine if marine mammals are in the area before and after a detonation event.

Although photo-identification studies are not typically a component of Navy exercise monitoring surveys, the Navy supports using the contracted platforms to obtain opportunistic data collection. Therefore, any digital photographs that are taken of marine mammals during visual surveys shall be provided to local researchers for their regional research.

1. Aerial Surveys

During sonar operations, an aerial survey team shall fly transects relative to a Navy surface vessel that is transmitting HFA/MFA sonar. The aerial survey team shall collect both visual sightings and behavioral observations of marine animals. These transect data will provide an opportunity to collect data of marine mammals at different received levels and their behavioral responses and movement relative to the Navy vessel's position. Surveys shall include time with and without active sonar in order to compare density, geographical distribution and behavioral observations. After declassification, related sonar transmissions shall be used to calculate exposure levels.

Behavioral observation methods shall involve three professionally trained marine mammal observers and a pilot. Two observers will observe behaviors, one with hand-held binoculars and one with the naked eye. If there is more than one whale, each observer shall record respirations of different animals, ideally from the same animal he/she is observing. In the case of large groups of delphinids, group behavior, speed, orientation, etc., shall be recorded. An observer shall use a video camera to record behaviors in real time. Two external microphones will be used and attached to the video camera to record vocal behavioral descriptions on two different channels of the video camera. The videotape shall be time-stamped and observers shall also call out times. The third observer shall record notes, environmental data, and operate a laptop connected to a GPS and the plane's altimeter.

Detailed behavioral focal observations of cetaceans shall be recorded, including the following variables where possible: Species, group size and composition (number of calves, etc.), latitude/longitude, surface and dive durations and times, number and spacing/times of respirations, conspicuous behaviors (*e.g.,* breach, tail slap, etc.), behavioral states, orientation and changes in orientation, estimated group travel speed, inter-individual distances, defecations, social interactions, aircraft speed, aircraft altitude, distance to focal group (using the plane's radar) and any unusual behaviors.

In addition, to measure whether marine mammals are displaced geographically as a result of sonar operations, systematic line-transect aerial surveys shall be conducted on the two days before and a variation of one to five days after a NSWC PCD RDT&E testing activity to collect relative density data in the testing area for marine mammals in the area. Attempts shall be made to survey during a test event when operationally feasible during the NSWC PCD RDT&E activities. One survey day following the mission activity event shall be devoted to flying coastlines nearest the mission event to look for potential marine mammal strandings. If a stranding is observed, an assessment of the animal's condition (alive, injured, dead, and/or decayed) shall be immediately reported to the Navy for appropriate action and the information will be transmitted immediately to NMFS.

2. Vessel Surveys

As with the aerial surveys, the vessel surveys shall be designed to maximize detections of any target species near mission activity events for focal follows. Systematic transects shall be used to locate marine mammals, and, the survey should deviate from transect protocol to collect behavioral data particularly if a Navy vessel is visible on the horizon or closer. The team shall go off effort for photo-id and close approach 'focal animal follows' as feasible, and when marine animal encounters occur in proximity to the vessel. While in focal follow mode, observers shall gather detailed behavioral data from the animals, for as long as the animal allows. Analysis of behavioral observations shall be made after the RDT&E event. While the Navy vessels are within view, attempts shall be made to position the dedicated survey vessel in the best possible way to obtain focal follow data in the presence of the NSWC PCD test event. If Navy vessels are not in view, then the vessel shall begin a systematic line transect survey within the area to assess marine mammal

occurrence and observe behavior. The goal of this part of the survey is to observe marine mammals that may not have been exposed to HFAS/MFAS or explosions. Therefore, post-analysis shall focus on how the location, speed and vector of the survey vessel and the location and direction of the sonar source (*e.g.* Navy surface vessel) relates to the animal. Any other vessels or aircraft observed in the area will also be documented.

3. Shore-Based Surveys

If explosive events are planned to occur adjacent to nearshore areas where there are elevated coastal structures (e.g. lookout tower at Eglin Air Force Base) or topography, then shore-based monitoring, using binoculars or theodolite, may be used to augment other visual survey methods.

Passive Acoustic Monitoring

The Navy shall visually survey a minimum of 2 HFAS/MFAS activities and 2 explosive events per year. If the 53C sonar was being operated, such activity must be monitored as one of the HFAS/MFAS activities. For explosive events, one of the monitoring measures shall be focused on a multiple detonation event.

While conducting passive acoustic monitoring (PAM), the array shall be deployed for each of the days the ship is at sea. The array shall be able to detect low frequency vocalizations (less than 1,000 Hertz) for baleen whales and relatively high frequency vocalizations (up to 30 kilohertz) for odontocetes such as sperm whales. Since the publishing of the proposed rule (74 FR 20156; April 30, 2009; page 20188), the Navy stated that it does not have a working bottom set hydrophone array to perform the required PAM. Therefore, the language regarding the equipment used for PAM is changed to: 'The Navy shall use towed or over-the-side passive acoustic monitoring device/hydrophone array when feasible in the NSWC PCD Study Area for PAM.'

Marine Mammal Observer on Navy Vessels

Civilian Marine Mammal Observers (MMOs) aboard Navy vessels shall be used to research the effectiveness of Navy marine observers, as well as for data collection during other monitoring surveys.

MMOs shall be field-experienced observers who are Navy biologists or contracted observers. These civilian MMOs shall be placed alongside existing Navy marine observers during a sub-set of NSWC PCD RDT&E activities. This can only be done on certain vessels and observers may be required to have security clearance. Use of MMOs will verify Navy marine observer sighting efficiency, offer an opportunity for more detailed species identification, provide an opportunity to bring animal protection awareness to the vessels' crew, and provide the opportunity for an experienced biologist to collect data on marine mammal behavior. Data collected by the MMOs is anticipated to assist the Navy with potential improvements to marine observer training as well as providing the marine observers with a chance to gain additional knowledge of marine mammals.

Events selected for MMO participation will be an appropriate fit in terms of security, safety, logistics, and compatibility with NSWC PCD RDT&E activities. The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts and Navy marine observers shall follow their chain of command in reporting marine mammal sightings. Exceptions shall be made if an animal is observed by the MMO within the shutdown zone and was not seen by the Navy marine observer. The MMO shall inform the marine observer of the sighting so that appropriate action may be taken by the chain of command. For less biased data, it is recommended that MMOs should schedule their daily observations to duplicate the Navy marine observers' schedule.

Civilian MMOs shall be aboard Navy vessels involved in the study. As described earlier, MMOs shall meet and adhere to necessary qualifications, security clearance, logistics and safety concerns. MMOs shall monitor for marine mammals from the same height above water as the marine observers and as all visual survey teams, they shall collect the same data collected by Navy marine observers, including but not limited to: (1) Location of sighting; (2) species (if not possible, identification of whale or dolphin); (3) number of individuals; (4) number of calves present, if any; (5) duration of sighting; (6) behavior of marine animals sighted; (7) direction of travel; (8) environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and (9) when in relation to the Navy RDT&E activities did the sighting occur (before, during or after detonations/exercise).

Monitoring Workshop

During the public comment period on past proposed rules for Navy actions (such as the Hawaii Range Complex (HRC) and Southern California Range Complex (SOCAL) proposed rules), NMFS received recommendations that a workshop or panel be convened to solicit input on the monitoring plan from researchers, experts, and other interested parties. The NSWC PCD RDT&E proposed rule included an adaptive management component and both NMFS and the Navy believe that a workshop would provide a means for Navy and NMFS to consider input from participants in determining whether (and if so, how) to modify monitoring techniques to more effectively accomplish the goals of monitoring set forth earlier in the document. NMFS and the Navy believe that this workshop is valuable in relation to all of the Range Complexes and major training exercise rules and LOAs that NMFS is working on with the Navy at this time, and consequently this single Monitoring Workshop will be included as a component of all of the rules and LOAs that NMFS will be processing for the Navy in the next year or so.

The Navy, with guidance and support from NMFS, will convene a Monitoring Workshop, including marine mammal and acoustic experts as well as other interested parties, in 2011. The Monitoring Workshop participants will review the monitoring results from the previous two years of monitoring pursuant to the NSWC PCD RDT&E rule as well as monitoring results from other Navy rules and LOAs (*e.g.,* AFAST, SOCAL, HRC, and other rules). The Monitoring Workshop participants would provide their individual recommendations to the Navy and NMFS on the monitoring plan(s) after also considering the current science (including Navy research and development) and working within the framework of available resources and feasibility of implementation. NMFS and the Navy would then analyze the input from the Monitoring Workshop participants and determine the best way forward from a national perspective. Subsequent to the Monitoring Workshop, modifications would be applied to monitoring plans as appropriate.

Integrated Comprehensive Monitoring Program

In addition to the site-specific Monitoring Plan for the NSWC PCD Study Area, the Navy has completed the Integrated Comprehensive Monitoring Program (ICMP) Plan by the end of 2009. The ICMP was developed by the Navy, with Chief of Naval Operations Environmental Readiness Division (CNO–N45) taken the lead. The program does not duplicate the monitoring plans

for individual areas (*e.g.* AFAST, HRC, SOCAL); instead it is to provide the overarching coordination that will support compilation of data from both range-specific monitoring plans as well as Navy funded research and development (R&D) studies. The ICMP will coordinate the monitoring program's progress towards meeting its goals and developing a data management plan. The ICMP will be evaluated annually to provide a matrix for progress and goals for the following year, and will make recommendations on adaptive management for refinement and analysis of the monitoring methods.

The primary objectives of the ICMP are to:

- Monitor and assess the effects of Navy activities on protected species;
- Ensure that data collected at multiple locations is collected in a manner that allows comparison between and among different geographic locations;
- Assess the efficacy and practicality of the monitoring and mitigation techniques;
- Add to the overall knowledge-base of marine species and the effects of Navy activities on marine species.

The ICMP will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander/marine observer data, as well as new information from other Navy programs (*e.g.,* R&D), and other appropriate newly published information.

In combination with the 2011 Monitoring Workshop and the adaptive management component of the NSWC PCD RDT&E rule and the other planned Navy rules (*e.g.* Virginia Capes Range Complex, Jacksonville Range Complex, Cherry Point Range Complex, etc.), the ICMP could potentially provide a framework for restructuring the monitoring plans and allocating monitoring effort based on the value of particular specific monitoring proposals (in terms of the degree to which results would likely contribute to stated monitoring goals, as well as the likely technical success of the monitoring based on a review of past monitoring results) that have been developed through the ICMP framework, instead of allocating based on maintaining an equal (or commensurate to effects) distribution of monitoring effort across range complexes.

The ICMP will identify:

- A means by which NMFS and the Navy would jointly consider prior years' monitoring results and advancing science to determine if modifications are needed in mitigation or monitoring measures to better effect the goals laid out in the Mitigation and Monitoring sections of the NSWC PCD RDT&E rule.
- Guidelines for prioritizing monitoring projects
- If, as a result of the workshop and similar to the example described in the paragraph above, the Navy and NMFS decide it is appropriate to restructure the monitoring plans for multiple ranges such that they are no longer evenly allocated (by rule), but rather focused on priority monitoring projects that are not necessarily tied to the geographic area addressed in the rule, the ICMP will be modified to include a very clear and unclassified record-keeping system that will allow NMFS and the public to see how each range complex/project is contributing to all of the ongoing monitoring programs (resources, effort, money, etc.).

Adaptive Management

The final regulations governing the take of marine mammals incidental to Navy's NSWC PCD RDT&E activities contain an adaptive management component. The use of adaptive management will give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy) on an annual basis if mitigation or monitoring measures should be modified or added (or deleted) if new data suggests that such modifications are appropriate (or are not appropriate) for subsequent annual LOAs.

The following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from NSWC PCD Study Area or other locations)
- Findings of the Workshop that the Navy will convene in 2011 to analyze monitoring results to date, review current science, and recommend modifications, as appropriate to the monitoring protocols to increase monitoring effectiveness
- Compiled results of Navy funded research and development (R&D) studies.
- Results from specific stranding investigations (either from NSWC PCD Study Area or other locations)
- Results from general marine mammal and sound research (funded by the Navy or otherwise)
- Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization

Mitigation measures could be modified or added (or deleted) if new data suggests that such modifications would have (or do not have) a reasonable likelihood of accomplishing the goals of mitigation laid out in this final rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to (or delete) the existing monitoring requirements if the new data suggest that the addition of (or deletion of) a particular measure would more effectively accomplish the goals of monitoring laid out in this final rule. The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data and issue annual LOAs. NMFS and the Navy will meet annually, prior to LOA issuance, to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking". Effective reporting is critical to ensure compliance with the terms and conditions of a LOA, and to provide NMFS and the Navy with data of the highest quality based on the required monitoring. As NMFS noted in its proposed rule, additional detail has been added to the reporting requirements since they were outlined in the proposed rule. The updated reporting requirements are all included below. A subset of the information provided in the monitoring reports may be classified and not releasable to the public.

General Notification of Injured or Dead Marine Mammals

Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as operational security allows) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy RDT&E activities utilizing underwater explosive detonations or other activities. The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

Annual Report

The NSWC PCD shall submit a report annually on October 1 describing the RDT&E activities conducted and implementation and results of the NSWC PCD Monitoring Plan (through August 1 of the same year) and RDT&E activities. The report will, at a minimum, include the following information:

(1) RDT&E Information

- Date and time test began and ended.
- Location.
- Number and types of active sources used in the test.
- Number and types of vessels, aircraft, etc., participated in the test.
- Number and types of underwater detonations.
- Total hours of observation effort (including observation time when sonar was not operating).
- Total hours of all active sonar source operation.
- Total hours of each active sonar source.
- Wave height (high, low, and average during the test).

(2) Individual Marine Mammal Sighting Info

- Location of sighting.
- Species.
- Number of individuals.
- Calves observed (y/n).
- Initial detection sensor.
- Indication of specific type of platform observation made from.
- Length of time observers maintained visual contact with marine mammal(s).
- Wave height (in feet).
- Visibility.
- Sonar source in use (y/n).
- Indication of whether animal is < 200 yd, 200–500 yd, 500–1,000 yd, 1,000–2,000 yd, or > 2,000 yd from sonar source above.
- Mitigation implementation—Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was.
- If the active MFAS in use is hull mounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel).
- Observed behavior—Marine observers shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.).
- An evaluation of the effectiveness of mitigation measures designed to avoid exposing marine mammals to mid-frequency sonar. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

NSWC PCD 5-Yr Comprehensive Report

The Navy will submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during HFAS/MFAS and underwater detonation related mission activities for which annual reports are required as described above. This report will be submitted at the end of the fourth year of the rule (October 2013), covering activities that have occurred through May 1, 2013. The Navy will respond to NMFS comments on the draft comprehensive report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments, or three months after the submittal of the draft if NMFS does not comment by then.

Comments and Responses

On April 30, 2009, NMFS published a proposed rule (74 FR 20156) in response to the Navy's request to take marine mammals incidental to conducting RDT&E activities in the NSWC PCD Study Area and requested comments, information and suggestions concerning the request. During the 30-day public comment period, NMFS received comments from 1 private citizen and comments from the Marine Mammal Commission (Commission). The comments are addressed below.

MMPA Concerns

Comment 1: The Commission recommends that NMFS require the Navy to conduct an external peer review of its marine mammal density estimates, including the data upon which those estimates are based and the manner in which those are collected and used.

Response: As discussed in detail in the proposed rule (74 FR 20156, April 30, 2009), marine mammal density estimates were based on the data gathered in the Marine Resource Assessments (MRAs). The Navy MRA Program was implemented by the Commander, Fleet Forces Command, to initiate collection of data and information concerning the protected and commercial marine resources found in the Navy's Operating Areas (OPAREAs). Specifically, the goal of the MRA program is to describe and document the marine resources present in each of the Navy's OPAREAs. The MRA for the NSWC PCD, which includes Pensacola and Panama City OPAREAs, was recently updated in 2007 (DoN, 2008).

Density estimates for cetaceans were derived in one of three ways, in order of preference: (1) Through spatial models using line-transect survey data provided by the NMFS (as discussed below); (2) using abundance estimates from Mullin and Fulling (2004); or (3) based on the cetacean abundance estimates found in the NMFS stock assessment reports (SAR; Waring *et al.,* 2007), which can be viewed at *http://www.nmfs.noaa.gov/pr/sars/species.htm.* For the model-based approach, density estimates were calculated for each species within areas containing survey effort. A relationship between these density estimates and the associated environmental parameters such as depth, slope, distance from the shelf break, sea surface temperature, and chlorophyll a concentration was formulated using generalized additive models. This relationship was then used to generate a two-dimensional density surface for the region by predicting densities in areas where no survey data exist.

The analyses for cetaceans were based on sighting data collected through shipboard surveys conducted by NMFS Northeast Fisheries Science Center (NEFSC) and Southeast Fisheries Science Center (SEFSC) between 1998 and 2005. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the most current NMFS SAR to ensure consistency. All spatial models and density estimates were reviewed by and coordinated with NMFS Science Center technical staff and scientists with the University of St. Andrews, Scotland, Centre for Environmental and Ecological Modeling (CREEM). Draft models and preliminary results were reviewed during a joint workshop attended by Navy, NMFS Science Center, and CREEM representatives. Subsequent revisions and draft reports were reviewed by these same parties. Therefore, NMFS considers that the density estimates, including the data upon which those estimates are based and the manner in which those are collected and used, has already gone through an independent review process.

Monitoring and Mitigation

Comment 2: The Commission recommends the Navy provide additional details concerning its Integrated Comprehensive Monitoring Program, including an estimated time frame for its implementation.

Response: The Navy has developed the ICMP Plan and will distribute it to

the Commission and other interested parties. The components of the ICMP Plan that were considered and incorporated into the final rules for the NSWC PCD include:

- A requirement to monitor Navy's RDT&E activities, particularly those involving sonar and underwater detonations, for compliance with the terms and conditions of ESA Section 7 consultations or MMPA authorizations;
- A requirement to minimize exposure of protected species from sound pressure levels from sonar and underwater detonations that result in harassment;
- A requirement to collect data to support estimating the number of individual marine mammals exposed to sound levels above current regulatory thresholds;
- A requirement to assess the adequacy of the Navy's current marine species mitigation;
- A requirement to document trends in species distribution and abundance in Navy mission activity areas through monitoring efforts;
- A requirement to compile data that would improve the Navy and NMFS' knowledge of the potential behavioral and physiological effects to marine species from sonar and underwater detonations.

The ICMP Plan will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy range complexes and exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander (lookout) data, as well as new information from other Navy programs (*e.g.,* research and development), and newly published non-Navy information. The ICMP Plan is described in the Navy's EIS and LOA application.

Comment 3: The Commission recommends that NMFS require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning or in conjunction with operations covered by the proposed incidental take authorization.

Response: NMFS has been working with the Navy throughout the rulemaking process to develop a series of mitigation, monitoring, and reporting protocols. These mitigation, monitoring and reporting measures include, but are not limited to: (1) The use of trained Navy marine observers who will conduct marine mammal monitoring to avoid collisions with marine mammals; (2) the use of exclusion zones that avoid exposing marine mammals to levels of sound likely to result in injury or death of marine mammals; (3) the use of MMOs/Navy marine observers to conduct aerial, vessel, and shore-based surveys; and (4) annual monitoring reports and comprehensive reports to provide insights of impacts to marine mammals.

NMFS has evaluated the effectiveness of the measures and has concluded they will achieve the least practicable adverse impact on the affected marine mammal species or stocks and their habitat. For example, operations will be suspended if trained Navy marine observers and/or MMOs detect marine mammals within the vicinity of the RDT&E activities, thereby preventing marine mammal injury or mortality (use of specified exclusion zones). In addition, prior to conducting RDT&E activities involving sonar or underwater explosive detonation, the Navy will be required to carry out monitoring to make sure that the safety zones are clear of marine mammals, and then during the test activity when feasible. These monitoring and mitigation measures will decrease the number of marine mammals exposed to underwater explosions and exposure to intense sounds from the detonations.

Over the course of the 5-year rule, NMFS will evaluate the Navy's RDT&E activities annually to validate the effectiveness of the measures. NMFS will, through the established adaptive management process, work with the Navy to determine whether additional mitigation and monitoring measures are necessary. In addition, with the implementation of the ICMP Plan by the end of 2009, and the planned Monitoring Workshop in 2011, NMFS will work with the Navy to further improve its monitoring and mitigation plans for its future activities.

Comment 4: The Commission recommends that NMFS implement a 60-minute waiting period when deep-diving species such as sperm and beaked whales or species that cannot be identified by watchstanders are observed within or are about to enter a safety zone.

Response: NMFS does not concur with the Commission's recommendation for the following reasons:

- The ability of an animal to dive longer than 30 minutes does not mean that it will always do so. Therefore, the 60-minute delay would only potentially add value in instances when animals had remained under water for more than 30 minutes.
- Navy vessels typically move at 10–12 knots (5–6 m/sec) when operating active sonar and potentially much faster when not. Fish *et al.* (2006) measured speeds of 7 species of odontocetes and found that they ranged from 1.4–7.30 m/sec. Even if a vessel was moving at the slower typical speed associated with active sonar use, an animal would need to be swimming near sustained maximum speed for an hour in the direction of the vessel's course to stay within the safety zone of the vessel. Increasing the typical speed associated with active sonar use would further narrow the circumstances in which the 60-minute delay would add value.
- Additionally, the times when marine mammals are deep-diving (i.e., the times when they are under the water for longer periods of time) are the same times that a large portion of their motion is in the vertical direction, which means that they are far less likely to keep pace with a horizontally moving vessel.
- Given that, the animal would need to have stayed in the immediate vicinity of the sound source for an hour and considering the maximum area that both the vessel and the animal could cover in an hour, it is improbable that this would randomly occur. Moreover, considering that many animals have been shown to avoid both acoustic sources and ships without acoustic sources, it is improbable that a deep-diving cetacean (as opposed to a dolphin that might bow ride) would choose to remain in the immediate vicinity of the source. NMFS believes that it is unlikely that a single cetacean would remain in the safety zone of a Navy sound source for more than 30 minutes.
- Last, in many cases, the marine observers are not able to differentiate species to the degree that would be necessary to implement this measure. Plus, Navy operators have indicated that increasing the number of mitigation decisions that need to be made based on biological information is more difficult for the lookouts (because it is not their area of expertise).

Comment 5: The Commission recommends that NMFS require the Navy to suspend an activity if a marine mammal is seriously injured or killed and the injury or death could be associated with the activity. Subsequently, the injury or death should be investigated to determine the cause, assess the full impact of the activity potentially implicated (e.g., the total of animals involved), and determine how the activity should be modified to avoid future injuries or deaths.

Response: Though NMFS largely agrees with the Commission, it should be noted that without detailed examination by an expert, it is usually not feasible to determine the cause of injury or mortality when an injured or dead marine mammal is sighted in the

field. Therefore, NMFS has required in its final rule that if there is clear evidence that a marine mammal is injured or killed as a result of the proposed Navy RDT&E activities (*e.g.,* instances in which it is clear that munitions explosions caused the injury or death) the Naval activities shall be immediately suspended and the situation immediately reported by personnel involved in the activity to the Test Director or the Test Director's designee, who will follow Navy procedures for reporting the incident to NMFS through the Navy's chain-of-command.

For any other sighting of injured or dead marine mammals in the vicinity of any Navy's RDT&E activities utilizing underwater explosive detonations for which the cause of injury or mortality cannot be immediately determined, the Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as operational security allows). The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

Comment 6: The Commission recommends NMFS require the Navy to, in those cases where authorization is sought to take marine mammals by injury, consult with NMFS to consider whether the requested take levels are realistic and adequately take into account the schooling behavior of dolphins.

Response: As discussed in the Navy's LOA application and in the Proposed Rule (74 FR 20156: April 30, 2009), take of marine mammals by Level A harassment (injury) could occur as a result of the underwater detonation exposures in the range of 76–272 lb NEW (34–272 kg) in non-territorial waters. However, as noted by the Commission, due to the schooling behavior of some dolphin species, there is the question of whether the requested take levels are realistic. Although NMFS shares the Commission's view to some degree that schooling dolphins are not evenly distributed, due to the changing oceanographic regime and the large area being considered, NMFS considers that the Navy's modeling and analysis on the requested take levels are the best approximations. In addition, NMFS believes that the Navy's take estimates are conservative, and that with the implementation of aforementioned mitigation and monitoring measures, many of the Level A harassments (injury) can be prevented.

Reporting

Comment 7: The Commission recommends NMFS require the Navy to submit annual reports that document in full the methods, results, and interpretation of all monitoring tasks.

Response: NMFS agrees with the Commission's recommendation. As described above, NMFS will require the Navy to submit a report annually on August 1 describing the RDT&E activities conducted and implementation and results of the NSWC PCD Monitoring Plan (through June 1 of the same year). A detailed description of report contents is provided above.

Comment 8: The Commission recommends that NMFS work with the Navy to develop a database for storing original records of Navy interactions with marine mammals, which will provide a basis for evaluating such interactions over long periods of time and across large areas.

Response: The Navy is required to document all marine mammal sightings through aerial, vessel, and shore-based survey by MMOs or Navy marine observers. Those records will be used to determine potential Navy interactions with marine mammals and to assess the impacts on marine mammals that may have resulted from the Navy's RDT&E activities. Currently there is no plan to develop a database for storing original records of Navy interactions with marine mammals due to limited resources. Nevertheless, NMFS will consider the Commission's recommendation when adequate resources are available to undertake such efforts.

Miscellaneous Issues

Comment 9: One private citizen expressed general opposition to Navy activities and NMFS' issuance of an MMPA authorization because of the danger of killing marine life.

Response: NMFS appreciates the commenter's concern for the marine mammals that live in the area of the proposed activities. However, the MMPA allows individuals to take marine mammals incidental to specified activities if NMFS can make the necessary findings required by law (i.e., negligible impact, unmitigable adverse impact on subsistence users, etc.). As explained throughout this rulemaking, NMFS has made the necessary findings under 16 U.S.C. 1371(a)(5)(A) to support our issuance of the final rule.

Estimated Take of Marine Mammals

As mentioned previously, with respect to the MMPA, NMFS' effects assessments serve four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.,* Level B Harassment (behavioral harassment), Level A Harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.,* mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities in the NSWC PCD Study Area; thus, there would be no effect to any subsistence user); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Estimated Take of Marine Mammals section of the proposed rule, NMFS related the potential effects to marine mammals from sonar operations and underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B Harassment and assessed the effects to marine mammals that could result from the specific activities that the Navy intends to conduct. The subsections of this analysis are discussed in the proposed rule (74 FR 20156; April 30, 2009). The only change in this section is that the sentence in the proposed rule (74 FR 20156; April 30, 2009; page 20179), "NSWC PCD RDT&E activities involve mid-frequency sonar operation for only 6 percent of operational hours," is changed to "NSWC PCD RDT&E activities involve mid-frequency sonar operation for only 7 percent of operational hours." The change is to fix the calculation error in the proposed rule.

In the Estimated Exposures of Marine Mammals section of the proposed rule, NMFS described in detail how the take estimates were calculated through modeling (74 FR 20156; pages 20178–20182; April 30, 2009). The following changes in this section have been made: (1) The first paragraph under Marine Mammal Sonar Exposures in Territorial Waters section of the proposed rule (74 FR 20156; April 30, 2009; page 20179), "rough-toothed dolphin" and one duplicated "Atlantic bottlenose dolphin" are deleted; and (2) the first paragraph under Marine Mammal

Ordnance Exposures in Non-Territorial Waters section (74 FR 20156; April 30, 2009; page 20181), "rough-toothed dolphin" and "striped dolphin" are deleted. The deletion is to clarify that no rough-toothed dolphin or striped dolphin would be affected by these activities. In addition, Fraser's dolphin is added to Tables 11, 12, and 13 in the final rule (74 FR 20156; April 30, 2009; pages 20181–20182), with zero exposures. No other change has been made to the final rule.

A summary of potential exposures from sonar operations and ordnance (per year) for marine mammals in the NSWC PCD Study Area is listed in Table 4 (these exposure estimates are the same as those presented in the proposed rule, with the exception as noted above).

TABLE 4—ESTIMATES OF TOTAL MARINE MAMMAL EXPOSURES FROM THE NSWC PCD MISSION ACTIVITIES PER YEAR

Marine mammal species	Mortality (severe lung injury)	Level A (slight lung injury)	Level B (non-injury)
Bryde's whale	.....	.....	.....
Sperm whale	.....	.....	2
Dwarf/Pygmy sperm whale	.....	.....	.....
All beaked whales	.....	.....	.....
Killer whale	.....	.....	.....
False killer whale	.....	.....	.....
Pygmy killer whale	.....	.....	.....
Melon-headed whale	.....	.....	2
Short-finned pilot whale	.....	.....	1
Risso's dolphin	.....	.....	2
Rough-toothed dolphin	.....	.....	.....
Bottlenose dolphin	0	2	614
Atlantic spotted dolphin	0	2	471
Pantropical spotted dolphin	.....	1	23
Striped dolphin	.....	.....	5
Spinner dolphin	.....	1	23
Clymene dolphin	.....	.....	5
Fraser's dolphin	.....	.....	.....

Effects on Marine Mammal Habitat

NMFS' NSWC PCD proposed rule included a section that addressed the effects of the Navy's activities on Marine Mammal Habitat (74 FR 20156; pages 20182–20183; April 30, 2009). NMFS concluded preliminarily that the Navy's activities would have minimal effects on marine mammal habitat. No changes have been made to the discussion contained in this section of the proposed rule.

Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be "taken" by the specified activities (i.e., takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a "negligible impact" on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of Level B harassment takes alone is not enough information on which to base an impact determination.

In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

The Navy's specified activities have been described based on best estimates of the number of HFAS/MFAS hours that the Navy will conduct and the planned detonation events. Taking the above into account, considering the sections discussed below, and dependent upon the implementation of the proposed mitigation measures, NMFS has determined that Navy's RDT&E activities utilizing HFAS/MFAS and underwater detonations will have a negligible impact on the marine mammal species and stocks present in the NSWC PCD Study Area.

Behavioral Harassment

As discussed in the Potential Effects of Exposure of Marine Mammals to HFAS/MFAS in the proposed rule (74 FR 20156; April 30, 2009) and illustrated in the conceptual framework, marine mammals can respond to HFAS/MFAS in many different ways, a subset of which qualifies as harassment. The take estimates do not take into account the fact that most marine mammals will likely avoid strong sound sources to one extent or another. Although an animal that avoids the sound source will likely still be taken in some instances (such as if the avoidance results in a missed opportunity to feed, interruption of reproductive behaviors, etc.) in other cases avoidance may result in fewer instances of take than were estimated or in the takes resulting from exposure to a lower received level than was estimated, which could result in a less severe response. The Navy proposes only 77 hours of mid-frequency sonar operations per year (Table 2) in the NSWC PCD Study Area, and the use of the most powerful 53C series sonar will be limited to just 4 hours per year. Therefore, any disturbance to marine mammals resulting from 53C and other MFAS is expected to be significantly less in terms of severity and duration when compared to major sonar exercises (*e.g.,* AFAST, HRC, SOCAL). As for the HFAS, source levels of those HFAS are not as high as the 53C series MFAS. In addition, high frequency signals tend to have more attenuation in the water

column and are more prone to lose their energy during propagation. Therefore, their zones of influence are much smaller, thereby making it easier to detect marine mammals and prevent adverse effects from occurring.

There is little information available concerning marine mammal reactions to MFAS/HFAS. The Navy has only been conducting monitoring activities since 2006 and has not compiled enough data to date to provide a meaningful picture of effects of HFAS/MFAS on marine mammals, particularly in the NSWC PCD Study Area. From the four major training exercises (MTEs) of HFAS/MFAS in the AFAST Study Area for which NMFS has received a monitoring report, no instances of obvious behavioral disturbance were observed by the Navy watchstanders in the 700+ hours of effort in which 79 sightings of marine mammals were made (10 during active sonar operation). One cannot conclude from these results that marine mammals were not harassed from HFAS/MFAS, as a portion of animals within the area of concern were not seen (especially those more cryptic, deep-diving species, such as beaked whales or *Kogia* sp.) and some of the non-biologist watchstanders might not have had the expertise to characterize behaviors. However, the data demonstrate that the animals that were observed did not respond in any of the obviously more severe ways, such as panic, aggression, or anti-predator response.

In addition to the monitoring that will be required pursuant to these regulations and subsequent LOAs, which is specifically designed to help us better understand how marine mammals respond to sound, the Navy and NMFS have developed, funded, and begun conducting a controlled exposure experiment with beaked whales in the Bahamas.

Diel Cycle

As noted in the proposed rule (74 FR 20156; April 30, 2009), many animals perform vital functions, such as feeding, resting, traveling, and socializing on a diel cycle (24-hr cycle). Substantive behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007).

In the proposed rule (74 FR 20156; April 30, 2009), NMFS discussed the fact that potential behavioral responses to HFAS/MFAS and underwater detonations that fall into the category of harassment could range in severity. By definition, takes by behavioral harassment involve the disturbance of a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns (such as migration, surfacing, nursing, breeding, feeding, or sheltering) to a point where such behavioral patterns are abandoned or significantly altered. These reactions would, however, be more of a concern if they were expected to last over 24 hours or be repeated in subsequent days. For hull-mounted sonar 53C series sonar (the highest power source), the total time of operation is only 4 hours per year, with 3 hours planned in territorial waters and 1 hour in non-territorial waters. Different sonar testing and underwater detonation activities will not occur simultaneously. When this is combined with the fact that the majority of the cetaceans in the NSWC PCD Study Area would not likely remain in the same area for successive days, it is unlikely that animals would be exposed to HFAS/MFAS and underwater detonations at levels or for a duration likely to result in a substantive response that would then be carried on for more than one day or on successive days.

TTS

NMFS and the Navy have estimated that individuals of some species of marine mammals may sustain some level of TTS from HFAS/MFAS and/or underwater detonation. As mentioned previously, TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths. The TTS sustained by an animal is primarily classified by three characteristics:

- Frequency—Available data (of mid-frequency hearing specialists exposed to mid to high frequency sounds—Southall *et al.,* 2007) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at ½; octave above).
- Degree of the shift (*i.e.,* how many dB is the sensitivity of the hearing reduced by)—generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). The threshold for the onset of TTS (>6 dB) for Navy sonars is 195 dB (SEL), which might be received at distances of up to 275–500 m from the most powerful MFAS source, the AN/SQS–53 (the maximum ranges to TTS from other sources would be less). An animal would have to approach closer to the source or remain in the vicinity of the sound source appreciably longer to increase the received SEL, which would be difficult considering the marine observers and the nominal speed of a sonar vessel (10–12 knots). Of all TTS studies, some using exposures of almost an hour in duration or up to 217 SEL, most of the TTS induced was 15 dB or less, though Finneran *et al.* (2007) induced 43 dB of TTS with a 64-sec exposure to a 20 kHz source (MFAS emits a 1-s ping 2 times/minute). The threshold for the onset of TTS for detonations is a dual criteria: 182 dB re 1 microPa^2-sec or 23 psi, which might be received at distances from 345–2,863 m from the centers of detonation based on the types of NEW involved.
- Duration of TTS (Recovery time)—see above. Of all TTS laboratory studies, some using exposures of almost an hour in duration or up to 217 SEL, almost all recovered within 1 day (or less, often in minutes), though in one study (Finneran *et al.,* 2007), recovery took 4 days.

Based on the range of degree and duration of TTS reportedly induced by exposures to non-pulse sounds of energy higher than that to which free-swimming marine mammals in the field are likely to be exposed during HFAS/MFAS testing activities, it is unlikely that marine mammals would sustain a TTS from MFAS that alters their sensitivity by more than 20 dB for more than a few days (and the majority would be far less severe). Also, for the same reasons discussed in the Diel Cycle section, and because of the short distance within which animals would need to approach the sound source, it is unlikely that animals would be exposed to the levels necessary to induce TTS in subsequent time periods such that their recovery were impeded. Additionally, though the frequency range of TTS that marine mammals might sustain would overlap with some of the frequency ranges of their vocalization types, the frequency range of TTS from MFAS (the source from which TTS would more likely be sustained because the higher source level and slower attenuation make it more likely that an animal would be exposed to a higher level) would not usually span the entire frequency range of one vocalization type, much less span all types of vocalizations.

For underwater detonations, due to its brief impulse of sounds, animals have to be at distances from 345–2,863 m from the center of detonation, based on the

types of NEW involved to receive the SEL that causes TTS compared to similar source level with longer durations (such as sonar signals).

Acoustic Masking or Communication Impairment

As discussed in the proposed rule (74 FR 20156; April 30, 2009), it is also possible that anthropogenic sound could result in masking of marine mammal communication and navigation signals. However, masking only occurs during the time of the signal (and potential secondary arrivals of indirect rays), versus TTS, which occurs continuously for its duration. Standard HFAS/MFAS sonar pings last on average one second and occur about once every 24–30 seconds for hull-mounted sources. When hull-mounted sonar is used in the Kingfisher mode, pulse length is shorter, but pings are much closer together (both in time and space, since the vessel goes slower when operating in this mode). For the sources for which we know the pulse length, most are significantly shorter than hull-mounted sonar, on the order of several microseconds to 10s of micro seconds. For hull-mounted sonar, though some of the vocalizations that marine mammals make are less than one second long, there is only a 1 in 24 chance that they would occur exactly when the ping was received, and when vocalizations are longer than one second, only parts of them are masked. Alternately, when the pulses are only several microseconds long, the majority of most animals' vocalizations would not be masked. Masking effects from HFAS/MFAS are expected to be minimal. Likewise, the masking effects from underwater detonation are also considered to be unlikely due to the much shorter impulsive signals from explosions. If masking or communication impairment were to occur briefly, it would be in the frequency range of MFAS, which overlaps with some marine mammal vocalizations; however, it would likely not mask the entirety of any particular vocalization or communication series because the pulse length, frequency, and duty cycle of the HFAS/MFAS signal does not perfectly mimic the characteristics of any marine mammal's vocalizations.

PTS, Injury, or Mortality

The Navy's model estimated that 1 individual of bottlenose dolphin and 1 individual of Atlantic spotted dolphin could experience severe lung injury (i.e., mortality) from explosive ordnance activities; and 1 individual each of bottlenose, Atlantic spotted, pantropical spotted, and spinner dolphins from slight lung injury (Level A harassment) as a result of the underwater detonation exposures in the range of 76–272 lb NEW (34–272 kg) in non-territorial waters per year. However, these estimates do not take into consideration the proposed mitigation measures. For sonar operations, NMFS believes that many marine mammals would deliberately avoid exposing themselves to the received levels necessary to induce injury (i.e., approaching to within approximately 10 m (10.9 yd) of the source). Animals would likely move away from or at least modify their path to avoid a close approach. Additionally, in the unlikely event that an animal approaches the sonar vessel at a close distance, NMFS believes that the mitigation measures (i.e., shutdown/power-down zones for HFAS/MFAS) further ensure that animals would not be exposed to injurious levels of sound. As for underwater detonations, the animals have to be within the 203 m ZOI to experience severe lung injury or mortality. NMFS believes it is unlikely that Navy observers will fail to detect an animal in such a small area during pre-testing surveys. As discussed previously, the Navy plans to utilize aerial (when available) in addition to marine observers on vessels to detect marine mammals for mitigation implementation and indicated that they are capable of effectively monitoring safety zones. When these points are considered, NMFS does not believe that any marine mammals will experience severe lung injury or mortality from exposure to HFAS/MFAS or underwater detonation. Instead, based on proposed mitigation and monitoring measures, NMFS preliminary determined that 2 individuals of bottlenose and Atlantic spotted dolphins, and 1 individual of pantropical spotted and spinner dolphins would receive slight lung injury (Level A harassment) as a result of underwater detonation exposures in the range of 76–272 lb NEW (34–272 kg) in non-territorial waters per year.

Based on the aforementioned assessment, NMFS determined that approximately 2 sperm whales, 2 melon-headed whales, 1 short-finned pilot whale, 2 Risso's dolphins, 614 bottlenose dolphins, 471 Atlantic spotted dolphins, 23 pantropical spotted dolphins, 5 striped dolphins, 23 spinner dolphins, and 5 Clymene dolphins would experience Level B harassment (TTS and sub-TTS) as a result of the proposed NSWC PCD RDT&E sonar and underwater detonation testing activities. These numbers represent approximately 0.12%, 0.08%, 0.14%, 0.07%, 2.85%, 1.25%, 0.07%, 0.08%, 1.16%, and 0.08% of sperm whales, melon-headed whales, short-finned pilot whale, rough-toothed dolphins, bottlenose dolphins, Atlantic spotted dolphins, pantropical spotted dolphins, striped dolphins, spinner dolphins, and Clymene dolphins, respectively in the vicinity of the proposed NSWC PCD Study Area (calculation based on NMFS 2007 US Atlantic and Gulf of Mexico Marine Mammal Stock Assessment).

In addition, the Level A takes of 2 bottlenose, 2 Atlantic spotted, 1 pantropical spotted, and 1 spinner dolphins represent 0.009%, 0.005%, 0.003%, and 0.050% of these species in the vicinity of the proposed NSWC PCD Study Area (calculation based on NMFS 2007 US Atlantic and Gulf of Mexico Marine Mammal Stock Assessment). Given these very small percentages, NMFS does not expect there to be any long-term adverse effect on the populations of the aforementioned dolphin species. No marine mammals are expected to be killed as a result of these activities.

Based on the supporting analyses, which suggest that that no marine mammals will be killed as a result of these activities, only 6 individuals of dolphins (2 bottlenose, 2 Atlantic spotted, 1 pantropical spotted, and 1 spinner dolphins) would experience injury (Level A harassment), and no more than a small percentage of the individuals of any affected species will be taken in the form of short-term Level B harassment per year.

Additionally, the aforementioned take estimates do not account for the implementation of mitigation measures. With the implementation of mitigation and monitoring measures, NMFS expects that the takes would be reduced further. Coupled with the fact that these impacts will likely not occur in areas and times critical to reproduction, NMFS has determined that the total taking over the 5-year period of the regulations and subsequent LOAs from the Navy's NSWC PCD RDT&E mission activities will have a negligible impact on the marine mammal species and stocks present in the NSWC PCD Study Area.

Subsistence Harvest of Marine Mammals

NMFS has determined that the total taking of marine mammal species or stocks from the Navy's mission activities in the NSWC PCD study area would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence uses, since there are no such uses in the specified area.

ESA

There are six marine mammal species of which NMFS has jurisdiction that are listed as endangered under the ESA that could occur in the NSWC PCD Study Area: humpback whale, North Atlantic right whale, blue whale, fin whale, sei whale, and sperm whale.

Pursuant to Section 7 of the ESA, the Navy has consulted with NMFS on this action. NMFS has also consulted internally on the issuance of regulations under section 101(a)(5)(A) of the MMPA for this activity. The Biological Opinion was issued on September 15, 2009, and concludes that the proposed RDT&E activities are likely to adversely affect but are not likely to jeopardize the continued existence of these threatened and endangered species under NMFS jurisdiction.

NEPA

NMFS participated as a cooperating agency on the Navy's Final Environmental Impact Statement (FEIS) for the NSWC PCD. NMFS subsequently adopted the Navy's EIS/OEIS for the purpose of complying with the MMPA.

Determination

Based on the analysis contained herein and in the proposed rule (and other related documents) of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation measures, NMFS finds that the total taking from the NSWC PCD's RDT&E activities utilizing MFAS/HFAS and underwater explosives over the 5 year period will have a negligible impact on the affected species or stocks and will not result in an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses because no subsistence uses exist in the NSWC PCD Study Area. NMFS has issued regulations for these exercises that prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

Classification

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act.

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. The Navy is the entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the RFA. This rulemaking authorizes the take of marine mammals incidental to a specified activity. The specified activity defined in the final rule includes the use of underwater detonations, which are only used by the U.S. military, during RDT&E activities that are only conducted by the U.S. Navy. Additionally, any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

The Assistant Administrator for Fisheries has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in effective date of the measures contained in the final rule. The U.S Navy has a compelling national policy reason to continue military readiness activities without interruption in its Gulf of Mexico Operating Areas, *i.e.,* the NSWC PCD Study Area. As discussed below, suspension/interruption of the Navy's ability to train, for even a small number of days, disrupts vital sequential RDT&E activities and certification processes essential to our national security.

In order to meet its national security objectives, the Navy must continually maintain its ability to operate in a challenging at-sea environment, conduct military operations, control strategic maritime transit routes and international straits, and protect sea lines of communications that support international commerce. To meet these objectives, the Navy must continually conduct RDT&E activities. These activities are critical because individual Navy units and Strike Groups/Amphibious Readiness Groups (ARG) currently operate in, or need to utilize highly advantaged technologies to support mission activities.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: January 13, 2010.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Subpart S is added to part 218 to read as follows:

Subpart S—Taking Marine Mammals Incidental to U.S. Naval Surface Warfare Center Panama City Division Mission Activities

Sec.

Subpart S—Taking Marine Mammals Incidental to U.S. Navy Mission Activities in the Naval Surface Warfare Center Panama City Division

§ 218.180 Specified activity and specified geographical area and effective dates.

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the NSWC PCD Study Area, which includes St. Andrew Bay (SAB) and military warning areas (areas within the GOM subject to military operations) W–151 (includes Panama City Operating Area), W–155 (includes Pensacola Operating Area), and W–470, as described in Figures 2–1 and 2–2 of the Navy's application for the Letter of Authorization (LOA). The NSWC PCD Study Area includes a Coastal Test Area, a Very Shallow Water Test Area, and Target and Operational Test Fields. The NSWC PCD Research, Development, Test, and Evaluation (RDT&E) activities may be conducted anywhere within the existing military

operating areas and SAB from the mean high water line (average high tide mark) out to 222 km (120 nm) offshore. The locations and environments include:

(1) Test area control sites adjacent to NSWC PCD.

(2) Wide coastal shelf 97 km (52 nm) distance offshore to 183 m (600 ft), including bays and harbors.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The use of the following high frequency active sonar (HFAS) and mid-frequency active sonar (MFAS) or similar sources for U.S. Navy mission activities in territorial waters in the amounts indicated below:

(i) AN/SQS–53/56 Kingfisher—up to 15 hours over the course of 5 years (an average of 3 hours per year);

(ii) Sub-bottom profiler (2–9 kHz)—up to 105 hours over the course of 5 years (an average of 21 hours per year);

(iii) REMUS SAS–LF (center frequency 15 kHz)—up to 60 hours over the course of 5 years (an average of 12 hours per year);

(iv) REMUS Modem—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(v) Sub-bottom profiler (2–16 kHz)—up to 120 hours over the course of 5 years (an average of 24 hours per year);

(vi) AN/SQQ–32—up to 150 hours over the course of 5 years (an average of 30 hours per year);

(vii) REMUS–SAS–LF (center frequency 20 kHz)—up to 100 hours over the course of 5 years (an average of 20 hours per year);

(viii) SAS–LF—up to 175 hours over the course of 5 years (an average of 35 hours per year);

(ix) AN/WLD–1 RMS–ACL—up to 168 hours over the course of 5 years (an average of 33.5 hours per year);

(x) BPAUV Sidescan (center frequency 75 kHz)—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(xi) TVSS—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xii) F84Y—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xiii) BPAUV Sidescan (center frequency 102.5 kHz)—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(xiv) REMUS–SAS–HF—up to 50 hours over the course of 5 years (an average of 10 hours per year);

(xv) SAS–HF—up to 58 hours over the course of 5 years (an average of 11.5 hours per year);

(xvi) AN/SQS–20—up to 2725 hours over the course of 5 years (an average of 545 hours per year);

(xvii) AN/WLD–11 RMS Navigation—up to 75 hours over the course of 5 years (an average of 15 hours per year); and

(xviii) BPAUV Sidescan (center frequency 120 kHz)—up to 150 hours over the course of 5 years (an average of 30 hours per year).

(2) The use of the following high frequency active sonar (HFAS) and mid-frequency active sonar (MFAS) or similar sources for U.S. Navy mission activities in non-territorial waters in the amounts indicated below:

(i) AN/SQS–53/56 Kingfisher—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(ii) Sub-bottom profiler (2–9 kHz)—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(iii) REMUS Modem—up to 60 hours over the course of 5 years (an average of 12 hours per year);

(iv) Sub-bottom profiler (2–16 kHz)—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(v) AN/SQQ–32—up to 5 hours over the course of 5 years (an average of 1 hour per year);

(vi) SAS–LF—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(vii) AN/WLD–1 RMS–ACL—up to 25 hours over the course of 5 years (an average of 5 hours per year);

(viii) BPAUV Sidescan (center frequency 75 kHz)—up to 190 hours over the course of 5 years (an average of 38 hours per year);

(ix) TVSS—up to 83 hours over the course of 5 years (an average of 16.5 hours per year);

(x) F84Y—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xi) REMUS–SAS–HF—up to 125 hours over the course of 5 years (an average of 25 hours per year);

(xii) SAS–HF—up to 75 hours over the course of 5 years (an average of 15 hours per year);

(xiii) AN/AQS–20—up to 75 hours over the course of 5 years (an average of 15 hours per year); and

(xiv) BPAUV Sidescan (center frequency 120 kHz)—up to 125 hours over the course of 5 years (an average of 25 hours per year).

(3) Ordnance operations for U.S. Navy mission activities in territorial waters in the amounts indicated below:

(i) Range 1 (0–10 lb)—up to 255 detonations over the course of 5 years (an average of 51 detonations per year);

(ii) Range 2 (11–75 lb)—up to 15 detonations over the course of 5 years (an average of 3 detonations per year); and

(iii) Line charges—up to 15 detonations over the course of 5 years (an average of 3 detonations per year).

(4) Ordnance operations for U.S. Navy mission activities in non-territorial waters in the amounts indicated below:

(i) Range 3 (76–600 lb)—up to 80 detonations over the course of 5 years (an average of 16 detonations per year).

(ii) Reserved.

(5) Projectile firing operations for U.S. Navy mission activities in non-territorial waters in the amounts indicated below:

(i) 5 in. Naval gunfire—up to 300 rounds over the course of 5 years (an average of 60 rounds per year);

(ii) 40 mm rounds—up to 2,400 rounds over the course of 5 years (an average of 480 rounds per year);

(iii) 30 mm rounds—up to 3,000 rounds over the course of 5 years (an average of 600 rounds per year);

(iv) 20 mm rounds—up to 14,835 rounds over the course of 5 years (an average of 2,967 rounds per year);

(v) 76 mm rounds—up to 1,200 rounds over the course of 5 years (an average of 240 rounds per year);

(vi) 25 mm rounds—up to 2,625 rounds over the course of 5 years (an average of 525 rounds per year); and

(vii) Small arms—up to 30,000 rounds over the course of 5 years (an average of 6,000 rounds per year).

(d) Regulations are effective January 21, 2010, through January 21, 2015.

§ 218.181 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 218.186 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.180(b), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The incidental take of marine mammals under the activities identified in § 218.180(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Sperm whale (*Physeter macrocephalus*)—10 (an average of 2 annually),

(ii) Risso's dolphin (*Grampus griseus*)—10 (an average of 2 annually);

(iii) Bottlenose dolphin (*Tursiops truncatus*)—3,070 (an average of 614 annually);

(iv) Atlantic spotted dolphin (*Stenella frontalis*)—2,355 (an average of 471 annually);

(v) Pantropical spotted dolphin (*S. attenuata)*—115 (an average of 23 annually);

(vi) Striped dolphin (*S. coeruleoalba*)—25 (an average of 5 annually);

(vii) Spinner dolphin (*S. longirostris*)—115 (an average of 23 annually);

(viii) Melon-headed whale (*Peponocephala electra*)—10 (an average of 2 annually);

(ix) Short-finned pilot whale (Globicephala macrorhynchus)—5 (an average of 1 annually);

(x) Clymene dolphin (*S. clymene*)—25 (an average of 5 annually);

(2) Level A Harassment:

(i) Bottlenose dolphin (*Tursiops truncatus*)—10 (an average of 2 annually);

(ii) Atlantic spotted dolphin (*Stenella frontalis*)—10 (an average of 2 annually);

(iii) Pantropical spotted dolphin (*S. attenuata)*—5 (an average of 1 annually);

(ix) Spinner dolphin (*S. longirostris*)—5 (an average of 1 annually).

§ 218.182 Prohibitions.

Notwithstanding takings contemplated in § 218.181 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.186, no person in connection with the activities described in § 218.180 may:

(a) Take any marine mammal not specified in § 218.181(b);

(b) Take any marine mammal specified in § 218.181(b) other than by incidental take as specified in § 218.181(b)(1) and (2);

(c) Take a marine mammal specified in § 218.181(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under § 216.106 of this chapter and § 218.186.

§ 218.183 Mitigation.

When conducting RDT&E activities identified in § 218.180(c), the mitigation measures contained in this subpart and subsequent Letters of Authorization issued under §§ 216.106 of this chapter and § 218.186 must be implemented. These mitigation measures include, but are not limited to:

(a) *Mitigation Measures for HFAS/ MFAS Operations:* (1) Personnel Training: (i) All marine observers onboard platforms involved in NSWC PCD RDT&E activities shall complete Marine Species Awareness Training (MSAT).

(ii) Marine observers shall be trained in the most effective means to ensure quick and effective communication within the command structure in order to facilitate implementation of mitigation measures if marine species are spotted.

(2) Marine Observer Responsibilities:

(i) On the bridge of surface vessels, there shall always be at least one to three marine species awareness trained observer(s) on watch whose duties include observing the water surface around the vessel.

(A) For vessels with length under 65 ft (20 m), there shall always be at least one marine observer on watch.

(B) For vessels with length between 65–200 ft (20–61 m), there shall always be at least two marine observers on watch.

(C) For vessels with length above 200 ft (61 m), there shall always be at least three marine observers on watch.

(ii) Each marine observer shall have at their disposal at least one set of binoculars available to aid in the detection of marine mammals.

(iii) On surface vessels equipped with AN/SQQ–53C/56, pedestal mounted "Big Eye" (20 x 110) binoculars shall be present and in good working order to assist in the detection of marine mammals in the vicinity of the vessel.

(iv) Marine observers shall employ visual search procedures employing a scanning methodology in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(v) Marine observers shall scan the water from the vessel to the horizon and be responsible for ensuring that all contacts in their sector follow the below protocols:

(A) In searching the assigned sector, the marine observer shall always start at the forward part of the sector and search aft (toward the back).

(B) To search and scan, the marine observer shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon.

(C) The marine observer shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars.

(D) The marine observer shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view.

(E) At the end of the sector search, the glasses would be lowered to allow the eyes to rest for a few seconds, and then the marine observer shall search back across the sector with the naked eye.

(vi) After sunset and prior to sunrise, marine observers shall employ Night Lookout Techniques in accordance with the Lookout Training Handbook.

(vii) At night, marine observers shall scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, marine observers shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision.

(viii) Marine observers shall be responsible for reporting all objects or anomalies sighted in the water (regardless of the distance from the vessel) to the Test Director or the Test Director's designee.

(3) Operating Procedures:

(i) The Test Director or the Test Director's designee shall maintain the logs and records documenting RDT&E activities should they be required for event reconstruction purposes. Logs and records will be kept for a period of 30 days following completion of a RDT&E mission activity.

(ii) A Record of Environmental Consideration shall be included in the Test Plan prior to the test event to further disseminate the personnel testing requirement and general marine mammal mitigation measures.

(iii) Test Directors shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the vessel.

(iv) All personnel engaged in passive acoustic sonar operation (including aircraft or surface vessels) shall monitor for marine mammal vocalizations and report the detection of any marine mammal to the Test Director or the Test Director's designee for dissemination and appropriate action.

(v) During HFAS/MFAS mission activities, personnel shall utilize all available sensor and optical systems (such as Night Vision Goggles) to aid in the detection of marine mammals.

(vi) Navy aircraft participating in RDT&E activities at sea shall conduct and maintain surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties.

(vii) Marine mammal detections shall be immediately reported to the Test Director or the Test Director's designee for further dissemination to vessels in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the vessel will likely result in a closing of the distance to the detected marine mammal.

(viii) Safety Zones—When marine mammals are detected by any means (aircraft, shipboard marine observer, or acoustically) the Navy will ensure that HFAS/MFAS transmission levels are limited to at least 6 dB below normal operating levels if any detected marine mammals are within 1,000 yards (914 m) of the sonar source (the bow).

(A) Vessels shall continue to limit maximum HFAS/MFAS transmission levels by this 6-dB factor until the marine mammal has been seen to leave the area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yards (1,828 m) beyond the location of the last detection.

(B) The Navy shall ensure that HFAS/MFAS transmissions will be limited to at least 10 dB below the equipment's normal operating level if any detected animals are within 500 yards (457 m) of the sonar source. Vessels will continue to limit maximum ping levels by this 10-dB factor until the marine mammal has been seen to leave the area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yards (1,828 m) beyond the location of the last detection.

(C) The Navy shall ensure that HFAS/MFAS transmissions are ceased if any detected marine mammals are within 200 yards (183 m) of the sonar source. HFAS/MFAS will not resume until the marine mammal has been seen to leave the area, has not been detected for 30 minutes, or the vessel has transited more than 2,000 yards (1,828 m) beyond the location of the last detection.

(D) Special conditions applicable for dolphins only: If, after conducting an initial maneuver to avoid close quarters with dolphins, the Officer of the Deck concludes that dolphins are deliberately closing to ride the vessel's bow wave, no further mitigation actions are necessary while the dolphins continue to exhibit bow wave riding behavior.

(E) If the need for power-down should arise as detailed in "Safety Zones" above, Navy shall follow the requirements as though they were operating at 235 dB—the normal operating level (*i.e.,* the first power-down will be to 229 dB, regardless of at what level above 235 sonar was being operated).

(ix) Prior to start up or restart of active sonar, operators will check that the Safety Zone radius around the sound source is clear of marine mammals.

(x) Sonar levels (generally)—Navy shall operate sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet RDT&E objectives.

(b) *Mitigation Measures for Ordnance and Projectile Firing:* (1) No detonations over 34 kg (75 lb) shall be conducted in territorial waters, except the line charge detonation, which is a 107 m (350 ft).

(2) The number of live mine detonations shall be minimized and the smallest amount of explosive material possible to achieve test objectives will be used.

(3) Activities shall be coordinated through the Environmental Help Desk to allow potential concentrations of detonations in a particular area over a short time to be identified and avoided.

(4) Visual surveys and aerial surveys of the clearance zones specified in § 218.183(b)(6)(i) through (iii) shall be conducted in accordance with § 218.184(c) for all test operations that involve detonation events with large net explosive weight (NEW). Any protected species sighted will be reported.

(5) Line charge tests shall not be conducted during the nighttime.

(6) Additional mitigation measures shall be determined through the NSWC PCD's Environmental Review Process based on test activities including the size of detonations, test platforms, and environmental effects documented in the Navy's EIS/OEIS. Clearance zones must be determined based on the upper limit of different ranges of net explosive weight (NEW) used in the tests, as listed below:

(i) NEW between 76–600 lb: clearance zone is 2,863 m (9,393 ft);

(ii) NEW between 11–75 lb: clearance zone is 997 m (2,865 ft); and

(iii) NEW less than 11 lb—clearance zone is 345 m (1,132 ft).

(c) *Mitigation Measures for Surface Operations:* (1) While underway, vessels shall have at least one to three marine species awareness trained observers (based on vessel length) with binoculars. As part of their regular duties, marine observers shall watch for and report to the Test Director or Test Director's designee the presence of marine mammals.

(i) For vessels with length under 65 ft (20 m), there shall always be at least one marine observer on watch.

(ii) For vessels with length between 65–200 ft (20–61 m), there shall always be at least two marine observers on watch.

(iii) For vessels with length above 200 ft (61 m), there shall always be at least three marine observers on watch.

(2) Marine observers shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968–D).

(3) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed" (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(4) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and shall implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Actions shall include changing speed and/or direction and are dictated by environmental and other conditions (*e.g.,* safety, weather).

(5) Naval vessels shall maneuver to keep at least 500 yd (460 m) away from any observed whale and avoid approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other Navy vessels in the vicinity of the whale.

(6) Where operationally feasible and safe, vessels shall avoid closing to within 200-yd (183 m) of marine mammals other than whales.

§ 218.184 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §§ 216.106 and 218.186 for activities described in § 218.180(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.180(c) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified or authorized in § 218.181(b).

(c) The Holder of the Letter of Authorization must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the NSWC PCD Study Area Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) Visual Surveys—Vessel, Aerial and Shore-based: The Holder of this Authorization shall visually survey a minimum of 2 HFAS/MFAS activities

and 2 explosive events per year. If the 53C sonar was being operated, such activity must be monitored as one of the HFAS/MFAS activities. For explosive events, one of the monitoring measures shall be focused on a multiple detonation event.

(i) In accordance with all safety considerations, observations shall be maximized by working from all available platforms: Vessels, aircraft, land and/or in combination.

(ii) Vessel and aerial surveys shall be conducted two days before, during, and one to five days after the NSWC PCD mission activities on commercial vessels and aircraft.

(iii) Visual surveys shall be conducted during Navy mission activities that have been identified to provide the highest likelihood of success.

(iv) The visual survey team shall collect the same data that are collected by Navy marine observers, including but not limited to:

(A) Location of sighting;

(B) Species (or to the lowest taxa possible);

(C) Number of individuals;

(D) Number of calves present, if any;

(E) Duration of sighting;

(F) Behavior of marine animals sighted;

(G) Direction of travel;

(H) Environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and

(I) When in relation to Navy exercises did the sighting occur (before, during or after detonations/exercise).

(v) Animal sightings and relative distance from a particular activity site shall be used post survey to estimate the number of marine mammals exposed to different received levels (energy and pressure of discharge based on distance to the source, bathymetry, oceanographic conditions and the type and size of detonation) and their corresponding behavior.

(vi) Any digital photographs that are taken of marine mammals during visual surveys shall be provided to local researchers for their regional research.

(vii) The Holder of the Letter of Authorization shall, when conducting RDT&E activities in the NSWC PCD Study Area, implement the following monitoring methods:

(A) Aerial surveys:

(*1*) During NSWC PCD sonar related mission activities, an aerial survey team shall fly transects relative to a Navy surface vessel that is conducting the mission activities.

(*2*) The aerial survey team shall collect both visual sightings and behavioral observations of marine animals.

(*3*) These transect data shall provide an opportunity to collect data of marine mammals at different received levels and their behavioral responses and movement relative to the Navy vessel's position.

(*4*) Aerial surveys shall include time with and without test events in order to compare density, geographical distribution and behavioral observations.

(*5*) Behavioral observation methods shall involve three professionally trained marine mammal observers and a pilot. Two observers shall observe behaviors, one with hand-held binoculars and one with the naked eye.

(*6*) Detailed behavioral focal observations of cetaceans shall be recorded including the following variables where possible: species (or to the lowest taxa possible), group size and composition (number of calves, etc.), latitude/longitude, surface and dive durations and times, number and spacing/times of respirations, conspicuous behaviors (*e.g.,* breach, tail slap, etc.), behavioral states, orientation and changes in orientation, estimated group travel speed, inter-individual distances, defecation, social interactions, aircraft speed, aircraft altitude, distance to focal group (using the plane's radar) and any unusual behaviors or apparent reactions.

(B) Vessel Surveys:

(*1*) Vessel surveys shall be designed to maximize detections of any target species near mission activity event for focal follows.

(*2*) Systematic transects shall be used to locate marine mammals. In the course of conducting these surveys, the vessel(s) shall deviate from transect protocol to collect behavioral data particularly if a Navy vessel is visible on the horizon or closer.

(*3*) While the Navy vessels are within view, attempts shall be made to position the dedicated survey vessel in the best possible way to obtain focal follow data in the presence of the Navy mission activities. If Navy vessels are not in view, then the vessel shall begin a systematic line transect surveys within the area to assess marine mammal occurrence and observe behavior.

(*4*) Post-analysis shall focus on how the location, speed and vector of the survey vessel and the location and direction of the sonar source (*e.g.* Navy surface vessel) relates to the animal.

(*5*) Any other vessels or aircraft observed in the area shall also be documented.

(C) Shore-based Surveys:

(*1*) Shore-based monitors shall observe explosive events that are planned in advance to occur adjacent to nearshore areas where there are elevated coastal structures (e.g. lookout tower at Eglin Air Force Base) or topography, and shall use binoculars or theodolite to augment other visual survey methods.

(*2*) Shore-based surveys of the detonation area and nearby beaches shall be conducted for stranded marine animals following nearshore events. If any distressed, injured or stranded animals are observed, an assessment of the animal's condition (alive, injured, dead, or degree of decomposition) shall be reported immediately to the Navy for appropriate action and the information shall be transmitted immediately to NMFS.

(*3*) If animals are observed prior to or during an explosion, a focal follow of that individual or group shall be conducted to record behavioral responses.

(2) Passive Acoustic Monitoring (PAM): The Holder of this Authorization shall visually survey a minimum of 2 HFAS/MFAS activities and 2 explosive events per year. If the 53C sonar was being operated, such activity must be monitored as one of the HFAS/MFAS activities. For explosive events, one of the monitoring measures shall be focused on a multiple detonation event.

(i) The Navy shall use towed or over-the-side passive acoustic monitoring device/hydrophone array when feasible in the NSWC PCD Study Area for PAM.

(ii) The array shall be deployed for each of the days the ship is at sea.

(iii) The array shall be able to detect low frequency vocalizations (less than 1,000 Hz) for baleen whales and relatively high frequency vocalizations (up to 30 kHz) for odontocetes.

(iv) These buoys shall be left in place for a long enough duration (*e.g.* months) that data are collected before, during and outside of mission activities.

(v) Acoustic data collected from the buoys shall be used in order to detect, locate, and potentially track calling whales/dolphins.

(3) Marine Mammal Observers (MMOs) on Navy vessels:

(i) Civilian MMOs aboard Navy vessels shall be used to research the effectiveness of Navy marine observers, as well as for data collection during other monitoring surveys.

(ii) MMOs shall be field-experienced observers that are Navy biologists or contracted observers.

(iii) MMOs shall be placed alongside existing Navy marine observers during a sub-set of RDT&E events.

(iv) MMOs shall inform the Navy marine observer of any marine mammal

sighting so that appropriate action may be taken by the chain of command. For less biased data, it is recommended that MMOs schedule their daily observations to duplicate the marine observers' schedule.

(v) MMOs shall monitor for marine mammals from the same height above water as the Navy marine observers (*e.g.* bridge wings) and as all visual survey teams, and they shall collect the same data collected by Navy marine observers, including but not limited to:

(A) Location of sighting;

(B) Species;

(C) Number of individuals;

(D) Number of calves present, if any;

(E) Duration of sighting;

(F) Behavior of marine animals sighted;

(G) Direction of travel;

(H) Environmental information associated with sighting event including Beaufort sea state, wave height, swell direction, wind direction, wind speed, glare, percentage of glare, percentage of cloud cover; and

(I) When in relation to Navy RDT&E activities did the sighting occur (before, during or after detonations/exercise).

(d) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy's RDT&E activities utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(e) If there is clear evidence that a marine mammal is injured or killed as a result of the proposed Navy RDT&E activities (*e.g.,* instances in which it is clear that munitions explosions caused the injury or death) the Naval activities shall be immediately suspended and the situation immediately reported by personnel involved in the activity to the Test Director or the Test Director's designee, who will follow Navy procedures for reporting the incident to NMFS through the Navy's chain-of-command.

(f) Annual NSWC PCD Report—The Navy shall submit a report annually on October 1 describing the RDT&E activities conducted and implementation and results of the NSWC PCD Monitoring Plan (through August 1 of the same year) and RDT&E activities. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the NSWC PCD Monitoring Plan shall, at a minimum, provide the same marine mammal observation data listed below.

(1) RDT&E Information:

(i) Date and time test began and ended;

(ii) Location;

(iii) Number and types of active sources used in the test;

(iv) Number and types of vessels, aircraft, etc., participated in the test;

(v) Number and types of underwater detonations;

(vi) Total hours of observation effort (including observation time when sonar was not operating).

(vii) Total hours of all active sonar source operation;

(viii) Total hours of each active sonar source; and

(ix) Wave height (high, low, and average during the test) in feet.

(2) Individual Marine Mammal Sighting Info:

(i) Location of sighting;

(ii) Species;

(iii) Number of individuals;

(iv) Calves observed (y/n);

(v) Initial detection sensor;

(vi) Indication of specific type of platform observation made from;

(vii) Length of time observers maintained visual contact with marine mammal(s);

(viii) Wave height (in feet);

(ix) Visibility;

(x) Sonar source in use (y/n);

(xi) Indication of whether animal is <200 yd, 200–500 yd, 500–1,000 yd, 1,000–2,000 yd, or >2,000 yd from sonar source above;

(xii) Mitigation implementation—Whether operation of sonar sensor was delayed, or sonar was powered or shut down, and how long the delay was;

(xiii) If the active MFAS in use is hullmounted, true bearing of animal from ship, true direction of ship's travel, and estimation of animal's motion relative to ship (opening, closing, parallel);

(xiv) Observed behavior—Marine observers shall report, in plain language and without trying to categorize in any way, the observed behavior of the animals (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming, etc.); and

(xv) An evaluation of the effectiveness of mitigation measures designed to avoid exposing marine mammals to HFAS/MFAS. This evaluation shall identify the specific observations that support any conclusions the Navy reaches about the effectiveness of the mitigation.

(g) NSWC PCD Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during sonar operations and underwater explosive events for which individual reports are required in § 218.184 (d-f). This report will be submitted at the end of the fourth year of the rule (December 2013), covering activities that have occurred through July 1, 2013.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the NSWC PCD Comprehensive Report and the Annual NSWC PCD Report if submitted within 3 months of receipt. The report will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(i) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

§ 218.185 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.180(c) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.186 or a renewal under § 218.187.

§ 218.186 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.187.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a

determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 218.187 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 218.186 for the activity identified in § 218.180(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.185 shall be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.184(b); and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.183 and the Letter of Authorization issued under §§ 216.106 of this chapter and 218.186, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 of this chapter and 218.187 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register.**

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from NSWC PCD Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.184(i)).

(3) Compiled results of Navy-funded research and development (R&D) studies.

(4) Results from specific stranding investigations (either from the NSWC PCD Study Area or other locations).

(5) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

§ 218.188 Modifications to Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 218.186 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.187, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 218.181(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.186 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

[FR Doc. 2010–1074 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 090218199–91223–02]

RIN 0648–AX38

Fisheries in the Western Pacific; Pelagic Fisheries; Vessel Identification Requirements

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

ACTION: Final rule.

SUMMARY: This final rule revises identification requirements for U.S. vessels that fish for pelagic management unit species in the western and central Pacific Ocean. Each vessel is required to display its International Telecommunication Union Radio Call Sign (IRCS) or, if an IRCS has not been assigned, its official number preceded by the characters "USA ". This rule makes Federal vessel identification requirements consistent with international requirements.

DATES: This final rule is effective February 22, 2010.

ADDRESSES: Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to William L. Robinson, NMFS, 1601 Kapiolani Blvd. 1110, Honolulu, HI 96814, e-mailed to *David__Rostker@omb.eop.gov*, or faxed to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Jarad Makaiau, Sustainable Fisheries, NMFS PIR, 808–944–2108.

SUPPLEMENTARY INFORMATION: This **Federal Register** document is also accessible at *www.gpoaccess.gov/fr/*.

This final rule revises the vessel identification requirements at 50 CFR § 665 to make them consistent with international requirements. Currently, each fishing vessel is required to display its official number (United States Coast Guard documentation or other registration number) on the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck, so as to be visible from enforcement vessels and aircraft.

New international rules require each vessel that fishes on the high seas in the Area of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the

Western and Central Pacific Ocean (Convention) to display its IRCS on the port and starboard sides of the hull or superstructure, and on a deck surface. If an IRCS has not been assigned, the vessel must display its official number preceded by the characters "USA" and a hyphen (i.e., "USA-").

U.S. vessels fishing for pelagic species on the high seas of the Convention area would be required to display the international vessel markings (IRCS or USA-official number). A pelagic vessel that fishes only within the U.S. Exclusive Economic Zone (EEZ), or on the high seas outside the Convention Area, would have the option to display either the international markings or official number.

On July 17, 2009, NMFS published a proposed rule and request for public comment on the vessel identification requirements (74 FR 34707). The comment period for the proposed rule ended on August 3, 2009, and NMFS did not receive any comments.

This final rule modifies only the manner in which federally-permitted pelagic fishing vessels are identified, and does not change vessel operations or other aspects of pelagic fisheries. Additional background information on this final rule may be found in the preamble to the proposed rule, and is not repeated here.

Changes From the Proposed Rule

NMFS made one administrative clarification to the final rule for consistency with a change implemented by a recent, separately published final rule in which NMFS restructured western Pacific fishing regulations. In that rule, former § 665.21, relating to pelagic fishing permits, was redesignated as § 665.801. This final rule updates the regulatory text to be consistent with the above change.

Classification

The Regional Administrator, Pacific Islands Region, NMFS, determined that this action is necessary for the conservation and management of western and central Pacific high seas pelagic fisheries, and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

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

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA), and which has been approved by the Office of Management and Budget (OMB) under control number 0648–0360. The one-time public reporting burden for vessel identification requirements is estimated at 45 minutes and $100 in supplies per vessel. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to William L. Robinson (see **ADDRESSES**) and by e-mail to *David__Rostker@omb.eop.gov*, or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 665

Fisheries, Fishing, Reporting and recordkeeping requirements, Vessel identification, Western and central Pacific.

Dated: January 14, 2010.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 665 is amended as follows:

PART 665—FISHERIES IN THE WESTERN PACIFIC

■ 1. The authority citation for part 665 continues to read as follows:

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

■ 2. In § 665.16, revise paragraphs (a) and (b) to read as follows:

§ 665.16 Vessel identification.

(a) Applicability. Each fishing vessel subject to this part, except those identified in paragraph (e) of this section, must be marked for identification purposes, as follows:

(1) A vessel that is registered for use with a valid permit issued under § 665.801 and used to fish on the high seas within the Convention Area as defined in § 300.211 of this title must be marked in accordance with the requirements at §§ 300.14 and 300.217 of this title.

(2) A vessel that is registered for use with a valid permit issued under § 665.801 of this part and not used to fish on the high seas within the Convention Area must be marked in accordance with either:

(i) Sections 300.14 and 300.217 of this title, or

(ii) Paragraph (b) of this section.

(3) A vessel that is registered for use with a valid permit issued under Subparts B through E of this part must be marked in accordance with paragraph (b) of this section.

(b) Identification. Each vessel subject to this section must be marked as follows:

(1) The vessel's official number must be affixed to the port and starboard sides of the deckhouse or hull, and on an appropriate weather deck, so as to be visible from enforcement vessels and aircraft. Marking must be legible and of a color that contrasts with the background.

(2) For fishing and receiving vessels of 65 ft (19.8 m) LOA or longer, the official number must be displayed in block Arabic numerals at least 18 inches (45.7 cm) in height, except that vessels in precious coral fisheries that are 65 ft (19.8 m) LOA or longer must be marked in block Arabic numerals at least 14 inches (35.6 cm) in height.

(3) For all other vessels, the official number must be displayed in block Arabic numerals at least 10 inches (25.4 cm) in height.

* * * * *

[FR Doc. 2010–1085 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 75, No. 13
Thursday, January 21, 2010

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0056; Directorate Identifier 2009–CE–051–AD]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Regional Aircraft Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: Cracks have been found in the NLG steering jack piston rod adjacent to the eye-end. This was caused by excessive torque which had been applied to the eye-end during assembly of the unit. Severe cracking, if not detected and corrected, can cause the jack to fail during operation, which may lead to loss of directional control of the aeroplane during critical phases of take-off and landing. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by March 8, 2010.

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

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4138; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0056; Directorate Identifier 2009–CE–051–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On May 9, 2007, we issued AD 2007–10–14, Amendment 39–15055 (72 FR 28587, May 22, 2007). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2007–10–14, the manufacturer revised the service information to exclude those airplanes from the applicability that have the modified steering jack assembly installed in accordance with BAE modification JM5414.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2009–0135, dated June 23, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Cracks have been found in the NLG steering jack piston rod adjacent to the eye-end. This was caused by excessive torque which had been applied to the eye-end during assembly of the unit. Severe cracking, if not detected and corrected, can cause the jack to fail during operation, which may lead to loss of directional control of the aeroplane during critical phases of take-off and landing.
>
> To address this unsafe condition, the UK CAA issued AD 003–11–2002 (which references BAE Systems Service Bulletin (SB) 32–JA020741), requiring an inspection for cracks and a measurement of the release torque of the piston rod end fitting to determine a new safe life (remaining fatigue life) for individual units. The revised safe life was calculated in accordance with the formula provided in associated APPH Ltd (the NLG Jack manufacturer) SB 32–76.
>
> Following the completion of testing, APPH determined that the remaining fatigue life needed further reduction and published inspection criteria and a revised formula for calculating the piston safe life. This calculation and a revised end fitting tightening torque are contained in APPH SB 32–76 Revision 1. As a result, pistons which were previously calculated to have significant remaining life could possibly be unserviceable.
>
> In response to this development, BAE Systems issued SB 32–JA030644 so that a revised calculation could be performed to establish the safe life of NLG steering jack pistons. Where not previously accomplished, the SB also recognised the need to inspect the piston for cracking and to measure the torque loading of the piston to eye-end joint so that safe life calculation could be performed. This SB superseded the earlier SB 32–JA020741 that produced an overly optimistic assessment of the component's safe life. The CAA UK issued AD G–2004–0029, superseding AD 003–11–2002, to require the accomplishment of these corrective actions.
>
> Subsequent to the original issue of BAE Systems SB 32–JA030644, APPH introduced

a modified unit (optionally installed on aeroplanes by application of BAE Systems SB 32–JM5414) that incorporates a strengthened piston with a defined safe life. This safe life is not calculated in accordance with the instructions of BAE Systems SB 32–JA030644, but is already declared in BAE Systems SB 32–JA981042, currently at revision 7. In response to requests for clarification, BAE Systems has revised SB 32–JA030644 to exclude those aeroplanes from the 'Effectivity' that have the modified steering jack assembly installed in accordance with BAE modification JM5414.

For the reasons described above, this new AD retains the requirements of UK CAA AD G–2004–0029, which is superseded, and confirms that for aeroplanes incorporating BAE modification JM5414, no further action is required.

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

Relevant Service Information

BAE Systems (Operations) Limited has issued British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA020741, dated November 2, 2002; British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA030644, Revision No. 1 dated August 19, 2008; and British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JM5414, dated August 6, 2004. APPH Ltd. has issued Service Bulletin 32–76, Revision 1, dated August 2003; and Service Bulletin 32–77, dated January 2004. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

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

Differences Between This Proposed AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this proposed AD will affect 190 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $32,300, or $170 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15055 (72 FR 28587; May 22, 2007), and adding the following new AD:

British Aerospace Regional Aircraft: Docket No. FAA–2010–0056; Directorate Identifier 2009–CE–051–AD.

Comments Due Date

(a) We must receive comments by March 8, 2010.

Affected ADs

(b) This AD supersedes AD 2007–10–14, Amendment 39–15055.

Applicability

(c) This AD applies to Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 airplanes, all serial numbers, that are:

(1) Equipped with steering jack part number (P/N) 6182–2, P/N 6182–3, or P/N 6182–4; and

(2) Certificated in any category.

Subject

(d) Air Transport Association of America (ATA) Code 32: Landing Gear.

Reason

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

Cracks have been found in the NLG steering jack piston rod adjacent to the eye-end. This was caused by excessive torque which had been applied to the eye-end during assembly of the unit. Severe cracking, if not detected and corrected, can cause the jack to fail during operation, which may lead to loss of directional control of the aeroplane during critical phases of take-off and landing.

To address this unsafe condition, the UK CAA issued AD 003–11–2002 (which references BAE Systems Service Bulletin (SB) 32–JA020741), requiring an inspection for cracks and a measurement of the release torque of the piston rod end fitting to

determine a new safe life (remaining fatigue life) for individual units. The revised safe life was calculated in accordance with the formula provided in associated APPH Ltd (the NLG Jack manufacturer) SB 32–76.

Following the completion of testing, APPH determined that the remaining fatigue life needed further reduction and published inspection criteria and a revised formula for calculating the piston safe life. This calculation and a revised end fitting tightening torque are contained in APPH SB 32–76 Revision 1. As a result, pistons which were previously calculated to have significant remaining life could possibly be unserviceable.

In response to this development, BAE Systems issued SB 32–JA030644 so that a revised calculation could be performed to establish the safe life of NLG steering jack pistons. Where not previously accomplished, the SB also recognised the need to inspect the piston for cracking and to measure the torque loading of the piston to eye-end joint so that safe life calculation could be performed. This SB superseded the earlier SB 32–JA020741 that produced an overly optimistic assessment of the component's safe life. The CAA UK issued AD G–2004–0029, superseding AD 003–11–2002, to require the accomplishment of these corrective actions.

Subsequent to the original issue of BAE Systems SB 32–JA030644, APPH introduced a modified unit (optionally installed on aeroplanes by application of BAE Systems SB 32–JM5414) that incorporates a strengthened piston with a defined safe life. This safe life is not calculated in accordance with the instructions of BAE Systems SB 32–JA030644, but is already declared in BAE Systems SB 32–JA981042, currently at revision 7. In response to requests for clarification, BAE Systems has revised SB 32–JA030644 to exclude those aeroplanes from the 'Effectivity' that have the modified steering jack assembly installed in accordance with BAE modification JM5414.

For the reasons described above, this new AD retains the requirements of UK CAA AD G–2004–0029, which is superseded, and confirms that for aeroplanes incorporating BAE modification JM5414, no further action is required.

Actions and Compliance

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

(1) For airplanes where British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA020741, dated November 2, 2002 (APPH Ltd. Service Bulletin 32–76, Revision 1, dated August 2003) has not been previously accomplished:

(i) Within 2 months after June 26, 2007 (the effective date retained from AD 2007–10–14), inspect the steering jack piston rod, check the torque of the end fitting, and determine the safe life of the steering jack piston rod in accordance with paragraph 2, Part 1 of British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA030644, Revision No. 1, dated August 19, 2008; or BAE Systems British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 32–JA030644, Original Issue: October 6, 2003.

(ii) If the piston rod is found cracked or unserviceable during the inspection as required by paragraph (f)(1)(i) of this AD, before next flight, remove the steering jack and replace it with a serviceable unit.

(2) For airplanes on which BAE British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA020741, dated November 2, 2002 (APPH Ltd. Service Bulletin 32–76, Revision 1, dated August 2003) has previously been accomplished:

(i) Within 3 months after June 26, 2007 (the effective date of AD 2007–10–14), recalculate the safe life of the steering jack piston rod and re-torque the piston rod eye-end in accordance with paragraph 2, Part 2 of British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA030644, Revision No. 1, dated August 19, 2008; or BAE Systems British Aerospace Jetstream Series 3100 & 3200 Service Bulletin 32–JA030644, Original Issue: October 6, 2003.

(ii) If the piston rod is found unserviceable during the inspection as required by paragraph (f)(2)(i) of this AD, before next flight, remove the steering jack and replace it with a serviceable unit.

(3) For airplanes equipped with steering jack part number (P/N) 6182–2, P/N 6182–3, or P/N 6182–4 incorporating Strike-off 4, installed by BAE Systems modification JM5414 (refer to British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JM5414, dated August 6, 2004; and APPH Ltd. Bulletin 32–77, dated January 2004): The actions specified in paragraph (f)(1)(i) or (f)(1)(ii) of this AD are not required.

(4) For all airplanes: After June 26, 2007 (the effective date of AD 2007–10–14), do not install a steering jack piston rod with P/N 6182–2, P/N 6182–3, or P/N 6182–4, unless it has been inspected and the safe life determined in accordance with paragraph 2 of British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA030644, Revision No. 1, dated August 19, 2008.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4138; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) AD No.: 2009–0135, dated June 23, 2009; British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA020741, dated November 2, 2002; British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JA030644, Revision No. 1 dated August 19, 2008; British Aerospace Jetstream Series 3100 & 3200 Service Bulletin No. 32–JM5414, dated August 6, 2004. APPH Ltd. Service Bulletin 32–76, Revision 1, dated August 2003; and APPH Ltd. Service Bulletin 32–77, dated January 2004, for related information.

Issued in Kansas City, Missouri on January 13, 2010.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–1086 Filed 1–20–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0041; Directorate Identifier 2009–NM–218–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 Airplanes, Model A340–211, –212, –213, –311, –312, and –313 Airplanes, and Model A340–541 and –642 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

Several reports have recently been received of loose pneumatic quick-disconnect unions on Goodrich pitot probes P/N (part number)

0851HL. These may be the result of mis-torque of the affected unions at equipment manufacturing level. Investigations are still on-going to determine the root cause(s).

This condition, if not corrected, could lead to an air leak, resulting in incorrect total pressure measurement and consequent erroneous Calibrated Airspeed (CAS)/MACH parameters delivered by the Air Data Computer (ADC).

* * * * *

Loss or fluctuation of indicated airspeed could result in misleading information provided to the flightcrew. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by March 8, 2010.

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

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

For service information identified in this proposed AD, contact Airbus SAS—Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80, e-mail *airworthiness.A330–A340@airbus.com*; Internet *http://www.airbus.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0041; Directorate Identifier 2009–NM–218–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued Emergency Airworthiness Directive 2009–0202–E, dated September 21, 2009, and corrected September 22, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Several reports have recently been received of loose pneumatic quick-disconnect unions on Goodrich pitot probes P/N (part number) 0851HL. These may be the result of mis-torque of the affected unions at equipment manufacturing level. Investigations are still on-going to determine the root cause(s).
>
> This condition, if not corrected, could lead to an air leak, resulting in incorrect total pressure measurement and consequent erroneous Calibrated Airspeed (CAS)/MACH parameters delivered by the Air Data Computer (ADC).
>
> As a precautionary measure, this AD requires a torque check of the pneumatic quick-disconnect union on certain Goodrich P/N 0851HL pitot probes and corrective action, depending on findings.
>
> * * * * *
>
> Loss or fluctuation of indicated airspeed could result in misleading information provided to the flightcrew. If the quick-disconnect union fitted on the pitot probe is not adequately torqued, the corrective action includes applying torque. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued All Operators Telexes A330–34A3235 (for Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes); A340–34A4241 (for Model A340–211, –212, –213, –311, –312, and –313 airplanes); and A340–34A5074 (for Model A340–541 and –642 airplanes); all Revision 1, all dated September 21, 2009. The actions described in the service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this proposed AD would

affect about 47 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,760, or $80 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2010–0041; Directorate Identifier 2009–NM–218–AD.

Comments Due Date

(a) We must receive comments by March 8, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the Airbus airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD; certificated in any category; all manufacturer serial numbers; with pitot probes having Goodrich part number (P/N) 0851HL, serial numbers 267328 through 270714 inclusive.

(1) Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(2) Model A340–211, –212, –213, –311, –312, and –313 airplanes.

(3) Model A340–541 and –642 airplanes.

Subject

(d) Air Transport Association (ATA) of America Code 34: Navigation.

Reason

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

Several reports have recently been received of loose pneumatic quick-disconnect unions on Goodrich pitot probes P/N (part number) 0851HL. These may be the result of mis-torque of the affected unions at equipment manufacturing level. Investigations are still on-going to determine the root cause(s).

This condition, if not corrected, could lead to an air leak, resulting in incorrect total pressure measurement and consequent erroneous Calibrated Airspeed (CAS)/MACH parameters delivered by the Air Data Computer (ADC).

As a precautionary measure, this AD requires a torque check of the pneumatic quick-disconnect union on certain Goodrich P/N 0851HL pitot probes and corrective action, depending on findings.

* * * * *

Loss or fluctuation of indicated airspeed could result in misleading information provided to the flightcrew. If the quick-disconnect union fitted on the pitot probe is not adequately torqued, the corrective action includes applying torque.

Compliance

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

Actions

(g) At the time specified, do the following actions.

(1) Within 14 days after the effective date of this AD: Perform a torque check of the pneumatic quick-disconnect union of each pitot probe having Goodrich P/N 0851HL to determine if the torque is adequate, in accordance with the instructions of the applicable service information specified in Table 1 of this AD. Before further flight, do all applicable corrective actions in accordance with the instructions of the applicable service information specified in Table 1 of this AD.

TABLE 1—AIRBUS SERVICE INFORMATION

Airbus All Operators Telex	Revision	Dated
A330–34A3235 (for Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes).	1	September 21, 2009.
A340–34A4241 (for Model A340–211, –212, –213, –311, –312, and –313 airplanes)	1	September 21, 2009.
A340–34A5074 (for Model A340–541 and –642 airplanes)	1	September 21, 2009.

(2) Within 30 days after performing the torque check required by paragraph (g)(1) of this AD, or within 30 days after the effective date of this AD, whichever occurs later: Report the torque check results to Airbus, including no findings, as specified in the instructions of the applicable service information listed in Table 1 of this AD.

(3) Actions done before the effective date of this AD in accordance with Airbus All Operators Telexes A330–34A3235, A340–34A4241, and A340–34A5074, all dated September 10, 2009, are acceptable for compliance with the corresponding requirements in paragraph (g)(1) of this AD.

(4) As of the effective date of this AD, no person may install a pitot probe having Goodrich P/N 0851HL on any airplane,

unless the actions required by paragraph (g)(1) of this AD have been done.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows:

Where the MCAI includes a compliance time of "5 days," we have determined that a compliance time of "within 14 days after the effective date of the AD" is appropriate. The manufacturer and EASA agree with this expansion in compliance time.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(i) Refer to MCAI Airworthiness Directive 2009–0202–E, dated September 21, 2009, and corrected September 22, 2009; and the service information specified in Table 1 of this AD; for related information.

Issued in Renton, Washington, on December 30, 2009.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–1044 Filed 1–20–10; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[EPA–R10–OAR–2009–0799; FRL–9095–7]

Outer Continental Shelf Air Regulations Consistency Update for Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to include in the regulations the revised applicability dates in the emissions user fees provision in 18 AAC 50.410. Requirements applying to Outer Continental Shelf ("OCS") sources located within 25 miles of States' seaward boundaries must be updated periodically to remain consistent with the requirements of the corresponding onshore area ("COA"), as mandated by section 328(a)(1) of the Clean Air Act ("the Act"). The portion of the OCS air regulations that is being updated pertains to the emission user fee requirements for OCS sources operating off of the State of Alaska. The intended effect of approving the OCS requirements for the State of Alaska is to regulate emissions from OCS sources in a manner consistent with the requirements onshore. The change to the existing requirements discussed below is incorporated by reference into the regulations and is listed in the appendix to the OCS air regulations.

DATES: Written comments must be received on or before *February 22, 2010.*

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R10–OAR–2009–0799, by one of the following methods:

A. *Federal eRulemaking Portal: http://www.regulations.gov*: Follow the on-line instructions for submitting comments;

B. *E-Mail: greaves.natasha@epa.gov*;

C. *Mail:* Natasha Greaves, Federal and Delegated Air Programs Unit, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: AWT–107, Seattle, WA 98101;

D. *Hand Delivery:* U.S. Environmental Protection Agency Region 10, Attn: Natasha Greaves (AWT–107), 1200 Sixth Avenue, Seattle, Washington 98101, 9th Floor. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Natasha Greaves, Federal and Delegated Air Programs Unit, Office of Air, Waste, and Toxics, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Suite 900, Mail Stop: AWT–107, Seattle, WA 98101; telephone number: (206) 553–7079; e-mail address: *greaves.natasha@epa.gov*.

SUPPLEMENTARY INFORMATION: For further information, please see the direct final action, of the same title, which is located in the Rules section of this **Federal Register.** EPA is incorporating 18 AAC 50.410 as amended through June 18, 2009 as a direct final rule without prior proposal because EPA views this as noncontroversial and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule. If EPA receives no adverse comments, EPA will not take further action on this proposed rule.

If EPA receives adverse comments, EPA will withdraw the direct final rule and it will not take effect. EPA will address all public comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. Please note that if we receive adverse comments on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

Administrative Requirements

Under the Clean Air Act, the Administrator is required to establish requirements to control air pollution from OCS sources located within 25 miles of States' seaward boundaries that are the same as onshore air control requirements. To comply with this statutory mandate, EPA must incorporate applicable onshore rules into part 55 as they exist onshore. 42 U.S.C. 7627(a)(1); 40 CFR 55.12. Thus, in promulgating OCS consistency updates, EPA's role is to maintain consistency between OCS regulations and the regulations of onshore areas, provided that they meet the criteria of the Clean Air Act. Accordingly, this action simply updates the existing OCS requirements to make them consistent with requirements onshore, without the exercise of policy discretion by EPA. For that reason, this action:

• Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

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

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

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

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

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

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, nor does it impose substantial direct compliance costs on tribal governments, nor preempt tribal law.

Under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information collection requirements contained in 40 CFR part 55 and, by extension, this update to the rules, and has assigned OMB control number 2060–0249. Notice of OMB's approval of EPA Information Collection Request ("ICR") No. 1601.07 was published in the **Federal Register** on February 17, 2009 (74 FR 7432). The approval expires January 31, 2012. As EPA previously indicated (70 FR 65897–65898 (November 1, 2005)), the annual public reporting and recordkeeping burden for collection of information under 40 CFR part 55 is estimated to average 549 hours per response, using the definition of burden provided in 44 U.S.C. 3502(2).

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedures, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Nitrogen oxides, Outer Continental Shelf, Ozone, Particulate matter, Permits, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: December 14, 2009.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2010–1108 Filed 1–20–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R1–ES–2008–0095;13410–1113–0000–C5]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To Remove the Marbled Murrelet (*Brachyramphus marmoratus*) From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), announce a 12-month finding on a petition to remove the Washington/Oregon/California population of the marbled murrelet (*Brachyramphus marmoratus*) (murrelet) from the Federal List of Endangered and Threatened Wildlife (List) pursuant to the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 *et seq.*). Based on a thorough review of the best scientific and commercial data available, we find that the Washington/Oregon/California population of the murrelet is a valid distinct population segment (DPS) in accordance with the discreteness and significance criteria in our 1996 DPS policy. Furthermore, we find that this DPS continues to be subject to a broad range of threats, such as nesting habitat loss, habitat fragmentation, and predation. Although some threats, such as gillnet bycatch and lack of regulatory mechanisms, have been reduced since the murrelet's 1992 listing, the primary threats to the species' persistence continue. Furthermore, the species faces newly identified threats, such as abandoned fishing gear, harmful algal blooms, and observed changes in the quality of the bird's marine food supply. Population surveys conducted from 2000 through 2008 from San Francisco Bay to the Canadian border document a population decline during this period. Given our current understanding of the species' population size and trajectory, and in light of the scope and magnitude of existing threats, we conclude that the species continues to meet the definition of a threatened species under the ESA. Therefore, we have determined that removing the murrelet from the List is not warranted.

DATES: The finding announced in this document was made on January 21, 2010.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number [FWS–R1–ES–2008–0095]. Supporting documentation we used in preparing this notice will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive, SE., Suite 102, Lacey, WA 98503, (360) 753–9440; (360) 753–9405 fax. New information, materials, comments, or questions concerning this species may be submitted to the Service at the above address.

FOR FURTHER INFORMATION CONTACT: Ken Berg, Field Supervisor, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, (*see* **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4 of the ESA (16 U.S.C. 1533 *et seq.*) and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal List of Endangered and Threatened Wildlife. Section 4(b)(3)(A) of the ESA requires that, for any petition containing substantial scientific and commercial information that listing, delisting, or reclassification may be warranted, we make a finding within 12

months of receiving the petition (12-month finding), on whether the petitioned action is: (a) Not warranted; (b) warranted; or (c) warranted, but that immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether other species are threatened or endangered. This document represents our 12-month finding on a May 28, 2008, petition by the American Forest Resources Council, the Carpenters Industrial Council, Douglas County, Oregon, and Ron Stuntzner to delist the Washington/Oregon/California population of the murrelet (*see* **Previous Federal Actions,** below).

Previous Federal Actions

The Washington/Oregon/California population of the murrelet was listed as a threatened species on October 1, 1992 (57 FR 45328).

On September 1, 2004, we issued a 5-year review of the Washington/Oregon/California population of the murrelet (USFWS 2004). This review found that the population was not a valid DPS, but that delisting should not be proposed until a rangewide status review was concluded. As noted below (*see* **Distinct Population Segment Analysis**), we now believe that our DPS analysis in that review was fundamentally flawed.

On May 28, 2008, we received a petition from the American Forest Resource Council; the Carpenters Industrial Council of Douglas County, Oregon; and Ron Stuntzner requesting that we delist the Washington/Oregon/California DPS of murrelet, primarily based on the DPS conclusion in our 2004 5-year review.

On October 2, 2008, we published a 90-day finding (73 FR 57314) on the May 28, 2008, petition and found that, although the petitioners based their arguments primarily on our flawed 2004 5-year review, a 12-month status review was nevertheless warranted because we had not formally revisited our DPS conclusion since then, and a reasonable person could find that the petitioned action may be warranted. Thus our 90-day finding initiated a 12-month status review.

On June 12, 2009, we issued a revised 5-year review of the Washington/Oregon/California murrelet population (USFWS 2009). This review found the murrelet population to be a valid DPS and recommended that the murrelet DPS remain listed as threatened.

Species Information

The murrelet is a small diving seabird of the Alcidae family. Murrelets spend most of their lives in the marine environment where they forage in near-shore areas and consume a diversity of prey species, including small fish and invertebrates. In their terrestrial environment, the presence of platforms in trees (large branches or deformities) used for nesting is the most important characteristic of their nesting habitat. Murrelet habitat use during the breeding season is positively associated with the presence and abundance of mature and old-growth forests, large core areas of old-growth, low amounts of edge habitat, reduced habitat fragmentation, proximity to the marine environment, and forests that are increasing in stand age and height. Additional information on murrelet taxonomy, biology, and ecology can be found in Ralph *et al.* (1995) and McShane *et al.* (2004).

Population Size and Trends

Our recent 5-year review (USFWS 2009, pp. 19–21), summarized below, analyzed the best available information on murrelet population size and trends in its listed range (Washington/Oregon/California). See this review (USFWS 2009, pp. 19–21, 26–68) for a more detailed analysis of population status, trends, and threats.

The best available data on murrelet population size for the area from San Francisco Bay, CA, to the Canadian border come from the results of the Effectiveness Monitoring Program of the Northwest Forest Plan (NWFP), which has conducted annual at-sea population surveys during the breeding season since 2000, using a uniform survey protocol (Huff 2006, p. 6; Miller *et al.* 2006, p. 31; Raphael *et al.* 2007b, pp. 44–45; Falxa *et al.* 2009, p. 2). The area surveyed includes five of the six murrelet conservation zones (Zones 1 through 5) established by the recovery plan for the murrelet (USFWS 1997, p. 114). (Zone 6 represents the areas south of San Francisco Bay, CA, and offshore breeding habitat between Half Moon Bay and Santa Cruz, CA.) As of 2008, the estimated population of murrelets in Zones 1–5 was 17,800 (95 percent confidence interval (CI): 14,600 to 21,000; Falxa *et al.* 2009, p. 2). The 2007 and 2008 population estimates represent the lowest estimates since monitoring began in 2000, and, as described below, the monitoring survey results indicate a statistically significant population decline since 2000.

Peery *et al.* (2008, p. 3) conducted at-sea population surveys for murrelets in Conservation Zone 6 in 2007 and 2008, following a method used previously to survey the same area during 1999 through 2003 (Peery *et al.* 2006a, pp. 1519–1522). No population estimates are available for 2005 and 2006 as surveys were not conducted. Using the same distance sampling estimation techniques applied to Conservation Zones 1–5, they estimated the 2007 Conservation Zone 6 population to be 367 birds (95 percent CI: 240–562) and the 2008 Conservation Zone 6 population to be 174 birds (95 percent CI: 91–256; Peery *et al.* 2008, p. 4).

Using the combined survey estimates from Conservation Zones 1–5 and Conservation Zone 6, the 2008 estimated population size within the listed range is approximately 18,000 birds (95 percent CI: 14,700–21,200, figures rounded to nearest 100) (USFWS 2009, p. 16).

Demographic models have predicted murrelet populations in the listed range to be declining at an estimated rate of 3 to 7 percent per year (USFWS 1997, p. 5; McShane *et al.* 2004, p. 3–15). Recent information, based on population size estimates conducted by standardized protocols for nearly a decade, provides empirical data with which to evaluate population trends in the listed range.

Trends were evaluated for two periods: (1) 2000 through 2008, and (2) 2001 through 2008. The latter was evaluated because inspection of the data set suggested that the 2000 estimate may have been unusually low, considering the pattern of estimates from subsequent years (Falxa *et al.* 2009, p. 6).

A significant population decline was detected for the combined 5-Conservation Zone area (Zones 1–5), both for the 2000–2008 and 2001–2008 periods (Falxa *et al.* 2009, p. 13). The 2000–2008 data represent an estimated 2.4 percent annual decline, while the 2001–2008 data represent an annual decline of about 4.3 percent (Falxa *et al.* 2009, p. 13). The 2.4 and 4.3 percent values represent two valid estimates for the annual rate of decline based on the best available information. The 2.4 and 4.3 percent annual decline rates represent overall declines of the population of 19 and 34 percent, respectively, in Conservation Zones 1 through 5. In terms of numbers of birds, the estimated average annual decline for this period was 490 birds per year (standard error: 241 birds) based on the 2000–2008 data, or about 870 birds per year (standard error: 129 birds) based on the 2001–2008 data (Falxa *et al.* 2009, p. 13).

The murrelet population in central California underwent a particularly significant and rapid decline between 2003 and 2008 (Peery *et al.* 2008, p. 4). The 2008 population estimate for Conservation Zone 6 represented a decline of about 55 percent since 2007, and a 75 percent decline since 2003

(Peery *et al.* 2008, p. 4). Compared to the 2003 Zone 6 estimate of 699 birds (95 percent CI: 567 to 680; Peery 2007), the 2008 estimate of 174 birds represents an average annual decline of about 15 percent, about 105 birds per year, between 2003 and 2008. The 2007 and 2008 population estimates in Zone 6 are the lowest since surveys began in 1999.

Productivity

McShane *et al.* (2004, p. 3–2) considered murrelet breeding success to be a function of nest predation, timing, foraging conditions, prey availability, and adult survival during the breeding season. Impacts to breeding success from predation are discussed under Factor C in the **Summary of Factors Affecting the Species** section, below. Data on nest success from radio telemetry studies and from adult:juvenile ratios at sea, as an index of breeding success, continue to confirm that murrelet reproduction in Washington, Oregon, and California is too low to sustain populations (USFWS 2009, p. 23). Recent information from studies in British Columbia and Conservation Zone 6 suggest that one potential cause for the observed poor reproductive success is related to changes in the marine environment that have resulted in murrelets eating prey at a lower trophic level—which is lower quality—particularly during the breeding season (USFWS 2009, pp. 22, 41–42). The trophic level shift is likely to have contributed to a decline in murrelet reproduction, at least in Conservation Zone 6, and perhaps elsewhere. The relative contributions of nest predation and trophic level shifts in prey consumption to reduced reproductive output are not well known, and probably change between years and areas. However, in combination, they are suspected to be largely responsible for current observations of poor reproductive success.

Distinct Population Segment Analysis

The petition to delist (AFRC *et al.* 2009) primarily cited the DPS conclusion in our 2004 5-year review (USFWS 2004, pp. 14–17) as sufficient reason to delist the Washington/Oregon/California DPS of murrelet. In our 2009 5-year review for the murrelet, we completed a thorough reevaluation of our previous DPS analysis of the murrelet (USFWS 2009, pp. 3–12). Below, we present the discreteness and significance analyses for the Washington/Oregon/California population of the murrelet based on our most recent 5-year review (USFWS 2009, pp. 3–12).

Under the ESA (section 3(16)), a species is defined to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." The ESA does not further define what is meant by a distinct population segment. We, along with the National Marine Fisheries Service (now the National Oceanic and Atmospheric Administration–Fisheries), developed the Policy Regarding the Recognition of Distinct Vertebrate Population Segments (DPS Policy) (February 7, 1996; 61 FR 4722) to help us in determining what constitutes a DPS, and thus what may be considered a species for listing under the ESA. The policy identifies three elements that we are to consider in making a DPS determination. These elements include: (1) The discreteness of the population segment; (2) the significance of the population segment to the taxon to which it belongs; and (3) the population segment's conservation status in relation to the ESA's standards for listing. If we determine that a population segment is discrete and significant, it is evaluated for endangered or threatened status based on the ESA's definition of those terms and a review of the five listing factors established in section 4(a) of the ESA.

Discreteness

Discreteness refers to the separation of a population segment from other members of the taxon based on either: (1) Physical, physiological, ecological, or behavioral factors; or (2) international boundaries within which significant differences in control of exploitation, habitat management, conservation status, or regulatory mechanisms exist in light of section 4(a)(1)(D) of the ESA.

There is no evidence of marked genetic or morphological discontinuity between murrelet populations at the United States-Canada border, nor is there evidence of differences in the control of exploitation. However, we find that there are significant differences in management of habitat, conservation status, and regulatory mechanisms between the countries. In our analysis of discreteness at the international border, we compare existing regulatory mechanisms in Canada with non-ESA regulatory mechanisms in the United States. This approach ensures that our analyses for listing and delisting a species are the same with respect to the international border discreteness test per our 1996 DPS policy.

Management of Habitat: The management of habitat would be different across the United States–Canada border without the protections of the ESA because the two countries would rely on regulatory mechanisms that are not equally protective of the murrelet or its habitat (*see Regulatory Mechanisms,* below).

Conservation Status: There is a difference in conservation status between the United States and Canada. If the murrelet were not listed under the ESA, no Federal protections would be afforded it under the ESA. Under Canada's endangered species legislation (the Species at Risk Act (SARA), 2002), the murrelet would remain classified as "threatened," that is, "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction." SARA's prohibition of harm to the species and its residence would mean the species would have significantly greater legal protection on the Canadian side of the border. The murrelet is listed as threatened in Oregon and Washington, and endangered in California under the individual State endangered species acts. However, these statutes, individually and collectively, provide less protection to the species as compared to regulatory protections under SARA. Hence, in the absence of ESA protections there would be a significant difference in the conservation status of the murrelet across the United States and Canadian border from a legal standpoint. See the *Differences in Regulatory Mechanisms* section below for additional information.

There is also a significant difference in conservation status from a population standpoint. The continental United States has a substantially smaller population of murrelets (approximately 18,000; USFWS 2009, p. 16), than does Canada (approximately 66,000; Burger 2002, p. 25). In addition, based on at-sea surveys of juvenile to adult ratios, the productivity of murrelets in Washington, Oregon, and California (Cresent Coastal Research, 2008, p. 13; Beissinger and Peery 2007, p. 299; Raphael *et al.* 2007a, p. 16; Long *et al.* 2008, pp. 18–19) is considerably lower than in British Columbia (Bellefleur and others, 2005 as cited in Piatt *et al.* 2007, p. 18). British Columbia reports higher productivity values than anywhere outside of Kachemak Bay in Alaska.

In addition, estimates of loss of old-growth forests in the United States' Pacific Northwest since pre-industrial times (National Research Council 2000, pp. 67–73), compared to the amount of forests within the range of the murrelet in British Columbia that have become unsuitable due to anthropogenic causes (*e.g.,* industrial logging and

urbanization) (Demarchi and Button 2001a and Demarchi and Button 2001b as adapted by Burger 2002, Chapter 4), show a higher percentage of murrelet habitat has been lost historically in Washington, Oregon, and California than in Canada.

Finally, there are differences in the amount of nesting habitat remaining for murrelets between the United States and Canada. There are approximately 1.5 to 2 million hectares (3.7 to 4.9 million acres) of nesting habitat remaining in British Columbia (Piatt *et al.* 2007, p. 118), while there are only 890,000 to 1.6 million hectares (2.2 to 4.0 million acres) of suitable nesting habitat remaining in the contiguous United States (McShane *et al.* 2004, pp. 4–5; Raphael *et al.* 2006, pp. 117–118, 123). Furthermore, the contiguous U.S. estimate is likely an overestimate because some administrative units used northern spotted owl habitat as a surrogate for murrelet habitat, and owl habitat includes younger forest than typical murrelet habitat.

In conclusion, the conservation status of the murrelet is significantly different across the international border. Murrelet population numbers are lower in the United States (less than one-third of the Canadian population), productivity is lower, the loss of old-growth forests has been more severe, and there is probably less habitat remaining (although the habitat estimates overlap somewhat). This difference in conservation status is likely to be exacerbated when one compares status across the border without the ESA's protections in the United States.

Differences in Regulatory Mechanisms: Compared with protection in Canada, there would be significantly less regulatory protection for the murrelet in Washington, Oregon, and California if the species were not listed.

Regulatory Mechanisms in Canada: In 2003, Canada implemented its Federal endangered species legislation, the Species At Risk Act (SARA). Under SARA the murrelet is classified as a "threatened" species (Statutes of Canada (S.C.) Chapter (ch). 29, Schedule 1, Part 3 (2002)). SARA defines a "threatened" species as "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction" (S.C. ch. 29 § 2). It is illegal to kill, harm, harass, capture, or take an individual of a wildlife species that is listed as an extirpated species, an endangered species, or a threatened species, or to possess, collect, buy, sell, or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species, or a threatened species, or any part or derivative of such an individual (S.C. ch. 29 § 32). SARA also prohibits any person from damaging or destroying the residence of a listed species, or from destroying any part of its critical habitat (S.C. ch. 29 §§ 33, 58). For many of the species listed under SARA, the prohibitions on harm to individuals and destruction of residences are limited to Federal lands, but this limitation does not apply to migratory birds protected under the Migratory Birds Convention Act, including the murrelet (S.C. ch. 29 § 34). Hence, SARA protects murrelets from harm and destruction of their residences, not only on Federal lands, but also on provincial and private lands, where most of the remaining habitat for the species occurs. (Because critical habitat has not yet been designated for the murrelet, SARA's provisions protecting critical habitat are not yet effective.) SARA defines the "residence" of a species to mean "a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating" (S.C. ch. 29, § 2). Hence, to receive SARA's protection, a "residence" need not be continuously occupied by the species. Thus, SARA protects the murrelet, not only from direct killing, but also from indirect harm through destruction of its residence. Moreover, SARA mandates development and implementation of a recovery strategy and action plans (S.C. ch. 29 §§ 37, 47).

Violations of SARA are punishable by a fine of up to $250,000 for an individual, or $1,000,000 for a corporation, or imprisonment for up to 5 years, or both (S.C. ch. 29 § 97). SARA provides that each day of a continuing violation constitutes a separate offense, and makes corporate officers and employers vicariously liable for actions of their agents and employees (S.C. ch. 29 §§ 97–99).

The murrelet is also protected under Canada's Federal Migratory Birds Convention Act, 1994 (MBCA) (S.C. ch 22), which is their domestic legislation similar to our Migratory Bird Treaty Act of 1918 (MBTA). The MBCA and its implementing regulations prohibit the hunting of migratory nongame birds and the possession or sale of "migratory birds, their nests, or eggs" (S.C. ch. 22 §§ 5, 12).

Although British Columbia has no stand-alone endangered species act, the provincial Wildlife Act protects virtually all vertebrate animals from direct harm, except as allowed by regulation (*e.g.,* hunting or trapping). Legal designation as endangered or threatened under this act increases the penalties for harming a species, and also enables the protection of habitat in a Critical Wildlife Management Area (British Columbia Wildlife Act 1996). The murrelet is not listed under this act as an endangered or threatened species.

The murrelet is designated as a "species at risk" and as an "identified wildlife species" under the British Columbia Forest and Range Practices Act (FRPA) (2002). Under this act, guidelines for murrelet management are contained in the Identified Wildlife Management Strategy (IWMS). Under the IWMS, murrelet habitat in British Columbia is divided into six conservation regions. Within each of these regions, a recommended maximum decline in population and habitat by 2032 has been identified. In four of the six regions, a limit of a 31 percent decline in population and habitat has been recommended. The other two regions have a zero to 10 and 15 percent recommended maximum decline. Management of habitat is implemented through several mechanisms, including wildlife habitat areas (WHAs) and strategic land use plans. The required size and characteristics of the WHAs (essentially protected suitable habitat) have been identified, yet "the amount of habitat to be established as WHAs remains constrained by existing policy," such as the 1 percent timber supply impact cap on the timber harvesting land base (British Columbia Ministry of Environment 1999, p. 1).

Under a directive issued pursuant to the FRPA, timber licensees on provincial lands must conserve all murrelet nesting habitat in the non-contributing land base (areas not economically viable to harvest) plus a small area in the timber harvesting land base (British Columbia Forest and Range Practices Board (BCFPB) 2008, p. 1). British Columbia has set a general objective under the FRPA to conserve sufficient habitat for the survival of all species at risk, without unduly reducing the timber supply (BCFPB 2008, p. 6). In 2004, British Columbia designated the murrelet as a species at risk, and issued a notice requiring the primary licensee on the southern coast to prepare a Forest Stewardship Plan (FSP) consistent with the murrelet conservation objective. The licensee met this requirement by preparing a strategy that avoids road-building and timber harvest in some murrelet nesting habitat. The BCFPB has determined that the effect of the FSP requirement will be to conserve 23,500 hectares (58,070 acres), or 67 percent, of remaining

suitable murrelet habitat on the southern coast of the province (BCFPB 2008, p. 13).

Murrelet habitat is also protected in British Columbia in several provincial and national parks. These designations, along with WHAs, protect about 490,000 hectares (1.2 million acres) of murrelet habitat, or about 25 percent of the total available in British Columbia in 2002 (Burger 2008, p. 6).

In accordance with SARA, the federally led Canadian Marbled Murrelet Recovery Team has developed a draft murrelet recovery strategy, which has been approved by the Province, but has not been posted on the SARA public registry. One of the three action plans identified by the Recovery Team has been drafted but has not yet been approved (Burger 2008, p. 4). Given that the murrelet is a migratory bird and, therefore, comes under Federal jurisdiction across all lands, including Provincial lands, the recovery and action plans will apply to the murrelet over its entire range in Canada (Bertram 2006). However, because it is unclear how the recovery and action plan elements (which are awaiting approval or are still being drafted) will interact with the IWMS, it is unclear how management of murrelet habitat in Canada will occur into the future.

Regulatory Mechanisms in Washington, Oregon, and California: If the murrelet were not federally listed in Washington, Oregon, and California, prohibitions under section 9 of the ESA would no longer apply. Thus, there would be no Federal prohibitions against take through habitat destruction or harassment of the murrelet. In addition, absent protection of the ESA, Federal agencies would have no duty under section 7 of the ESA to consult with the Service on the effects of their actions on the species, to avoid jeopardizing the species, or to avoid adversely modifying previously identified critical habitat.

The murrelet would continue to receive some protection under the MBTA (16 U.S.C. 703), which makes it unlawful to take migratory birds, including the murrelet. However, the MBTA's definition of "take" includes direct pursuit, killing, and capturing, but does not include harm through habitat destruction, nor harassment (16 U.S.C. 715n). The Ninth Circuit has held that the MBTA does not protect migratory birds from habitat destruction such as logging of old growth forest (*Seattle Audubon Society* v. *Evans,* 952 F.2d 297 (9th Cir. 1991)). SARA, by contrast, protects the murrelet from not only direct killing, but also harm, harassment, and destruction of the species' "residence". Moreover, the MBTA's sanctions for violations are significantly lighter than SARA's, imposing only misdemeanor penalties of 6 months imprisonment and $15,000 in fines (16 U.S.C. 707), compared with the felony-level sanctions under SARA.

The murrelet receives some protection under State laws in Washington, Oregon, and California, but these laws are less protective than SARA. Washington law prohibits "maliciously" killing or harassing murrelets or destroying their nests, but does not prohibit indirect harm through habitat modification (Revised Code of Washington (RCW) § 77.15.120; and Washington Administrative Code (WAC) § 232–12–011). Violation of this law is a gross misdemeanor, punishable by no more than 1 year of imprisonment or a fine of no more than $5,000. This law is less protective than SARA because, by limiting its reach to "malicious" conduct, it does not govern as broad a range of conduct as does SARA's strict liability standard, and because the penalties it imposes are substantially lighter. Washington forest practice regulations limit, but do not entirely prohibit, timber harvest that would constitute "take" under the ESA (WAC §§ 222–10–042, 222–16–080). Washington law (WAC 232–12–297) requires that recovery plans be written for species listed as endangered or threatened by the Washington Fish and Wildlife Commission; however, currently there is no State recovery plan for the murrelet. In order to delist the species, Washington Department of Fish and Wildlife would have to develop criteria for reclassifying to a species of concern and delisting and then show how the species has met these criteria.

In Washington, the State Forest Practices Rules (FPR) (Wash. Admin. Code Title 222, Chapt. 10 & 16) specifically establish murrelet suitable habitat definitions, survey requirements, and review processes for forest practices that may impact murrelet habitat. The FPRs provide protection to occupied (as defined by FPR) murrelet sites during the nesting season on private forest lands where the landowner owns more than 500 acres of land that are less than 50 miles from marine waters. For those lands that are presumed to have at least a 30 percent probability of occupancy, landowners are subject to survey requirements and those areas where occupancy is found are protected. The FPRs provide for protection of murrelets through minimization of take and jeopardy pursuant to the Washington Endangered Species Act and the Federal Endangered Species Act. However, the FPR definitions of suitable habitat, inland distance, and occupied site do not include all of the lands the Service considers to have features essential for conservation of murrelet. Therefore, some suitable habitat may be harvested without review. In addition, landowners have the option to go through the State Environmental Policy Act process and get approval to harvest; although this has not occurred to date. Current FPRs protect occupied (as defined by State) habitat and a 300-foot managed buffer around occupied habitat. However, there are no reasonable assurances that the maximum site size and managed buffers are adequate to protect and maintain complex-structured forest isolated from human development such that the risk of predation, windthrow, and changes in microclimate are reduced.

Oregon has listed the murrelet as a threatened species under State law (Oregon Administrative Regulations (OAR) 635–100–0125(3)(i)), but the Oregon Endangered Species Act (Oregon ESA) is less protective than SARA. It includes no take prohibition (ORS 496.182). In fact, the statute expressly exempts private landowners from any obligation to protect listed species (ORS 496.192(1)). The Oregon ESA provides some protection on State lands, but less than SARA provides on public lands in Canada. Under the Oregon ESA, each State agency is permitted to make its own determination as to how to balance the needs of listed species with the "social and economic impacts" that conservation would have on the State (ORS 496.182(8)(a)(B)). A State agency is permitted to take an action that would jeopardize a State-listed species, provided the agency determines that the public benefits of the action outweigh the harm to the species (ORS 496.182(4)(a)). Moreover, State lands comprise a relatively small proportion of occupied murrelet habitat in Oregon; the majority of known occupied habitat is on Federal land. Finally, the murrelet could lose any State protection in Oregon if it is delisted under the Federal ESA, because the Oregon ESA provides that the State may delist a species if it has been determined not to qualify for listing under the Federal ESA (ORS 496.176(6)(c)).

In Oregon, the Oregon Forest Practices Act (ORS 527.610 to 527.992 and OAR Chapter 629, Divisions 600 to 665) lists protection measures specific to private and State-owned forested lands in Oregon. These measures include specific rules for resource protection, including some threatened and endangered species such as the northern spotted owl, but the rules do not

address protection of murrelet habitat (OAR 629–665).

The murrelet is listed as endangered under California law (California Code of Regulations (CA Code of Regs), tit. 14, § 670.5(a)(5)(R)). The California Endangered Species Act (CESA) (CA Code of Regs, tit. 14, § 2080, *et seq.*) prohibits "take" of endangered species (CA Code of Regs, tit. 14, § 2080). "Take" is defined by California Fish and Game Code section 86. This definition includes capturing or killing or attempting to capture or kill, but not harming or harassing, which is prohibited under the Federal ESA and SARA. Therefore, some actions that would be prohibited under SARA would not be prohibited under CESA. Activities that may disrupt a bird's behavior such that it constitutes "harm" or "harassment" under SARA would not constitute "take" under CESA if the disruption does not result in mortality of the bird through nest abandonment or other means. Damaging or destroying a bird's residence is prohibited under SARA even without evidence that the bird died, while CESA would require at least circumstantial evidence showing that the bird died as a result of the action. Nothing in California State law requires recovery planning. Recovery actions can be voluntarily undertaken, however, pursuant to authorities such as the Natural Community Conservation Planning Act (CA Code of Regs, tit. 14, § 2080).

In California, the California Forest Practice Rules (CFPR) (CA Code of Regs., tit. 14, chapters 4, 4.5 and 10) were established to regulate timber harvest on non-Federal lands within the State of California. The CFPRs are implemented through the review and approval processes for the California Department of Forestry and Fire Protection (CALFIRE) individual Timber Harvest Plans (THP) and Nonindustrial Timber Management Plans (NTMP). With the exception of plans that are exempted from the preparation and submission requirements under the CFPRs, all commercial timber harvest must go through this process.

The CFPRs do not contain a definition of suitable murrelet nesting habitat. Consequently, each plan has a decision on habitat suitability on a stand-by-stand basis, and they may or may not disclose the presence of murrelet habitat. Under the CFPR's Special Conditions section 898.2, CALFIRE is required to disapprove a plan if implementation of the plan would result in take or jeopardy in violation of the Federal Endangered Species Act. When recommendations to avoid unauthorized take of murrelets are provided, they are typically included in THPs or NTMPs. However, because only some of these plans are reviewed by California Department of Fish and Game or the Service, suitable murrelet habitat and possibly even occupied nesting habitat likely has been lost due to this lack of oversight. In summary, the practical application of the CFPRs are only partially effective at protecting suitable habitat pursuant to the Federal ESA due to the lack of a detailed description of habitat suitability within the CFPRs and the lack of adequate resource agency staff to review THPs and NTMPs that may contain suitable murrelet nesting habitat.

The adoption of the Northwest Forest Plan (NWFP) by the U.S. Forest Service (Forest Service) and the Bureau of Land Management (BLM) has greatly reduced the annual rate of habitat loss on Federal land in the United States since 1994. Nonetheless, estimated potential total loss of suitable murrelet habitat since the 1992 listing of the species is about 10 percent of the current estimate of suitable habitat (USFWS 2004, p. 16). If the murrelet were delisted, the NWFP could be amended to reduce protection for the species. The murrelet would still derive some incidental benefit from continued protection of the reserve system under the NWFP, although conservation benefits would not likely extend to all areas currently protected for the murrelet. In addition, even if the NWFP were not amended, delisting would relieve the Forest Service and the BLM of any obligation to consult with the Service on site-specific actions that may adversely affect the murrelet. These agencies would also be relieved of their duty under section 7(a)(1) of the Federal ESA to carry out programs for the conservation of the species. The British Columbia murrelet conservation assessment, by comparison, states a central recovery goal is to downlist the species from Threatened to Special Concern, by creating conditions that will limit the decline of the British Columbia population and its nesting habitat to less than 30 percent over three generations (30 years) (Bertram *et al.* 2003, p. 5), roughly the same habitat loss in arithmetical terms as that experienced during the period 1992 to 2003 in the United States.

Absent listing under the Federal ESA, State laws would not necessarily protect murrelets on Federal lands. Other Federal laws governing management of Federal lands could preempt State law to the extent there is an irreconcilable conflict (*National Audubon Society* v. *Davis,* 307 F.3d 835, 854 (9th Cir. 2002)).

There appears to be a difference in management of marine habitat between Canada and the United States as well. In the United States there is a ban on exploitation of forage fishes and regulated take of protected species under the Magnuson-Stevens Fishery Conservation and Management Act. For regulation purposes, the National Marine Fisheries Service considers forage species to include the prey species important to murrelets; however, some important prey species (such as Pacific herring) are commercially fished. In British Columbia, there are no restrictions on exploitation of forage species (Piatt *et al.* 2007, p. 94). In the United States, murrelets are protected from commercial fisheries in California and Oregon through State laws. However in Washington State, protections afforded the commercial fishery are tied specifically to section 7 of the Federal ESA, and are implemented through interagency consultation with the National Oceanic and Atmospheric Administration (NOAA) and the Bureau of Indian Affairs. Without the ESA, murrelets in Washington do not appear to be protected from bycatch. In British Columbia, although the MBCA does afford them some protections, there have been limited direct efforts to reduce bycatch (Piatt *et al.* 2007, p. 92). SARA's take prohibitions, however, are applicable in the marine environment, and hence, commercial fishing operations that harm murrelets by ensnaring them in nets would violate the statute.

As described above, the differences in regulatory mechanisms that would exist on each side of the border would be significant in light of section 4(a)(1)(D) of the ESA and would result in differences in management of habitat. The loss of Federal protective measures afforded by the ESA is likely to place the species at greater risk of extirpation in the coterminous United States.

Significance

If we determine that a population meets the DPS discreteness element, we then consider whether it also meets the DPS significance element. The DPS policy (61 FR 4722) states that, if a population segment is considered discrete under one or more of the discreteness criteria, its biological and ecological significance will be considered in light of Congressional guidance that the authority to list DPSs be used "sparingly" while encouraging the conservation of genetic diversity. In making this determination, we consider available scientific evidence of the discrete population's importance to the

taxon to which it belongs. Since precise circumstances are likely to vary considerably from case to case, the DPS policy does not describe all the classes of information that might be used in determining the biological and ecological importance of a discrete population. However, the DPS policy does provide four possible reasons why a discrete population may be significant. As specified in the DPS policy (61 FR 4722), this consideration of significance may include, but is not limited to, the following:

(1) Persistence of the discrete population segment in a unique or unusual ecological setting;

(2) Evidence that loss of the discrete segment would result in a significant gap in the range of the taxon;

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of the taxon that may be more abundant elsewhere as an introduced population outside of its historic range; or

(4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Loss of the DPS would result in a significant gap in the range of the murrelet. This gap is significant because the Washington, Oregon, and California area accounts for roughly 18 percent of the total coastal distribution of the species, encompassing 17 degrees of latitude. In addition, the Washington, Oregon, and California area is located at the southern-most extent of the range. This DPS contains an ecologically distinct forest system, the coastal redwood zone. Moreover, peripheral and disjunct populations may play an important role in maintaining opportunities for speciation and future biodiversity (Fraser 1999, p. 50). Recovery of species without the conservation of these peripheral populations may be impossible if these populations are eliminated or severely damaged (Fraser 1999, p. 50).

Although there is no genetic distinction at the border, researchers have found significant genetic distinction throughout the range of the species. Friesen *et al.* (2005, pp. 611–612) reported significant differentiation of birds from peripheral sites (*i.e.,* California and the Aleutian Islands), with the Aleutian and California populations each having one or more private control region haplotypes that occurred at high frequency. Friesen *et al.* (2007, pp. 13–14) results indicate that genetic variation changes clinally in this species, and provided additional resolution showing that murrelets in western and central Aleutian Islands and central California differ significantly from murrelets in the rest of the species' range. They concluded that murrelets appear to comprise three genetic units: (1) Western and central Aleutian Islands; (2) eastern Aleutian Islands to northern California; and, (3) central California. Loss of any of these populations would result in the loss of a portion of the species' genetic resources and/or local adaptations, and may compromise its long-term viability (Piatt *et al.* 2007, p. 43). Since the currently listed population encompasses all of one genetic unit as mentioned above and a portion of another, loss of the population could compromise the long-term viability of the species as a whole.

DPS Conclusion

We consider the Washington/Oregon/California population of murrelets to be a valid distinct population segment under the 1996 DPS Policy. This population of murrelets is discrete at the international border because: (1) The coterminous United States has a substantially smaller population of murrelets (approximately 18,000) than does Canada (approximately 66,000); (2) breeding success of the murrelet in Washington, Oregon, and California is considerably lower than in British Columbia; and (3) there are differences in the amount of habitat, the rate of habitat loss, and regulatory mechanisms between the countries (USFWS 2009, pp. 4–5). The coterminous United States population of murrelets is also considered significant in accordance with the criteria of the DPS Policy, as the loss of this distinct population segment would result in a significant gap in the range of the taxon and the loss of unique genetic characteristics that are significant to the taxon (USFWS 2009).

Having found that the population of murrelets in Washington, Oregon, and California is a valid DPS, we next evaluate the status of the population based on the ESA's five listing factors to determine whether the DPS continues to warrant listing as a threatened species.

Summary of Factors Affecting the Species

Under section 4 of the ESA, a species may be determined to be endangered or threatened on the basis of any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for the following reasons: (1) The species is extinct; (2) the species has recovered and is no longer endangered or threatened; or (3) the original scientific data used at the time the species was classified were in error.

We are using the extensive evaluation undertaken in our 2009 5-year review as the foundation for our 12-month finding (USFWS 2009, pp. 26–68). Below, we present a summary of our recent 5-year review (USFWS 2009), which is available at: [*http://www.fws.gov/westwafwo/pdf/Mamu2009_5yr_review%20FINAL%2061209.pdf*]. The reader is referred to that document for a more detailed analysis of the threats to the murrelet.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

Terrestrial Habitat Modification

At the time the murrelet was listed in 1992, we determined that the species' decline was due in part to habitat removal across the DPS (57 FR 45328). In addition, we noted that, while modification of historical harvest practices could help decrease the amount of time it would take an area to again become suitable habitat for the murrelet, this was unlikely over the short-term. Historic and ongoing loss and fragmentation of remaining suitable nesting habitat for murrelets continues to be a threat throughout most of the forested range of the DPS.

In our 2004 5-year review (USFWS 2004, p. 19; citing McShane *et al.* 2004), we found that habitat loss and fragmentation were expected to continue in the near future, but at an uncertain rate. Information presented in our 2009 5-year review does not suggest this threat has abated (USFWS 2009, pp. 33–34). Raphael *et al.* (2006, p. 137) suggest that habitat losses in the past decade were likely greater than previously estimated, notably on non-Federal lands. Thus, nesting habitat loss continues to be a threat to the murrelet.

Climate Change in the Terrestrial Environment

Though considerable uncertainty exists with respect to any regional-scale impacts of climate change due to the differences in trajectories of climate change scenarios, modeling results

underscore the potentially large impacts on the Pacific Northwest and California ecosystems. Adverse consequences to forest ecosystems are likely to increase as a result of climate change (Kliejunas *et al.* 2008, p. 25), potentially negatively impacting habitat for many species, including the murrelet.

Climate change is likely to further exacerbate some existing threats such as the projected potential for increased habitat loss from drought-related fire, mortality, insects and disease, and increases in extreme flooding, landslides, and windthrow events in the next 10 to 30 years. While it appears likely that the murrelet will be negatively affected by these changes, we lack adequate information to quantify the magnitude of effects to the species from climate change projections.

Threats to the Marine Environment

Threats in the murrelet's marine environment include harmful algal blooms, dead zones, changes in prey availability and quality, and the potential exacerbation of these conditions from climate change.

Murrelets in the listed range are affected by changes in the California Current System, the Straits of Juan de Fuca, and Puget Sound. The California Current System is dominated by a southward surface current of colder water from the north Pacific (Miller *et al.* 1999, p. 1; Dailey *et al.* 1993, pp. 8–10) and is characterized by upwellings, particularly in the spring and summer. This system is affected by inter-annual El Niño-Southern Oscillation and inter-decadal (Pacific Decadal Oscillation) climatic processes, which result in warm and cool phases. The Strait of Juan de Fuca is where deep in-flowing oceanic waters mix with out-flowing Puget Sound and Georgia Basin surface waters. The marine conditions in the Straits are in response to upwelling and downwelling patterns generated by coastal winds and changes in coastal circulation. The Puget Sound is an estuary within which the subtidal circulation is largely driven by the differences in salinity between fresher waters within the Sound and the saltier waters in the Strait of Juan de Fuca. Shallow sills within Puget Sound restrict the entry of deep oceanic waters, reducing flushing of these inland marine and estuarine waters and resulting in hydrologic isolation that puts aquatic organisms at higher risk because toxic chemicals, nutrients, and pathogens remain in the system longer, resulting in increased exposure (Puget Sound Action Team 2007, p. 129).

Based on available information, murrelet prey species abundance appears to be in decline (USFWS 2009, pp. 39–41). There are commercial and recreational fisheries for some prey species stocks, and the Pacific herring in Puget Sound are carrying high body loads of PCBs (polychlorinated biphenyls) (Puget Sound Action Team (PSAT) 2007, p. 129). In addition, new information indicates prey quality has declined over the last decade and murrelets are now feeding at lower trophic levels in central California and Puget Sound (Becker and Beissinger 2006, p. 475; Norris *et al.* 2007, p. 879) and possibly throughout the 3-State area; however, prey quality has not been assessed in other portions of the murrelet's listed range.

Shifts to lower trophic-level food items may be compromising murrelet reproduction. Egg production is energetically costly and dependent on the availability of adequate prey, especially during egg development (Becker and Beissinger 2006, p. 477). In central California, a large proportion (50–90 percent) of murrelets forego breeding and may do so because they cannot find sufficient food resources during preparation for breeding (Peery *et al.* 2004, pp. 1094–1095). Norris *et al.* (2007, p. 879) found murrelet breeding success increased when their pre-breeding diet consisted of higher trophic-level prey (*i.e.,* they found a strong correlation between the pre-breeding diet and murrelet abundance 3–4 years later (the time lag for young-of-the-year to attain breeding age)).

Murrelets are exposed to harmful algal blooms (HABs) and dead zones throughout the DPS, although the potential effects may be more pronounced in specific areas, such as the Oregon coast, Monterey Bay, and Puget Sound (USFWS 2009, pp. 36–39). These events result in significant mortality of fish and invertebrates and may contribute to low food availability during the murrelet breeding season, thereby contributing to low murrelet reproductive success. In addition to the impacts to prey resources, HABs from certain algae species produce biotoxins that result in domoic acid poisoning or paralytic shellfish poisoning, causing murrelet mortality (Peery *et al.* 2006b, p. 83; McShane *et al.* 2004, pp. 3–67). HABs and dead zones may have been occurring all along and have just begun to be studied; however, scientists (Chan *et al.* 2008, p. 1; Rucklehaus and McClure 2007, p. 54) predict the scope and length of these events are likely to increase in the future.

Climate Change in the Marine Environment

Climate change is likely to result in changes to the murrelet's marine environment. While physical changes to the near-shore environment appear likely, much remains to be learned about the magnitude, geographic extent, and temporal and spatial patterns of change, and their effects on murrelets. Effects on the murrelet food supply (amount, distribution, quality) provide the most likely mechanism for climate change impacts to murrelets. However, limitations on our knowledge of murrelet prey, and how climate change could affect those prey, constrain our ability to forecast effects with confidence.

While the differing climate change predictions prevent a conclusive threat assessment, the predicted direction of change for most variables considered suggests that few changes are likely to benefit murrelets, with many more having the potential to negatively affect murrelets, through direct mortality, changes to food supply, or interactions with other threats. While seabirds such as the murrelet have life-history strategies adapted to variable marine environments, ongoing and future climate change could present changes of a rapidity and scope outside the adaptive range of murrelets. The ability of the species to respond to shifts in prey conditions is constrained by several factors. Nesting habitat distribution is limited, and nesting birds may be restricted to foraging in waters relatively near their inland nest sites (USFWS 2009, p. 14). Furthermore, the available information indicates substantial nest site fidelity, and does not suggest that individual murrelets will abandon a nesting area that becomes unsuitable, and move to a new, distant nest site (Nelson 1997, pp. 16–17; Meyer *et al.* 2002, pp. 112–113; Hebert and Golightly 2006, pp. 257–282).

We conclude that the information suggests there is an increase in the level of threats in the marine environment including HABs, dead zones, prey availability and quality, and the potential exacerbation of these conditions from climate change.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We have no information or evidence that indicates that overutilization of murrelets for commercial, recreational, scientific or educational purposes is a threat to the persistence of the species.

Factor C. Disease or Predation

Disease

We did not identify disease as a threat to the murrelet in our 1992 listing (USFWS 1992, p. 45334). More recently, it has been reported that bacterial, fungal, parasitic, and viral diseases and biotoxins affect numerous populations of seabirds, but no information on the effects of these threats to alcids was available (McShane *et al.* 2004, pp. 6–12). West Nile virus has been identified as a potential threat as it has been detected in other marine bird species, such as cormorants and many species of gulls, and forest-dwelling species, such as spotted owls, goshawks, corvids, and many passerine species (information available on the Centers for Disease Control (*http://www.cdc.gov*) and National Wildlife Health Center (*http://www.nwhc.usgs.gov*) Web sites). However, West Nile virus has not been observed in murrelets (McShane *et al.* 2004, pp. 6–12).

In addition, the highly pathogenic avian influenza (HPAI) has also emerged since the murrelet's 1992 listing. However, no cases of this disease have been detected in wild birds anywhere in North America (U.S. Geological Survey 2007, p. 2; *http://www.nwhc.usgs.gov/map*), and, therefore, we have no information to indicate that HPAI is currently a threat to the murrelet.

Predation

Predation was identified in our original 1992 listing rule and our analysis for the 2004 5-year review as a significant threat to murrelet demographic rates (USFWS 1992, p. 45334; McShane *et al.* 2004, p. 19). New information supports these findings (USFWS 2009, pp. 47–49). Predation has two primary components: Losses of adults or fledged juveniles and nest predation (eggs or chicks). Adult/juvenile predation may occur at sea or inland. There is no significant new information concerning at-sea or terrestrial non-nest predation on murrelets. Corvids remain the predator with the greatest impact on murrelets (USFWS 2009, p. 46).

Nest failure rates of 68 to 100 percent (Hebert and Golightly 2003, p. 52; Peery *et al.* in prep as cited in McShane *et al.* 2004, p. 6–29) due to predation in real nests, and 81 to 95 percent in artificial nests (Luginbuhl *et al.* 2001, p. 563; Marzluff and Neatherlin 2006, p. 312) have been reported. The key elements affecting nest predation rates appeared to be proximity to humans, abundance of avian predators, and proximity to, and type of, forest edge. The best available information indicates that murrelets are highly vulnerable to nest predation and confirms the importance of nest predation in limiting murrelet nest success throughout the DPS, particularly in areas where murrelet habitat is in close proximity to humans (*e.g.,* parks) (USFWS 2009, p. 48).

Factor D. Inadequacy of Existing Regulatory Mechanisms

Information reviewed in the 2009 5-year review considered revisions of plans and regulations within the range of the murrelet that addressed increased or decreased regulatory protection with respect to murrelets (USFWS 2009, pp. 50–55). This analysis found that, while some regulatory mechanisms protecting the murrelet and its habitat have been enacted since listing, regulatory mechanisms would not be sufficiently protective of the murrelet or its habitats to ensure its long-term viability, without the continued protections of the ESA. See the discussion under the DPS discreteness factor above, as well as the 2009 5-year review (USFWS 2009, pp. 50–55 and Appendix B) for an expanded explanation of the non-ESA regulatory mechanisms currently in place. Therefore, the threat posed by the inadequacy of existing mechanisms has been reduced since listing but not removed.

Factor E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Oil Spills

Oil spills have resulted in observed or estimated mortality to marbled murrelets since the mid-1980s (USFWS 2009, p. 57). Individual spills have been estimated to kill anywhere from 6 to 350 murrelets from oiling (USFWS 2009, p. 57). Thus, localized impacts from oil spills can be severe and can result in direct mortality through oiling and impacts to reproductive success through changes in prey base, marine habitat, and disturbance.

Gill Net Bycatch

Gill nets may be responsible for direct mortality of murrelets, but the impacts continue to be localized to the Puget Sound area and northern Washington coast. This threat may be increasing in Puget Sound where there appears to be an increase in fishing effort (USFWS 2009, p. 59).

Derelict Fishing Gear

Entanglement in derelict fishing nets has recently been identified as a threat to marine mammals, seabirds, shellfish, and fish in Puget Sound and the Straits of Juan de Fuca. Derelict fishing gear consists of nets and crab pots that have been lost, abandoned, or discarded in the marine environment. This gear can persist in the marine environment and continue "fishing" (capturing sea life) for decades (Natural Resources Consultants, Inc. 2008, p. 3). Not only does derelict gear result in direct mortality of species, it destroys and degrades marine habitat by accumulating sediment, scouring bottom substrate, impeding plant and sessile animal growth, and blocking access to habitat used for foraging and escaping predators (June and Antonelis 2009, p. 3). Impacts from derelict fishing gear (nets and pots) are a newly identified threat since the murrelet's 1992 listing. While the scope and severity of the threat posed to murrelet prey from derelict pot fishing gear has yet to be determined, the threat posed by derelict fishing nets appears to be localized to the Puget Sound and Straits of Juan de Fuca. The severity of this threat in these areas is high due to the potential for significant and persistent direct mortality.

Wave and Tidal Energy Projects

The threat(s) these projects may pose to murrelets varies greatly, depending upon the proposed location and type of equipment. In some cases, such as tidal energy projects that will use underwater turbines, the threat may be direct mortality to diving birds. In other cases, the projects may degrade marine habitat through shading, collision or entanglement obstacles, night-lighting, changes in prey abundance, and/or increased human presence. The magnitude of threat to the murrelet from these types of activities is dependent upon their proximity to murrelet foraging and breeding habitat. There are new wave and/or tidal projects proposed in all three States within the murrelet's listed range (USFWS 2009, p. 61). However, at this time, it is uncertain how these projects will impact murrelets because the project plans are still under development and locations are undetermined at this time.

Wind Power Projects

The threat(s) that wind development projects may pose to murrelets varies greatly, depending upon the proposed location and type of equipment. We are aware of four new on-shore wind projects proposed in Washington and one in California, within the murrelet's listed range (USFWS 2009, pp. 61–62). However, at this time, it is uncertain how these projects will impact murrelets because the project plans are still under development and locations are not finalized at this time. In some

cases, the threats posed by on-shore wind energy projects may include direct mortality (*i.e.*, collisions) and habitat removal.

At this time we are unaware of any off-shore wind energy projects proposed along the coasts of Washington, Oregon, or California.

Liquefied Natural Gas Terminal and Pipeline Projects

Four liquefied natural gas terminals have been proposed in Oregon (USFWS 2009, p. 62), each with associated pipelines through murrelet nesting habitat. At this time, it is uncertain how these projects will impact murrelets in either the terrestrial or marine environments because the projects are still under development. In some cases, the threat posed by the pipelines may include loss or fragmentation of nesting habitat.

Disturbance in the Marine Environment

Little empirical data are available regarding the probability of lethal responses, sublethal injuries, physiological responses (particularly stress responses), behavioral responses, or social responses by murrelets to human activities in the marine environment. However, based on the best available information, murrelets may be affected by exposure to elevated underwater and above water sound levels, boat traffic, and reductions of prey or prey habitat. Most of these impacts occur in Puget Sound and Grays Harbor in Washington State (USFWS 2009, p. 63). Similar activities either do not take place along the outer coasts of Washington, Oregon, and California or have not yet been analyzed.

Elevated sound pressure levels can be generated underwater by such activities as underwater detonations and pile driving. Exposure to elevated sound pressure levels may result in injuries that lead to death or significant impairment of an individual's ability to carry out essential life functions (USFWS 2009, p. 63). Murrelets may also be exposed and respond to elevated sound pressure levels while at the water's surface. While there are no known studies or data available that evaluate the behavioral response of murrelets (or other alcids) to noise in the marine environment, behaviors that we believe could indicate disturbance of murrelets in the marine environment include: Aborted feeding attempts, multiple delayed feeding attempts within a single day or across multiple days, multiple interrupted resting attempts, and precluded access to suitable foraging habitat.

Boat traffic elicits behavioral responses in murrelets (McShane *et al.* 2004, pp. 5–36 through 5–37; Speckman *et al.* 2004, p. 33; Bellefleur *et al.* 2009, pp. 534–536) and may cause an energetic impact on murrelets due to the cost of flight compounded with being flushed off preferred feeding grounds (Bellefleur *et al.* 2009, p. 536). Murrelets may or may not habituate to boat traffic. While Bellefleur *et al.* (2009, p. 536) found the mean flushing distance decreased in areas with high boat density, suggesting murrelets may tolerate close encounters, they also found the percentage of murrelets that flushed in high boat density areas increased, suggesting murrelets are less committed to foraging in areas with many boats. Murrelet survival and reproduction are dependent upon an adequate quantity of high-quality food throughout the year, and human activities that limit access to select foraging sites may result in reduced reproduction or survival, especially if the human activities result in increased diving or relocation to a less favorable foraging area or a foraging area further from the nesting habitat (USFWS 2009, pp. 64–65). Although the relationship between disturbance in the marine environment and murrelet reproductive success or population abundance has not been sufficiently studied, it appears that within areas with high boat density or fast-moving boats, murrelets are more likely to move away, possibly to a less desirable foraging location. Within the DPS, there are areas (such as Puget Sound and Monterey Bay) where murrelets co-occur with substantial boat traffic, both recreational and commercial. Within these areas, boat traffic may be causing energetic impacts on murrelets that they are unable to compensate for, especially during the pre-breeding and breeding seasons.

Disturbance in the Terrestrial Environment

Hebert and Golightly (2006, pp. 34–35) and Golightly *et al.* (2009, p. 18) found vehicular traffic noise appeared to have little or no effect on murrelet nesting success. However, murrelets were more likely to nest further away from paved roads (Golightly *et al.* 2009, pp. 8–16), possibly due to noise disturbance or due to increased predation risk near roads regardless of sound levels (Golightly *et al.* 2009, p. 18).

Observations of incubating adult and chick responses to disturbance events (such as chainsaw operations) resulted in no flushing and no significant increase in corvid presence (Hebert and Golightly 2006, pp. 22, 28, 68). However, adults spent more time with their heads raised, and their bill up during the disturbances, compared to the pre- and post-disturbance periods. Chicks also spent more time with their heads raised, and their bill up during the disturbance trials, but the relevance of these behavioral changes is unknown (Hebert and Golightly 2006, pp. 35–36).

Conclusion

The petition to delist (AFRC *et al.* 2009) primarily cited the DPS conclusion in our 2004 5-year review (USFWS 2004, pp. 14–17) as sufficient reason to delist the Washington/Oregon/California DPS of murrelet. However, based on the analysis in our 2009 5-year review, we consider the Washington/Oregon/California population of murrelets to be a valid distinct population segment under the 1996 DPS Policy. The population is discrete due to differences in population size and breeding success, and differences in the amount of habitat, the rate of habitat loss, and regulatory mechanisms between the countries (USFWS 2009, pp. 4–5). The Washington/Oregon/California population of murrelets is also considered significant in accordance with the criteria of the DPS Policy, as the loss of this distinct population segment would result in a significant gap in the range of the taxon and the loss of unique genetic characteristics that are significant to the taxon (USFWS 2009, p. 12).

The Washington/Oregon/California population of murrelets was estimated to contain approximately 18,000 individuals in 2008, which represents a significant population decline since intensive monitoring efforts began in 2000, and a decline of approximately 26 percent compared to the population estimate in our 2004 5-year review (USFWS 2004, p. 18). Historical population declines have been largely caused by extensive removal of late-successional and old-growth coastal forest, which serve as nesting habitat for murrelets. Ongoing factors contributing to continued population declines include high nest-site predation rates and human-induced mortality in the marine environment from disturbance, gillnets, and oil spills. Murrelet reproductive success is strongly correlated with the abundance of mid-trophic-level prey. Overfishing or oceanographic variation from weather or climate events are likely to affect the marine environment, negatively impacting the availability of murrelet prey and ultimately, murrelet reproductive success.

Based on the evaluation of the threats and the murrelet's population status and

trends, we have determined that the murrelet is likely to become endangered in the foreseeable future unless the current population decline is arrested. Nothing in our assessment indicates that the currently observed population decline is transient. Rather, our threats assessment indicates that it is reasonable to expect that the species will continue to be exposed to a broad range of threats across its listed range. Although some threats have been reduced, most continue unabated and new threats now strain the ability of the murrelet to successfully reproduce. In summary, our analysis indicates that reproductive success is currently too low to sustain the population, manmade and natural threats are likely to continue at current or increased levels, and the population is likely to continue to decline such that the species is likely to become endangered in the foreseeable future and, therefore, continues to warrant threatened status.

Finding

On the basis of the best available scientific and commercial information, as discussed above, we find that the Washington/Oregon/California population of the murrelet is a valid DPS and is likely to become endangered within the foreseeable future (*i.e.*, it is threatened, as defined by the ESA). Therefore, removing this DPS of the murrelet from the List is not warranted.

References Cited

A complete list of all references cited herein is available upon request from the Washington Fish and Wildlife Office (*see* **ADDRESSES**).

Author

The primary authors of this document are the staff of the U.S. Fish and Wildlife Service (*see* **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 22, 2009.

Daniel M. Ashe,

Deputy Director, Fish and Wildlife Service.

[FR Doc. 2010–951 Filed 1–20–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 080228326–91445–02]

RIN 0648–AW30

Fisheries of the Northeastern United States; Northeast Skate Complex Fishery; Amendment 3

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement measures in Amendment 3 to the Northeast Skate Complex Fishery Management Plan (Skate FMP). Amendment 3 was developed by the New England Fishery Management Council (Council) to rebuild overfished skate stocks and implement annual catch limits (ACLs) and accountability measures (AMs) consistent with the requirements of the reauthorized Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Amendment 3 would implement a rebuilding plan for smooth skate and establish an ACL and annual catch target (ACT) for the skate complex, total allowable landings (TAL) for the skate wing and bait fisheries, seasonal quotas for the bait fishery, reduced possession limits, in-season possession limit triggers, and other measures to improve management of the skate fisheries. This proposed rule also includes skate fishery specifications for fishing years (FY) 2010 and 2011.

DATES: Public comments must be received no later than 5 p.m., eastern standard time, on February 22, 2010.

ADDRESSES: A final environmental impact statement (FEIS) was prepared for Amendment 3 that describes the proposed action and other considered alternatives and provides a thorough analysis of the impacts of the proposed measures and alternatives. Copies of Amendment 3, the FEIS, and the Initial Regulatory Flexibility Analysis (IRFA), are available on request from Paul J. Howard, Executive Director, New England Fishery Management Council (Council), 50 Water Street, Newburyport, MA 01950. These documents are also available online at *http://www.nefmc.org.*

You may submit comments, identified by 0648–AW30, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Fax:* (978) 281–9135, Attn: Tobey Curtis.
- *Mail:* Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Skate Amendment 3 Proposed Rule."

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are 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). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Tobey Curtis, Fishery Policy Analyst, (978) 281–9273; fax: (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

In 2003, NMFS implemented the Skate FMP to manage a complex of seven skate species in the Northeast Region: winter (*Leucoraja ocellata*); little (*L. erinacea*); thorny (*Amblyraja radiata*); barndoor (*Dipturus laevis*); smooth (*Malacoraja senta*); clearnose (*Raja eglanteria*); and rosette (*L. garmani*). The FMP established biological reference points and overfishing definitions for each species based on abundance indices in the NMFS Northeast Fisheries Science Center bottom trawl survey. In February 2007, NMFS informed the Council that, based on trawl survey data updated through 2006, winter skate was considered overfished. The Council was therefore required to initiate a rebuilding plan for winter skate, consistent with the Magnuson-Stevens Act.

After considering a wide range of issues, alternatives, and public input, the Council submitted a draft environmental impact statement (DEIS) for Amendment 3 to NMFS. The Notice of Availability (NOA) for the DEIS published in the **Federal Register** on September 26, 2008 (73 FR 55843). In

October 2008, the Council held four public hearings on the draft amendment, and public comments on the DEIS were accepted through November 10, 2008. At the time the amendment was initiated, the objectives of Amendment 3 were to rebuild winter skate and thorny skate (a species which has been overfished since FMP implementation) to their respective biomass targets, and to implement ACLs and AMs for the skate complex, consistent with the reauthorized Magnuson-Stevens Act. However, over the course of developing the amendment and subsequent to the publication of the DEIS, the objectives were modified to reflect more recent scientific information. Primarily, this includes the results of a new stock assessment completed in December 2008 by the Northeast Data Poor Stocks Working Group (DPWG). This assessment updated the minimum biomass thresholds and biomass targets for six of the seven skate species in the complex, resulting in a change in status for some species.

These new biomass reference points, as well as the most recent trawl survey data, indicate that winter skate is not overfished; however, thorny skates remain overfished, and smooth skates are now also considered to be overfished. Thorny skate was also determined to be experiencing overfishing in 2007 (but not in 2008); therefore, under the requirements of the reauthorized Magnuson-Stevens Act, the Skate FMP must be amended to establish a rebuilding plan for smooth skate and establish ACLs and AMs by 2011. The final objectives of Amendment 3 are to prevent overfishing of and rebuild smooth and thorny skate, promote biomass increases in other skate stocks, and implement ACLs and AMs for the skate complex.

Proposed Measures

The proposed regulations are based on the description of the measures in Amendment 3. Under section 305(d) of the Magnuson-Stevens Act, the Secretary has general responsibility to promulgate regulations that may be necessary to carry out the provisions of an approved FMP or amendment. NMFS has noted several instances where it has interpreted the language in Amendment 3 to account for any missing detail or ambiguity in the Council's description of the proposed measures. NMFS seeks comments on all of the proposed measures in Amendment 3.

New Biological Reference Points

Due to the data poor status of skate stocks, including a lack of reliable species-specific information on landings and discards, poor understanding of population dynamics and basic life history, and the inability to estimate the biomass that would support harvest at maximum sustainable yield (B_{MSY}) or the fishing mortality rate that would produce maximum sustainable yield (F_{MSY}) using more traditional methods, the DPWG recommended continued use of trawl survey indices for status determinations. However, they recommended that the time series used to estimate biomass thresholds and targets be updated to include the most recent years of survey data. For all species except barndoor, the B_{MSY} proxy (biomass target) is defined as the 75th percentile of the appropriate survey (autumn or spring trawl survey) biomass index time series for that species: autumn 1975–2007 for clearnose; spring 1982–2008 for little; autumn 1967–2007 for winter and rosette; and autumn 1963–2007 for smooth and thorny. For barndoor, the B_{MSY} proxy remains unchanged as the average 1963–1966 autumn survey biomass index, because the survey did not catch barndoor skates during a protracted time period of years.

A skate species is considered overfished if its 3-year moving average survey biomass falls below one-half of its B_{MSY} proxy value (biomass threshold). Therefore, since the current biomass indices for thorny and smooth skates are below their respective thresholds, they are considered overfished (Table 1). The current biomass for clearnose and rosette skates are above their respective biomass targets, so they are considered to be above B_{MSY}. Winter, little, and barndoor skates are not overfished, but not yet rebuilt to their biomass targets (Table 1).

Fishing mortality reference points, defined by percentage changes in the survey biomass indices, remain unchanged. No skates are currently subject to overfishing, although thorny skate experienced overfishing in 2007. The existing and proposed biomass reference points are shown in Table 1, relative to the most recent survey biomass for each species.

TABLE 1—COMPARISON BETWEEN CURRENT SKATE BIOMASS STATUS (THROUGH AUTUMN 2008) WITH EXISTING AND PROPOSED BIOMASS REFERENCE POINTS

Skate species	Stratified mean biomass (kg/tow)				
	Current biomass	Threshold	Proposed threshold	Target	Proposed target
Winter	5.23	3.43	2.80	6.46	5.60
Little	5.04	3.27	3.51	6.54	7.03
Barndoor	1.02	0.81	0.81	1.62	1.62
Thorny	0.42	2.20	2.06	4.41	4.12
Smooth	0.13	0.16	0.14	0.31	0.29
Clearnose	1.04	0.28	0.38	0.56	0.77
Rosette	0.052	0.015	0.024	0.029	0.048

2010–2011 ACL, ACT, and TAL

In each fishing year, the ACL for the skate complex would be set equal to the acceptable biological catch (ABC) recommended by the Council's Scientific and Statistical Committee (SSC). Through FY 2011, the SSC has recommended an ABC based on the median catch/biomass exploitation rate of the skate complex multiplied by the 2005–2007 average survey biomass, which is 67.556 million lb (30,643 mt) per year. To account for management uncertainty, an ACT would be set at 75 percent of the ACL, or 50.667 million lb (22,982 mt) per year. Due to the difficulties in monitoring skate discards in all fisheries during a fishing year, a projection of total annual dead discards would be subtracted from the ACT to generate the TAL for the skate fisheries. After deducting an estimate of skate landings from vessels fishing solely in state waters (approximately 3 percent of the total landings), the remaining TAL for Federal waters in FY 2010 and 2011 would be 20.783 million lb (9,427 mt) per year.

The TAL would be allocated between the skate wing fishery and the skate bait

fishery based on historic landings proportions. The skate wing fishery predominantly lands winter skate, while the bait fishery predominantly lands little skate. The skate wing fishery would receive 66.5 percent of the TAL, or 13.821 million lb (6,269 mt), and the skate bait fishery would receive 33.5 percent of the TAL, or 6.962 million lb (3,158 mt). Landings of skates would be monitored and allocated to the appropriate fishery quota through information currently required to be submitted by seafood dealers on a weekly basis.

If this action is not effective by the start of the fishing year on May 1, 2010, all skate landings that accrue from May 1, 2010, until the date of implementation of the final rule for this action will count against the respective skate wing and bait TALs for fishing year 2010, as described above.

Possession Limits and Seasons

All vessels possessing, retaining, and landing skates would continue to be required to obtain a Federal open access skate permit. Subject to the additional restrictions described in the following sections, a possession limit of 1,900 lb (862 kg) wing wt. (4,313 lb (1,956 kg) whole wt.) would be implemented for any vessels in possession of skates, unless the vessel is in possession of a Skate Bait Letter of Authorization. All skates landed in wing form or sold for use as food would accrue against the skate wing TAL. To keep the skate wing TAL from being exceeded, when 80 percent of the annual skate wing TAL is landed, the 1,900 lb (862 kg) skate wing possession limit would be reduced to 500 lb (227 kg) wing wt. (1,135 lb (515 kg) whole wt.) for the remainder of the fishing year. This would dilute incentives to target skates but allow some incidental catches of skates to be landed rather than discarded.

This proposed rule retains the requirement that a vessel possessing a valid Federal skate permit must also fish under an Atlantic sea scallop, NE multispecies, or monkfish day-at-sea (DAS) in order to possess, retain, and land skates, with two exceptions: (1) That the vessel possesses a limited access multispecies permit and is enrolled and participating in an approved sector described at § 648.87; or (2) that the vessel is otherwise exempted under § 648.80.

This action would also implement an incidental skate trip limit of 500 lb (227 kg) wing wt. or 1,135 lb (515 kg) whole wt. for any vessel issued a Federal skate permit that is not fishing under a DAS and is not participating in an approved sector under the Northeast Multispecies FMP.

A possession limit of 20,000 lb (9,072 kg) whole wt. would be implemented for vessels participating in the skate bait fishery that also possess a Skate Bait Letter of Authorization. The existing requirements of the Skate Bait Letter of Authorization would remain in effect, including the requirement to land skates in only whole form, to be sold only as bait, a maximum skate size limit of 23 inches (58 cm) total length, and a minimum participation period of 7 days. To help maintain a consistent market supply of bait skates, the skate bait TAL would be split into three fishing seasons per year. All skates landed in whole form that are sold for use as bait would accrue against the skate bait TAL. When 90 percent of the skate bait quota is harvested in each season, the possession limit would be reduced to the whole weight equivalent of the skate wing fishery possession limit until the next season, whether it be 1,900 lb (862 kg) or 500 lb (227 kg) wing weight at the time.

As an additional conservation measure, vessels declared to be fishing on a Northeast Multispecies Category B Day-at-Sea would have a skate possession limit of 220 lb (100 kg) wing wt. (500 lb (227 kg) whole wt.).

Accountability Measures

If the annual TAL (landings target) allocated to either fishery is exceeded by more than 5 percent in a given year, the possession limit trigger (80 percent in the wing fishery, 90 percent in the bait fishery) would be reduced by 1 percent for each 1-percent overage for that fishery. This would help prevent repeated excessive TAL overages.

If it is determined that the ACL for the skate complex was exceeded in a given year, including landings and estimates of discards, then the ACL–ACT buffer (25 percent, initially) would be increased by 1 percent for each 1-percent overage. For example, if the ACL is exceeded by 5 percent, the ACL–ACT buffer would be increased to 30 percent in the subsequent fishing year, which could effectively reduce allowable landings.

Annual Review, SAFE Reports, and Specifications Process

In place of the "Skate Baseline Review" process included in the original Skate FMP, the Skate Plan Development Team (PDT) would convene annually to review skate stock status, fishery landings and discards, and determine if any AMs were triggered in the previous year. The annual review would also incorporate an assessment of changes to other fishery management plans that may impact skates, and determine if changes to skate management measures may be warranted. If changes to the Skate FMP are warranted, the Skate PDT would recommend changes via specifications or framework adjustment to the Council. Specifications for the skate fisheries could be implemented for up to 2 years.

A Stock Assessment and Fishery Evaluation (SAFE) report for the skate complex would be completed every 2 years by the Skate PDT. The SAFE report would be the primary vehicle for the presentation of all updated biological and socio-economic information regarding the skate complex and its associated fisheries, and provide source data for any adjustments to the management measures that may be needed to continue to meet the goals and objectives of the FMP.

At its April 2009 meeting, the Council reviewed the draft regulations and deemed them necessary and appropriate for implementation of Amendment 3, as required under section 303(c) of the Magnuson-Stevens Act. Technical changes to the regulations deemed necessary by the Secretary for clarity may be made, as provided under section 304(b) of the Magnuson-Stevens Act.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has made a preliminary determination that this proposed rule is consistent with the Skate FMP, Amendment 3, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. Pursuant to the procedures established to implement section 6 of E.O. 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

A NOA for Amendment 3 was published on December 28, 2009. Public comments are being solicited on the amendment through the end of the comment period on February 26, 2010.. Public comments on the proposed rule must be received by the end of the comment period on the amendment, as published in the NOA, to be considered in the decision to approve or disapprove the amendment. All comments received by the end of the comment period on the amendment, whether specifically directed to the amendment, or the proposed rule, will be considered in the approval/disapproval decision. Comments received after that date will not be considered in the approval/disapproval decision on the amendment. To be considered,

comments must be received by close of business on the last day of the comment period; that does not mean postmarked or otherwise transmitted by that date.

The Council prepared a FEIS for Amendment 3; a NOA was published on January 22, 2010. The FEIS describes the impacts of the proposed Amendment 3 measures on the environment. Because most of the measures were designed to reduce skate landings, the impacts are primarily social and economic, as well as biological. In general, all biological impacts are expected to be positive. Although the economic and social impacts may be negative in the short term, particularly for vessels that have traditionally targeted or relied substantially on sales of skates, the long-term social and economic benefits of sustainable skate fisheries would be positive.

An IRFA was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA), and is included in Amendment 3 and supplemented by information contained in the preamble to this proposed rule. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section of the preamble and in the **SUMMARY** of this proposed rule. A summary of the IRFA follows. A copy of this analysis is available from the Council (see **ADDRESSES**).

All of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration size standards for small fishing businesses ($4.0 million in annual gross sales). Therefore, there are no disproportionate effects on small versus large entities. Information on costs in the fishery are not readily available and individual vessel profitability cannot be determined directly; therefore, expected changes in gross revenues were used as a proxy for profitability.

This action does not introduce any new reporting, recordkeeping, or other compliance requirements. This proposed rule does not duplicate, overlap, or conflict with other Federal rules.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

The participants in the commercial skate fishery were defined using Northeast dealer reports to identify any vessel that reported having landed 1 lb (0.45 kg) or more of skates during calendar year 2007. These dealer reports identified 542 vessels that landed skates in states from Maine to North Carolina out of 2,685 vessels that held a Federal skate permit.

Economic Impacts of the Proposed Action Compared to Significant Non-Selected Alternatives

The proposed action to establish possession limits for both the wing and bait skate fishery are expected to impact approximately 127 vessels out of the vessels included in the analysis (approximately 25 percent). Collectively, the proposed action would reduce skate revenues by 14.9 percent, and would reduce total revenues by 5.5 percent. Given that skate biomass is not expected to reach optimum yield (OY) without taking any action, the short-term economic losses resulting from the proposed actions are likely to be less than any future losses in yield and revenue.

In terms of impacts to individual vessels, an analysis of dependency on the skate fishery indicates that almost 75 percent of the vessels included in the analysis have less than a 5-percent dependency on the skate fishery. The estimated impact on gross sales increases markedly in relation to dependency on the skate fishery among the 127 vessels estimated to be adversely affected by this action. The 18 affected vessels that show a less than 1-percent dependency on the skate fishery are estimated to have less than a 2-percent impact on gross revenues. By contrast, estimated revenue loss is 27.8 percent for the 75 affected vessels at the upper end of the dependency spectrum (4.75-percent dependent or greater).

All of the alternatives considered in this action are based on the same TACs. However, some of the alternatives (1A and 3A) utilize a hard TAC approach while others (1B, 2, 3B and 4) use a target TAC approach. Under the hard TAC approach, the Regional Administrator would publish a notice prohibiting skate landings for the remainder of the fishing year once it is determined that skate landings will exceed the overall TAC. Adjustments to the TAC due to an overage would occur in the next fishing year. Under the target TAC approach, the Regional Administrator would determine when landings will meet or are likely to meet the TAL for each fishery (wing or bait), and publish a notice prohibiting landings in excess of the incidental limit for the remainder of the fishing year.

The preferred alternative is basically a modified version of Alternative 2, with slightly higher possession limits for the skate bait fishery (20,000 lb versus 14,200 lb whole weight), a seasonal quota for the bait fishery (similar to Alternative 4), and modified accountability measures. A summary of the possession limits considered under each alternative is provided in Table 2. It should be noted that the Alternatives 1A and 1B propose the same possession limits for both the wing and bait fisheries, while Alternative 4 has the same possession limit for the wing fishery only. Alternatives 2, 3A, and 3B have the same possession limits for both the wing and bait fisheries. Table 2. Comparison of possession limits under each alternative.

Alternative number	Skate wing possession limit		Skate bait possession limit	
	Option 1	Option 2	Option 1	Option 2
1A (Hard TAC, and time/area management).	4,800 wing lb (2,177 kg) 10,896 whole lb (4,942 kg)	3,800 wing lb (1,724 kg) 8,626 whole lb. (3,913 kg).	6,800 lb (3,084 kg)	12,100 lb. (5,488 kg).
1B (Target TAC and time/area management).	4,800 wing lb (2,177 kg) 10,896 whole lb (4,942 kg)	3,800 wing lb (1,724 kg) 8,626 whole lb. (3,913 kg).	6,800 lb (3,084 kg)	12,100 lb. (5,488 kg).
2 (Target TAC with time/area management as accountability measure only).	2,500 wing lb (1,134 kg) 5,675 whole lb (2,574 kg)	1,900 wing lb (862 kg) 4,313 whole lb. (1,956 kg).	8,200 lb (3,719 kg)	14,200 lb. (6,396 kg).

Alternative number	Skate wing possession limit		Skate bait possession limit	
	Option 1	Option 2	Option 1	Option 2
3A (Hard TAC)	2,500 wing lb (1,134 kg) 5,675 whole lb (2,574 kg)	1,900 wing lb (862 kg) 4,313 whole lb. (1,956 kg).	8,200 lb (3,719 kg)	14,200 lb. (6,396 kg).
3B (Target TAC)	2,500 wing lb (1,134 kg) 5,675 whole lb (2,574 kg)	1,900 wing lb (862 kg) 4,313 whole lb. (1,956 kg).	8,200 lb (3,719 kg)	14,200 lb. (6,396 kg).
4 (Target TAC)	4,800 wing lb (2,177 kg) 10,896 whole lb (4,942 kg)	3,800 wing lb (1,724 kg). 8,626 whole lb. (3,913 kg).	Quota managed by season with no possession limit.	

All of the non-preferred alternatives considered in this action would have resulted in a reduction in revenue. Alternative 4 would affect the least number of vessels (99) and have the least impact on total revenue (2.8 percent), while alternatives 3A and 3B would affect the largest number of vessels (145) and have the greatest impact on total revenue (6.1 percent). The estimated economic impacts associated with Alternatives 1A and 1B are in between the two other non-preferred alternatives and are similar to the preferred alternative—affecting approximately 128 vessels and resulting in an estimated 5.1-percent reduction in total revenues. It should be noted that although Alternative 4 appears to have the least impact on revenue, the quantified economic effects of this alternative are underestimated since it does not include the likely negative impacts associated with quota management for the skate bait fishery. These impacts could not be quantified because the timing and affects are unpredictable and will vary from year to year.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: January 14, 2010.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.13, paragraph (h)(2) is revised to read as follows:

§ 648.13 Transfers at sea.

* * * * *

(h) *Skates.* (1) Except as provided in paragraph (h)(2) of this section, all persons or vessels issued a Federal skate permit are prohibited from transferring, or attempting to transfer, at sea any skates to any vessel, and all persons or vessels not issued a Federal skate permit are prohibited from transferring, or attempting to transfer, at sea to any vessel any skates while in the EEZ, or skates taken in or from the EEZ portion of the Skate Management Unit.

(2) Vessels and vessel owners or operators issued Federal skate permits under § 648.4(a)(14) may transfer at sea skates taken in or from the EEZ portion of the Skate Management Unit, provided:

(i) The transferring vessel possesses on board a valid letter of authorization issued by the Regional Administrator as specified under § 648.322(c); and

(ii) The transferring vessel and vessel owner or operator comply with the requirements specified at § 648.322(c).

* * * * *

3. In § 648.14, paragraphs (v)(1)(ii), (v)(3)(i) and (v)(3)(ii)(A) are revised to read as follows:

§ 648.14 Prohibitions.

* * * * *

(v) * * *

(1) * * *

(ii) Onboard a federally permitted lobster vessel (i.e., transfer at sea recipient) while in possession of only whole skates as bait that are less than the maximum size specified at § 648.322(c).

* * * * *

(3) * * *

(i) *Skate wings.* Fail to comply with the conditions of the skate wing possession and landing limits specified at § 648.322(b), unless holding a valid letter of authorization to fish for and land skates as bait only at § 648.322(c).

(ii) * * *

(A) Transfer at sea, or attempt to transfer at sea, to any vessel, any skates unless in compliance with the provisions of §§ 648.13(h) and 648.322(c).

* * * * *

4. In § 648.80, paragraphs (b)(5)(i)(C)(*1*) and (*2*) and (b)(6)(i)(D)(*1*) and (*2*) are revised to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(b) * * *

(5) * * *

(i) * * *

(C) * * *

(*1*) The vessel is called into the monkfish DAS program (§ 648.92) and complies with the skate possession limit restrictions at § 648.322;

(*2*) The vessel has a valid letter of authorization on board to fish for skates as bait only, and complies with the requirements specified at § 648.322(c); or

* * * * *

(6) * * *

(i) * * *

(D) * * *

(*1*) The vessel is called into the monkfish DAS program (§ 648.92) and complies with the skate possession limit restrictions at § 648.322;

(*2*) The vessel has a valid letter of authorization on board to fish for skates as bait only, and complies with the requirements specified at § 648.322(c); or

* * * * *

5. Revise § 648.320 to read as follows:

§ 648.320 Skate FMP review and monitoring.

(a) *Annual review and specifications process.* The Council, its Skate Plan Development Team (PDT), and its Skate Advisory Panel shall monitor the status of the fishery and the skate resources.

(1) The Skate PDT shall meet at least annually to review the status of the

species in the skate complex. At a minimum, this review shall include annual updates to survey indices, fishery landings and discards; a re-evaluation of stock status based on the updated survey indices and the FMP's overfishing definitions; and a determination of whether any of the accountability measures specified under § 648.323 were triggered. The review shall also include an analysis of changes to other FMPs (*e.g.,* Northeast Multispecies, Monkfish, Atlantic Scallops, etc.) that may impact skate stocks, and describe the anticipated impacts of those changes on the skate fishery.

(2) If new and/or additional information becomes available, the Skate PDT shall consider it during this annual review. Based on this review, the Skate PDT shall provide guidance to the Skate Committee and the Council regarding the need to adjust measures in the Skate FMP to better achieve the FMP's objectives. After considering guidance, the Council may submit to NMFS its recommendations for changes to management measures, as appropriate, through the specifications process described in this section, the framework process specified in § 648.321, or through an amendment to the FMP.

(3) For overfished skate species, the Skate PDT and the Council shall monitor the trawl survey index as a proxy for stock biomass. As long as the 3-year average of the appropriate weight per tow increases above the average for the previous 3 years, it is assumed that the stock is rebuilding to target levels. If the 3-year average of the appropriate survey mean weight per tow declines below the average for the previous 3 years, then the Council shall take management action to ensure that stock rebuilding will achieve target levels.

(4) Based on the annual review described above and/or the Stock Assessment and Fishery Evaluation (SAFE) Report described in paragraph (b) of this section, recommendations for acceptable biological catch (ABC) from the Scientific and Statistical Committee, and any other relevant information, the Skate PDT shall recommend to the Skate Committee and Council the following annual specifications for harvest of skates: An annual catch limit (ACL) for the skate complex set less than or equal to ABC; an annual catch target (ACT) for the skate complex set less than or equal to 75 percent of the ACL; and total allowable landings (TAL) necessary to meet the objectives of the FMP in each fishing year (May 1–April 30), specified for a period of up to 2 fishing years.

(5) *Recommended measures.* The Skate PDT shall also recommend management measures to the Skate Committee and Council to assure that the specifications are not exceeded. Recommended measures should include, but are not limited to:

(A) Possession limits in each fishery;

(B) In-season possession limit triggers for the wing and/or bait fisheries; and

(C) Required adjustments to in-season possession limit trigger percentages or the ACL–ACT buffer, based on the accountability measures specified at § 648.323.

(6) Taking into account the annual review and/or SAFE Report described in paragraph (b) of this section, the advice of the Scientific and Statistical Committee, and any other relevant information, the Skate PDT may also recommend to the Skate Committee and Council changes to stock status determination criteria and associated thresholds based on the best scientific information available, including information from peer-reviewed stock assessments of the skate complex and its component species. These adjustments may be included in the Council's specifications for the skate fisheries.

(7) *Council recommendation.* The Council shall review the recommendations of the Skate PDT, Skate Committee, and Scientific and Statistical Committee, any public comment received thereon, and any other relevant information, and make a recommendation to the Regional Administrator on appropriate specifications and any measures necessary to assure that the specifications will not be exceeded. The Council's recommendation must include supporting documentation, as appropriate, concerning the environmental, economic, and social impacts of the recommendations. The Regional Administrator shall review the recommendations and publish a rule in the **Federal Register** proposing specifications and associated measures, consistent with the Administrative Procedure Act. If the specifications published in the **Federal Register** differ from those recommended by the Council, the reasons for any differences must be clearly stated and the revised specifications must satisfy the criteria set forth in this section. If the final specifications are not published in the **Federal Register** for the start of the fishing year, the previous year's specifications shall remain in effect until superseded by the final rule implementing the current year's specifications, to ensure that there is no lapse in regulations while new specifications are completed.

(b) *Biennial SAFE Report*—(1) The Skate PDT shall prepare a biennial Stock Assessment and Fishery Evaluation (SAFE) Report for the NE skate complex. The SAFE Report shall be the primary vehicle for the presentation of all updated biological and socio-economic information regarding the NE skate complex and its associated fisheries. The SAFE Report shall provide source data for any adjustments to the management measures that may be needed to continue to meet the goals and objectives of the FMP.

(2) In any year in which a SAFE Report is not completed by the Skate PDT, the annual review process described in paragraph (a) of this section shall be used to recommend any necessary adjustments to specifications and/or management measures in the FMP.

6. Revise § 648.321 to read as follows:

§ 648.321 Framework adjustment process.

(a) *Adjustment process.* To implement a framework adjustment for the Skate FMP, the Council shall develop and analyze proposed actions over the span of at least two Council meetings (the initial meeting agenda must include notification of the impending proposal for a framework adjustment) and provide advance public notice of the availability of both the proposals and the analyses. Opportunity to provide written and oral comments shall be provided throughout the process before the Council submits its recommendations to the Regional Administrator.

(1) *Council review and analyses.* In response to the annual review, or at any other time, the Council may initiate action to add or adjust management measures if it finds that action is necessary to meet or be consistent with the goals and objectives of the Skate FMP. After a framework action has been initiated, the Council shall develop and analyze appropriate management actions within the scope of measures specified in paragraph (b) of this section. The Council shall publish notice of its intent to take action and provide the public with any relevant analyses and opportunity to comment on any possible actions. Documentation and analyses for the framework adjustment shall be available at least 1 week before the final meeting.

(2) *Council recommendation.* After developing management actions and receiving public testimony, the Council may make a recommendation to the Regional Administrator. The Council's recommendation shall include supporting rationale, an analysis of

impacts required under paragraph (a)(1) of this section, and a recommendation to the Regional Administrator on whether to issue the management measures as a final rule. If the Council recommends that the framework measures should be issued directly as a final rule, without opportunity for public notice and comment, the Council shall consider at least the following factors and provide support and analysis for each factor considered:

(i) Whether the availability of data on which the recommended management measures are based allows for adequate time to publish a proposed rule, and whether regulations have to be in place for an entire harvest/fishing season;

(ii) Whether there has been adequate notice and opportunity for participation by the public and members of the affected industry in the development of the Council's recommended management measures;

(iii) Whether there is an immediate need to protect the resource or to impose management measures to resolve gear conflicts; and

(iv) Whether there will be a continuing evaluation of management measures adopted following their implementation as a final rule.

(3) The Regional Administrator may publish the recommended framework measures in the **Federal Register.** If the Council's recommendation is first published as a proposed rule and the Regional Administrator concurs with the Council's recommendation after receiving additional public comment, the measures shall then be published as a final rule in the **Federal Register.**

(4) If the Regional Administrator approves the Council's recommendations, the Secretary may, for good cause found under the standard of the Administrative Procedure Act, waive the requirement for a proposed rule and opportunity for public comment in the **Federal Register.** The Secretary, in so doing, shall publish only the final rule. Submission of recommendations does not preclude the Secretary from deciding to provide additional opportunity for prior notice and comment in the **Federal Register.**

(5) The Regional Administrator may approve, disapprove, or partially approve the Council's recommendation. If the Regional Administrator does not approve the Council's specific recommendation, the Regional Administrator must notify the Council in writing of the reasons for the action prior to the first Council meeting following publication of such decision.

(b) *Possible framework adjustment measures.* Measures that may be changed or implemented through framework action, provided that any corresponding management adjustments can also be implemented through a framework adjustment, include:

(1) Skate permitting and reporting;

(2) Skate overfishing definitions and related targets and thresholds;

(3) Prohibitions on possession and/or landing of individual skate species;

(4) Skate possession limits;

(5) Skate closed areas (and consideration of exempted gears and fisheries);

(6) Seasonal skate fishery restrictions and specifications;

(7) Target TACs for individual skate species;

(8) Hard TACs/quotas for skates, including species-specific quotas, fishery quotas, and/or quotas for non-directed fisheries;

(9) Establishment of a mechanism for TAC set-asides to conduct scientific research, or for other reasons;

(10) Onboard observer requirements;

(11) Gear modifications, requirements, restrictions, and/or prohibitions;

(12) Minimum and/or maximum sizes for skates;

(13) Adjustments to exemption area requirements, area coordinates, and/or management lines established by the FMP;

(14) Measures to address protected species issues, if necessary;

(15) Description and identification of EFH;

(16) Description and identification of habitat areas of particular concern;

(17) Measures to protect EFH;

(18) OY and/or MSY specifications;

(19) Changes to the accountability measures described at § 648.323;

(20) Changes to TAL allocation proportions to the skate wing and bait fisheries;

(21) Changes to seasonal quotas in the skate bait or wing fisheries;

(22) Reduction of the baseline 25-percent ACL–ACT buffer to less than 25 percent; and

(23) Changes to catch monitoring procedures.

(c) *Emergency action.* Nothing in this section is meant to derogate from the authority of the Secretary to take emergency action under section 305(c) of the Magnuson-Stevens Act.

7. Revise § 648.322 to read as follows:

§ 648.322 Skate allocation, possession, and landing provisions.

(a) *Allocation of TAL.* (1) A total of 66.5 percent of the annual skate complex TAL shall be allocated to the skate wing fishery. All skate products that are landed in wing form, for the skate wing market, or classified by Federal dealers as food as required under § 648.7(a)(1)(i), shall count against the skate wing fishery TAL.

(2) A total of 33.5 percent of the annual TAL shall be allocated to the skate bait fishery. All skate products that are landed for the skate bait market, or classified by Federal dealers as bait as required under § 648.7(a)(1)(i), shall count against the skate bait fishery TAL. The annual skate bait fishery TAL shall be allocated in three seasonal quota periods as follows:

(i) Season 1—May 1 through July 31, 30.8 percent of the annual skate bait fishery TAL shall be allocated;

(ii) Season 2—August 1 through October 31, 37.1 percent of the annual skate bait fishery TAL shall be allocated; and

(iii) Season 3—November 1 through April 30, the remainder of the annual skate bait fishery TAL not landed in Seasons 1 or 2 shall be allocated.

(b) *Skate wing possession and landing limits.* A vessel or operator of a vessel that has been issued a valid Federal skate permit under this part, provided the vessel fishes under an Atlantic sea scallop, NE multispecies, or monkfish DAS as specified at §§ 648.53, 648.82, and 648.92, respectively, or is also a limited access multispecies vessel participating in an approved sector described under § 648.87, unless otherwise exempted under § 648.80 or paragraph (c) of this section, may fish for, possess, and/or land up to the allowable trip limits specified as follows:

(1) Up to 1,900 lb (862 kg) of skate wings (4,313 lb (1,956 kg) whole weight) per trip, except for a vessel fishing on a declared NE multispecies Category B DAS described under § 648.85(b), which is limited to no more than 220 lb (100 kg) of skate wings (500 lb (227 kg) whole weight) per trip (or any prorated combination of skate wings and whole skates based on the conversion factor for wing weight to whole weight of 2.27—for example, 100 lb (45.4 kg) of skate wings × 2.27 = 227 lb (103.1 kg) of whole skates).

(2) *In-season adjustment of skate wing possession limits.* When the Regional Administrator projects that 80 percent of the annual skate wing fishery TAL has been landed, the Regional Administrator shall, through a notice in the **Federal Register** consistent with the Administrative Procedure Act, reduce the skate wing trip limit to 500 lb (227 kg) of skate wings (1,135 lb (515 kg) whole weight, or any prorated combination of skate wings and whole skates based on the conversion factor for wing weight to whole weight of 2.27) for the remainder of the fishing year, unless

such a reduction would be expected to prevent attainment of the annual TAL.

(3) *Incidental possession limit for vessels not under a DAS.* A vessel issued a Federal skate permit that is not fishing under an Atlantic sea scallop, NE multispecies, or monkfish DAS as specified at §§ 648.53, 648.82, and 648.92, respectively, and is not a limited access multispecies vessel participating in an approved sector described under § 648.87, may retain up to 500 lb (227 kg) of skate wings or 1,135 lb (515 kg) of whole skate, or any prorated combination of skate wings and whole skates based on the conversion factor for wing weight to whole weight of 2.27), per trip.

(c) *Bait Letter of Authorization (LOA).* A skate vessel owner or operator under this part may request and receive from the Regional Administrator an exemption from the skate wing possession limit restrictions for a minimum of 7 consecutive days, provided that at least the following requirements and conditions are met:

(1) The vessel owner or operator obtains and retains onboard the vessel a valid LOA. LOAs are available upon request from the Regional Administrator.

(2) The vessel owner or operator possesses and/or lands only whole skates less than 23 inches (58.42 cm) total length.

(3) The vessel owner or operator fishes for, possesses, or lands skates only for use as bait.

(4) The vessel owner or operator possesses or lands no more than 20,000 lb (9,072 kg) of only whole skates less than 23 inches (58.42 cm) total length, and does not possess or land any skate wings or whole skates greater than 23 inches (58.42 cm) total length. Vessels that possess, and/or land any combination of skate wings and whole skates less than 23 inches (58.42 cm) total length must comply with the possession limit restrictions under paragraph (b) of this section for all skates or skate parts on board.

(5) The vessel owner or operator complies with the transfer at sea requirements at § 648.13(h).

(d) *In-season adjustment of skate bait possession limits.* When the Regional Administrator projects that 90 percent of the skate bait fishery seasonal quota has been landed in Seasons 1 or 2, or 90 percent of the annual skate bait fishery TAL has been landed, the Regional Administrator shall, through a notice in the **Federal Register** consistent with the Administrative Procedure Act, reduce the skate bait trip limit to the whole weight equivalent of the skate wing trip limit specified under paragraph (b) of this section for the remainder of the quota period, unless such a reduction would be expected to prevent attainment of the seasonal quota or annual TAL.

(e) *Prohibitions on possession of skates.* A vessel fishing in the EEZ portion of the Skate Management Unit may not:

(1) Retain, possess, or land barndoor or thorny skates taken in or from the EEZ portion of the Skate Management Unit.

(2) Retain, possess, or land smooth skates taken in or from the GOM RMA described at § 648.80(a)(1)(i).

8. Section 648.323 is added to read as follows:

§ 648.323 Accountability measures.

(a) *TAL overages.* If the skate wing fishery TAL or skate bait fishery TAL is determined to have been exceeded by more than 5 percent in any given year based upon, but not limited to, available landings information, the Regional Administrator shall reduce the in-season possession limit trigger for that fishery, as specified at § 648.322(b) and (c), in the next fishing year by 1 percent for each 1 percent of TAL overage, consistent with the Administrative Procedure Act.

(b) *ACL overages.* (1) If the ACL is determined to have been exceeded in any given year, based upon, but not limited to, available landings and discard information, the percent buffer between ACL and ACT, initially specified at 25 percent, shall be increased by 1 percent for each 1-percent ACL overage in the subsequent fishing year, through either the specifications or framework adjustment process described under §§ 648.320 and 648.321.

(2) If the Council fails to initiate action to correct an ACL overage through the specifications or framework adjustment process, consistent with paragraph (b)(1) of this section, the Regional Administrator shall implement the required adjustment, as described under paragraph (b)(1) of this section, consistent with the Administrative Procedure Act.

[FR Doc. 2010–1084 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 75, No. 13
Thursday, January 21, 2010

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

DEPARTMENT OF AGRICULTURE

Forest Service

Tahoe National Forest, California, Tahoe National Forest Motorized Travel Management Supplemental Draft EIS

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplemental draft environmental impact statement.

SUMMARY: The Tahoe National Forest (TNF) will prepare a supplemental draft environmental impact statement to disclose the impacts associated with the following proposed actions:

1. Prohibition of Cross Country Travel: The prohibition of wheeled motor vehicle travel off designated National Forest Transportation System (NFTS) roads, NFTS motorized trails, and areas by the public except as allowed by permit or other authorization.

2. Additions to the NFTS: The addition of unauthorized routes as roads and trails to the NFTS by vehicle class and season of use.

3. Establishment of Motorized "Open Areas": The establishment of motorized "Open Areas" by vehicle class and season of use.

4. Changes to the NFTS: Changes to the NFTS including Vehicle Class, Season of Use and/Reopening Maintenance Level 1 roads.

5. Amendments to the Forest Plan: The amendment of The Tahoe National Forest Land and Resource Management Plan to remove the November 1 to May 1 seasonal closure in the Sugar Pine area (Management Area 84 Humbug Sailor) on key winter deer range to improve motorized recreation opportunities.

DATES: Scoping is not required for supplemental draft environmental statements (40 CFR 1502.9(c)(4)). There was extensive public involvement in the development of the proposed action as published in the **Federal Register** April 11, 2007 and the Forest Service is not inviting additional comments at this time.

FOR FURTHER INFORMATION CONTACT: David Arrasmith, Tahoe National Forest, 631 Coyote Street, Nevada City, California 95959. *Phone:* (530) 478–6220. *E-mail: darrasmith@fs.fed.us.*

SUPPLEMENTARY INFORMATION:

Background

On April 11, 2007, the Forest Service published the "Proposed Action and Notice of Intent to Prepare an Environmental Impact Statement" (**Federal Register** Vol. 72/No. 69). The public comment period began on April 11, 2007, and ended May 14, 2007. Over 3,500 comments were received.

On October 3, 2008 the Forest Service published the "Notice of Availability" for the Tahoe National Forest Motorized Travel Management Draft EIS (**Federal Register** Vol. 73/No. 193). A two-month comment period was initially announced, and was expanded for an additional month based on public and elected official requests for a total of three months. The comment period ended December 26, 2008, but comments were accepted through December 29 due to a Presidential Proclamation to close the office on Friday, December 26. Over 7,000 letters, emails, map packets and other supporting materials were received.

In response to public comments received on the Draft Travel Management EIS (DEIS) the TNF undertook a comprehensive review of its existing NFTS. This review was done to respond to concerns expressed by the public during the comment period on the DEIS. Based on this review, the following corrections were made to the NFTS motorized recreation opportunities.

SUMMARY OF NFTS MILEAGE BEFORE AND AFTER CORRECTIONS

Class of vehicle	DEIS mileage	SDEIS mileage	Change
Roads open to highway legal vehicles only	629.3	616.7	−12.6
Roads Open to all vehicles	1,845.2	1,450.9	−394.3
Trails open to high clearance trail vehicles only	161.5	133.8	−27.7
Trails open to ATV's and motorcycles only	16.8	25.5	+8.7
Trails open to motorcycles only	147.6	168.8	+21.2
Total	2,800.4	2,395.7	−404.7

The Forest Supervisor reviewed this information and, based on the interdisciplinary team's recommendation, determined the preparation of a supplemental DEIS was warranted so that the public has an opportunity to review the proposed action and alternatives in light of the corrections that have been made since the DEIS was circulated. These corrections will be incorporated into all of the alternatives in the Supplemental DEIS.

Purpose and Need for Action

The purpose and need for this project was previously described in the Notice of Intent published in the **Federal Register** Vol. 72/No. 69/Wednesday April 11, 2007. See the Notice of Intent for further details.

Proposed Action

The proposed action was previously identified in the Notice of Intent published in the **Federal Register** Vol. 72/No. 69/Wednesday April 11, 2007. See the Notice of Intent for further details.

Responsible Official

Tom Quinn, Forest Supervisor, Tahoe National Forest, 631 Coyote Street, Nevada City, California 95959.

Nature of Decision To Be Made

The responsible official will decide whether to adopt and implement the proposed action, an alternative to the proposed action, or take no action to make changes to the existing Tahoe National Forest Transportation System and prohibit cross country wheeled motorized vehicle travel by the public off the designated system.

Early Notice of Importance of Public Participation in Subsequent Environmental Review

The Supplemental Draft Environmental Impact Statement (SDEIS) is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review during February 2010. EPA will publish a notice of availability of the SDEIS in the **Federal Register**. The comment period on the SDEIS will extend 45 days from the date the EPA notice appears in the **Federal Register**. At that time, copies of the SDEIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is very important that those interested in the management of the Tahoe National Forest participate at that time.

The Final EIS is scheduled to be completed in June 2010. In the Final EIS, the Forest Service is required to respond to substantive comments received during the comment period that pertain to the environmental consequences discussed in the SDEIS and applicable laws, regulations, and policies considered in making the decision. Substantive comments are defined as "comments within the scope of the proposed action, specific to the proposed action, and have a direct relationship to the proposed action, and include supporting reasons for the responsible official to consider" (36 CFR 215.2). Submission of substantive comments is a prerequisite for eligibility to appeal under the 36 CFR part 215 regulations. The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of an SDEIS must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978). Also, environmental objections that could be raised at the SDEIS stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the Final Environmental Impact Statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the SDEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the SDEIS. Comments may also address the adequacy of the SDEIS or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

Comments received, including the names and addresses of those who comment, will be considered part of the public record on this proposal and will be available for public inspection.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21).

Dated: January 13, 2010.

Tom Quinn,

Forest Supervisor.

[FR Doc. 2010–1035 Filed 1–20–10; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Nebraska Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the Nebraska Advisory Committee to the Commission will convene by conference call at 2:30 p.m. and adjourn at approximately 3:30 p.m. on Thursday, February 25, 2010. The purpose of this meeting is to provide SAC orientation and to plan future activities for the SAC project.

This meeting is available to the public through the following toll-free call-in number: (866) 364–7584, conference call access code number 49779430. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and contact name Farella E. Robinson.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Corrine Sanders of the Central Regional Office and TTY/TDD telephone number, by 4 p.m. on February 22, 2010.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by March 25, 2010. The address is U.S. Commission on Civil Rights, 400 State Avenue, Suite 908, Kansas City, Kansas 66101. Comments may be e-mailed to *frobinson@usccr.gov.* Records generated by this meeting may be inspected and reproduced at the Central Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Central Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, January 15, 2010.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2010–1060 Filed 1–20–10; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, January 29, 2010; 11:30 a.m. EST.

PLACE: Via Teleconference, Public Dial In—1–800–597–7623, Conference ID # 52144588.

MEETING AGENDA: This meeting is open to the public.

I. Approval of Agenda.

II. Program Planning.

- Approval of Findings and Recommendations for *The Impact of Illegal Immigration on the Wages and Employment Opportunities of Black Workers* Report.
- Update on Status of Title IX Project.
- Update on Status of 2010 Enforcement Report.

III. State Advisory Committee Issues.

- Pennsylvania SAC.

IV. Approval of January 15, 2010 Meeting Minutes.

V. Adjourn.

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: January 19, 2010.

Martin Dannenfelser,

Staff Director.

[FR Doc. 2010–1214 Filed 1–19–10; 11:15 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Florida Keys National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applications for the following vacant seats on the Florida Keys National Marine Sanctuary Advisory Council: Conservation and Environment [1 of 2] (alternate), Fishing—Commercial—Shell/Scale (alternate), Submerged Cultural Resources (alternate), and Tourism—Upper Keys (member). Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen as members should expect to serve 3-year terms, pursuant to the council's Charter.

DATES: Applications are due by February 12, 2010.

ADDRESSES: Application kits may be obtained from Lilli Ferguson, Florida Keys National Marine Sanctuary, 33 East Quay Rd., Key West, FL 33040. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Lilli Ferguson, Florida Keys National Marine Sanctuary, 33 East Quay Rd., Key West, FL 33040; (305) 292–0311 x245; *Lilli.Ferguson@noaa.gov*.

SUPPLEMENTARY INFORMATION: Per the council's Charter, if necessary, terms of appointment may be changed to provide for staggered expiration dates or member resignation mid term.

Authority: 16 U.S.C. Sections 1431, *et seq.* (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: January 6, 2010.

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2010–1116 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–405–803]

Purified Carboxymethylcellulose From Finland: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

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

DATES: *Effective Date:* January 21, 2010.

FOR FURTHER INFORMATION CONTACT: Tyler Weinhold or Robert James, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1121 and (202) 482–0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

At the request of interested parties, on August 25, 2009, the Department published in the **Federal Register** a notice of initiation of this antidumping duty administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 74 FR 42873, August 25, 2009. The review covers the period July 1, 2008, through June 30, 2009. The preliminary results for these administrative reviews are currently due no later than April 2, 2010.

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department to complete the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested. However, if it is not practicable to complete the review within this time period, section 751(a)(3)(A) of the Act allows the Department to extend the 245 day time period for the preliminary results up to 365 days.

The Department has determined it is not practicable to complete this review within the statutory time limit because we require additional time to conduct a sales below-cost investigation in this administrative review and to collect and analyze other information needed for our preliminary results. Accordingly, the Department is extending the time limits for completion of the preliminary results of this administrative review until no later than June 30, 2010, which is 334 days from the last day of the anniversary month of these orders. We intend to issue the final results in this review no later than 120 days after publication of the preliminary results.

This notice is issued and published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

January 14, 2010.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–1068 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–801]

Ball Bearings and Parts Thereof From Germany: Initiation of Antidumping Duty Changed-Circumstances Review

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

SUMMARY: Pursuant to section 751(b) of the Tariff Act of 1930, as amended, and

19 CFR 351.216 and 351.221(c)(3), the Department of Commerce is initiating a changed-circumstances review of the antidumping duty order on ball bearings and parts thereof from Germany with respect to myonic GmbH.

DATES: *Effective Date:* January 21, 2010.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5760 or (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce (the Department) published antidumping duty orders on ball bearings, cylindrical roller bearings, and spherical plain bearings and parts thereof from Germany on May 15, 1989. See *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany*, 54 FR 20900 (May 15, 1989). The orders on cylindrical roller bearings and spherical plain bearings and parts thereof from Germany have been revoked. See *Revocation of Antidumping Duty Orders on Certain Bearings From Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom,* 65 FR 42667 (July 11, 2000).

Miniaturkugellager GmbH (MKL) was a respondent in a new-shipper administrative review of the antidumping duty order on ball bearings and parts thereof from Germany covering the period December 1, 1994, through May 31, 1995. See *Ball Bearings (Other Than Tapered Roller Bearings) and Parts Thereof, From Germany; Final Results of New Shipper Antidumping Duty Administrative Review*, 61 FR 15769 (April 9, 1996). As a result of a changed-circumstances review, we determined that myonic GmbH (myonic), a foreign producer of subject merchandise, is a successor-in-interest to MKL. See *Ball Bearings and Parts Thereof from Germany: Final Results of Antidumping Duty Changed-Circumstances Review*, 73 FR 75078 (December 10, 2008).

On June 24, 2009, we initiated the administrative review of the antidumping duty order on ball bearings and parts thereof from Germany covering the period May 1, 2008, through April 30, 2009. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 FR 30052 (June 24, 2009). After analysis of the quantity and value of the sales of ball bearings and parts thereof from Germany during the 2008–09 period of review, we selected myonic as a respondent for individual examination. See the memorandum to the File entitled "Ball Bearings and Parts Thereof from Germany—Respondent Selection" dated August 3, 2009. In its October 1, 2009, response to the Department's antidumping questionnaire, myonic informed the Department that, on March 5, 2009, Minebea Co., Ltd., purchased 100 percent of the shares of myonic GmbH Holding, which is myonic's parent company. In addition, myonic reported that an unaffiliated investor purchased myonic Inc., which was myonic's U.S. subsidiary. The Department did not receive a request from myonic or any other interested parties for a changed-circumstances review with respect to myonic.

Scope of the Order

The products covered by the order are ball bearings and parts thereof. These products include all antifriction bearings that employ balls as the rolling element. Imports of these products are classified under the following categories: Antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof.

Imports of these products are classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 3926.90.45, 4016.93.10, 4016.93.50, 6909.19.50.10, 8431.20.00, 8431.39.00.10, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00, 8482.99.05, 8482.99.35, 8482.99.25.80, 8482.99.65.95, 8483.20.40, 8483.20.80, 8483.30.40, 8483.30.80, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.93.30, 8708.93.60.00, 8708.99.06, 8708.99.31.00, 8708.99.40.00, 8708.99.49.60, 8708.99.58, 8708.99.80.15, 8708.99.80.80, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90, 8708.30.50.90, 8708.40.75, 8708.50.79.00, 8708.50.89.00, 8708.50.91.50, 8708.50.99.00, 8708.70.60.60, 8708.80.65.90, 8708.93.75.00, 8708.94.75, 8708.95.20.00, 8708.99.55.00, 8708.99.68, 8708.99.81.80.

Although the HTSUS item numbers above are provided for convenience and customs purposes, the written description of the scope of the order remains dispositive.

Initiation of Changed-Circumstances Review

Pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216(d), the Department will conduct a changed-circumstances review upon receipt of information concerning, or a request from an interested party for a review of, an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. Based on the information myonic has submitted in the 2008–09 administrative review, we find that we have received information which shows changed circumstances sufficient to warrant initiation of such a review in order to determine whether the post-acquisition myonic is the successor-in-interest to the pre-acquisition myonic. See 19 CFR 351.216(d). Therefore, in accordance with the above-referenced statute and regulation, the Department is initiating a changed-circumstances review.

Because we are currently conducting the 2008–09 administrative review, we will conduct the changed-circumstances review in the context of the 2008–09 administrative review. In accordance with 19 CFR 351.221(b)(2), we will issue a questionnaire requesting factual information pertinent to the changed-circumstances review. We intend to issue the preliminary results of the changed-circumstances review when we issue the preliminary results of the 2008–09 administrative review; we intend to issue the final results of the changed-circumstances review when we issue the final results of the 2008–09 administrative review. During the course of this review, we will not change the cash-deposit requirements for the subject merchandise. The cash-deposit rate will be altered, if warranted, pursuant only to the final results of the changed-circumstances and/or administrative review.

This notice of initiation is in accordance with section 751(b)(1) of the Act and 19 CFR 351.221(b)(1).

Dated: January 14, 2010.

Gary Taverman,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–1069 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–802]

Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Intent To Rescind New Shipper Review

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

SUMMARY: On February 1, 2005, the Department of Commerce ("the Department") published in the **Federal Register** the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam"). *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam,* 70 FR 5152 (February 1, 2005) ("*VN Shrimp Order*"). The Department is conducting a new shipper review ("NSR") of the *VN Shrimp Order,* covering the period of review ("POR") of February 1, 2008, through January 31, 2009. Because the sale made by Nhat Duc was not *bona fide,* we have preliminarily determined to rescind this new shipper review.

DATES: *Effective Date:* January 21, 2010.

FOR FURTHER INFORMATION CONTACT: Paul Walker or Toni Dach, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0413 or (202) 482–1655, respectively.

SUPPLEMENTARY INFORMATION:

General Background

On February 26, 2009, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.214(c), the Department received a NSR request from Nhat Duc Co., Ltd. ("Nhat Duc"). On March 20, 2009, the Department initiated a new shipper review of Nhat Duc. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Initiation of Antidumping Duty New Shipper Review,* 74 FR 13416 (March 27, 2009).

On April 7, 2009, the Department issued its non-market economy ("NME") questionnaire to Nhat Duc. Nhat Duc responded to the Department's NME questionnaire and subsequent supplemental questionnaires between May and October 2009.

Extension of Time Limits

On September 8, 2009, the Department extended the time limits for these preliminary results. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Extension of Preliminary Results of Antidumping Duty New Shipper Review,* 74 FR 47190 (September 15, 2009).

Surrogate Country and Surrogate Values

On August 7, 2009, Nhat Duc submitted surrogate country comments, and on September 4, 2009, Nhat Duc submitted surrogate value data. No other party submitted surrogate country or surrogate value data.

Verification

Pursuant to 19 CFR 351.307(b)(iv), we conducted verification of the sales and factors of production ("FOP") for Nhat Duc between November 16–18, 2009. See Memorandum to the File from Paul Walker, Senior Case Analyst and Toni Dach, Case Analyst through Scot T. Fullerton, Program Manager, Verification of the Sales and Factors of Production Response of Nhat Duc Co., Ltd. in the Antidumping Duty New Shipper Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam, dated January 12, 2010.

Scope of the Order

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[1] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris),* southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); (7) certain dusted shrimp; and (8) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather

[1] "Tails" in this context means the tail fan, which includes the telson and the uropods.

the written description of the scope of this order is dispositive.

Preliminary Intent To Rescind

Consistent with the Department's practice, we investigated the *bona fide* nature of the sale made by Nhat Duc for this new shipper review. In evaluating whether or not a sale in a new shipper review is commercially reasonable, and therefore *bona fide,* the Department considers, *inter alia,* such factors as: (1) The timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arms-length basis. *See Tianjin Yiancheng Pharmaceutical Co., Ltd.* v. *United States,* 366 F. Supp. 2d 1246, 1250 (CIT 2005) ("TTPC"). Accordingly, the Department considers a number of factors in its *bona fides* analysis, "all of which may speak to the commercial realities surrounding an alleged sale of the subject merchandise." *See Hebei New Donghua Amino Acid Co., Ltd.* v. *United States,* 374 F. Supp. 2d 1333, 1342 (CIT 2005) ("New Donghua") (citing *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review,* 67 FR 11283 (March 13, 2002) and accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.). Also, in *TTPC,* the court affirmed the Department's practice of considering that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant," (*See TTPC,* 366 F. Supp. 2d at 1250), and found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale." *See TTPC* 366 F. Supp. 2d at 1263. Finally, in *New Donghua,* the CIT affirmed the Department's practice of evaluating the circumstances surrounding a NSR sale so that a respondent does not unfairly benefit from an atypical sale, and obtain a lower dumping margin than the producers usual commercial practice would dictate. Where a review is based on a single sale, exclusion of that sale as non-*bona fide* necessarily must end the review. *See TTPC,* 366 F. Supp. 2d at 1249.

In analyzing Nhat Duc's single POR sale to the United States, the Department preliminarily determines that this sale is not *bona fide,* as it is not typical of Nhat Duc's usual commercial practices or is it commercially reasonable. Further, the Department is unable to analyze whether the sale was conducted on an arm's-length basis. The Department reached this conclusion based on the totality of the circumstances, namely: (a) The atypical nature of Nhat Duc's POR pricing; (b) the timing and extent of payment receipt for Nhat Duc's single POR sale; (c) the existence of undisclosed sales subsequent to Nhat Duc's single POR sale; (d) the atypical nature of Nhat Duc's production timeline for its POR U.S. sale; (e) irregularities in Nhat Duc's sales negotiation correspondence and the unverifiable nature of this correspondence; and (f) the unverifiable nature of Nhat Duc's founding capital sources. Since much of our analysis regarding the evidence of the *bona fide* of the transaction involves business proprietary information, a full discussion of the bases for our decision to find Nhat Duc's single POR sale not *bona fide* is set forth in the Memorandum to the File from Toni Dach, Case Analyst, through Scot T. Fullerton, Program Manager, Regarding Antidumping Duty New Shipper Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Bona Fide Nature of the Sale Under Review for Nhat Duc Co., Ltd.

Therefore, the Department is preliminarily rescinding the new shipper review for Nhat Duc, as Nhat Duc's single sale during the POR is not *bona fide* and, consequently, not subject to review.

Comments

In accordance with 19 CFR 351.301(c)(1), for the final results of this new shipper review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record.[2]

Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of this new shipper review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 5 days after the deadline for submitting the case briefs. *See* 19 CFR 351.309(d). The Department requests that interested parties provide an executive summary of each argument contained within the case briefs and rebuttal briefs.

Any interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If we receive a request for a hearing, we plan to hold the hearing seven days after the deadline for submission of the rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

The Department intends to issue the final results of this new shipper review, which will include the results of its analysis raised in any such comments, within 90 days of publication of these preliminary results, pursuant to section 751(a)(2)(B)(iv) of the Act.

Cash-Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this new shipper review for all shipments of subject merchandise from Nhat Duc entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by Nhat Duc, the cash deposit rate will continue to be the Vietnam-wide rate (*i.e.,* 25.76 percent; (2) for subject merchandise exported by Nhat Duc but not manufactured by Nhat Duc, the cash deposit rate will continue to be the Vietnam-wide rate (*i.e.,* 25.76 percent); and (3) for subject merchandise manufactured by Nhat Duc, but exported by any other party, the cash deposit rate will be the rate applicable to the exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the

[2] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission in Part,* 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 2.

subsequent assessment of double antidumping duties.

We are issuing and publishing this determination in accordance with sections 751(a)(2)(B) and 777(i) of the Act, and 19 CFR 351.214(h) and 351.221(b)(4).

Dated: January 12, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–1070 Filed 1–20–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Military Leadership Diversity Commission

AGENCY: Department of Defense (DoD).

ACTION: Charter modification.

SUMMARY: Under the provisions of section 596 of Public Law 110–417, the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.65, the Department of Defense established the Military Leadership Diversity Commission (hereafter referred to as the Commission) on January 15, 2009. The requirement for the Commission remains; however, section 594 of Public Law 111–84 modified the Commission's membership by adding six additional members.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The six additional members include—(a) An active commissioned officer from the National Guard, and an active commissioned officer from the Reserves, each of whom serves or has served in a leadership position with either a Military Department command or combatant command; (b) a retired general or flag officer from the National Guard, and a retired general or flag officer from the Reserves; and (c) a retired noncommissioned officer from the National Guard, and a retired noncommissioned officer from the Reserves.

The additional members, as with the original members, shall be appointed for the life of the Commission. Any vacancy in the commission shall be filled in the same manner as the original appointment.

With the exception of the representatives of the U.S. Coast Guard, the Secretary of Defense shall appoint the commission members. Commission members appointed by the Secretary of Defense, who are not full-time or permanent part-time employees of the federal government, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109, and these individuals shall serve as special government employees.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations are reminded that they may submit written statements to the Military Leadership Diversity Commission membership about the commission's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Military Leadership Diversity Commission.

All written statements shall be submitted to the Designated Federal Officer for the Military Leadership Diversity Commission, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Military Leadership Diversity Commission's Designated Federal Officer, once appointed, may be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Military Leadership Diversity Commission. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: January 15, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–1046 Filed 1–20–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Notice Extending the Deadline Date for Transmittal of Applications for the Excellence in Economic Education Program Fiscal Year (FY) 2010 Competition

Catalog of Federal Domestic Assistance (CFDA) Number: 84.215B.

SUMMARY: On December 21, 2009, we published in the **Federal Register** (74 FR 67862) a notice inviting applications for the Excellence in Economic Education program's FY 2010 competition. The original notice established a February 16, 2010, deadline date for eligible applicants to apply for funding under this program. For this competition, applicants are required to submit their applications electronically through the Department's Electronic Grant Application System (e-Application). However, e-Application will not be available to users beginning Wednesday, February 10, 2010 at 3:00 p.m. until 6:00 a.m. Tuesday, February 16, 2010. During this time the Department will transition the e-application process from the current system (GAPS) to a new system. Because e-Application will be unavailable for several days prior to the original deadline date, we are extending the deadline date for transmittal of applications for the Excellence in Economic Education program FY 2010 competition.

DATES: *Deadline for Transmittal of Applications:* February 22, 2010. (Applications must be received by e-Application no later than 4:30:00 p.m., Washington, DC time.)

Note: Applications for grants under this competition must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. You may not e-mail an electronic copy of a grant application to us. For information about how to submit your application electronically, please refer to section IV. 6. *Other Submission Requirements* in the December 21, 2009 notice (74 FR 67863). We have not extended the deadline for submitting a statement that an applicant qualifies for an exception to the electronic submission requirement.

Deadline for Intergovernmental Review: The deadline date for Intergovernmental Review under Executive Order 12732 is extended to April 21, 2010.

FOR FURTHER INFORMATION CONTACT: Carolyn Warren, U.S. Department of Education, 400 Maryland Avenue, SW., room 4W209, Washington, DC 20202–5900. Telephone: (202) 205–5443 or by e-mail: *carolyn.warren@ed.gov.*

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

Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of the notice.

Electronic Access to This Document: You can view this document, as well as

all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

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

Dated: January 15, 2010.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2010–1081 Filed 1–20–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information; Teaching American History Grant Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010

Catalog of Federal Domestic Assistance (CFDA) Number: 84.215X.

Dates:

Applications Available: January 21, 2010.

Deadline for Notice of Intent To Apply: February 22, 2010.

Deadline for Transmittal of Applications: March 22, 2010.

Deadline for Intergovernmental Review: May 21, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Teaching American History Grant (TAH) Program supports projects that aim to raise student achievement by improving teachers' knowledge, understanding, and appreciation of traditional American history. Grant awards assist local educational agencies (LEAs), in partnership with entities that have extensive content expertise, in developing, implementing, documenting, evaluating, and disseminating innovative, cohesive models of professional development. By helping teachers to develop a deeper understanding and appreciation of traditional American history as a separate subject within the core curriculum, these programs are intended to improve instruction and raise student achievement.

Priorities: This competition includes one absolute priority and two invitational priorities that are explained in the following paragraphs.

Absolute Priority: In accordance with 34 CFR 75.105(b)(2)(iv), this priority is from section 2351 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 6721(b)). For FY 2010 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Partnerships With Other Agencies or Institutions.

Each applicant LEA must propose to work in partnership with one or more of the following:

- An institution of higher education.
- A non-profit history or humanities organization.
- A library or museum.

Invitational Priorities: For FY 2010 and any subsequent year in which we make awards from the list of unfunded applicants from this competition, these priorities are invitational priorities. Under 34 CFR 75.105(c)(1) we do not give an application that meets these invitational priorities a competitive or absolute preference over other applications.

These priorities are:

1. *Applications that provide for the development and dissemination of grant products and results through Open Educational Resources (OER).* OER are teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use or repurposing by others. This invitational priority encourages applications that describe how the applicants will make their TAH grant products and resources freely available online, in an effort to share traditional American history content, proven teaching strategies, and lessons learned in implementing TAH projects with the wider community of history educators.

Note: Each applicant addressing this priority is encouraged to include plans for how the applicant will disseminate resources, for example through a Web site that is freely available to all users. Each of these applicants is also encouraged to include plans specifying how the project will identify quality resources, such as lesson plans, primary source activities, reading lists, teacher reflections, and video of quality traditional American history teaching and student learning in action, for presentation to the wider community.

2. *Applications that provide for the collection and use of student work and achievement data.* This invitational priority encourages projects that collect and use student work and achievement data to assess the impact of teacher participation on student learning and for continuous program improvement.

Note: A goal of this program is to improve the quality of instruction of traditional American history in K–12 schools. Our purpose for establishing this priority is to support the collection and use of student work and achievement data that demonstrate increased or improved knowledge and understanding of traditional American history content by participating teachers and their students. The applicant is encouraged to address how its proposed professional development strategy will significantly improve both history teachers' abilities to teach traditional American history content and student performance with regard to traditional American history.

Program Authority: 20 U.S.C. 6721.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99. (b) The notice of final selection criteria and other application requirements for this program, published in the Federal Register on April 15, 2005 (70 FR 19939). (c) The notice of final revisions to selection criteria, published in the **Federal Register** on December 23, 2008 (73 FR 78761).

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

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

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $118,952,000.

We anticipate that initial awards under this competition will be made for a three-year (36 month) period.

Contingent upon the availability of funds and each grantee's substantial progress towards accomplishing the goals and objectives of the project as described in its approved application, we may make continuation awards to grantees for the remaining 24 months of the program. Review of each grantee's progress may include consideration of evidence of promising practice and strong evaluation design. Further, contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2011 from the list of unfunded applicants from this competition.

Maximum Award: The following maximum award amounts are from the notice of final selection criteria and

other application requirements for this program, published in the **Federal Register** on April 15, 2005 (70 FR 19939).

(1) Total funding for a three-year project period is a maximum of $500,000 for LEAs with enrollments of less than 20,000 students; $1,000,000 for LEAs with enrollments of 20,000–300,000 students; and $2,000,000 for LEAs with enrollments above 300,000 students. LEAs may form consortia and combine their enrollments in order to receive a grant reflective of their combined enrollment. For districts applying jointly as a consortium, the maximum award is based on the combined enrollment of the individual districts in the consortium. See section III. Eligibility Information for information on joint applications.

(2) A maximum of one grant will be awarded per applicant per competition.

Estimated Number of Awards: 120–125.

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

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* LEAs, including charter schools that are considered LEAs under State law and regulations, which must work in partnership with one or more of the following entities:

- An institution of higher education.
- A non-profit history or humanities organization.
- A library or museum.

An LEA may form a consortium with one or more other LEAs and submit a joint application for funds. The consortium must follow the procedures for joint applications described in 34 CFR 75.127 through 75.129 of EDGAR.

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

IV. Application and Submission Information

1. *Address to Request Application Package:* ED Pubs, U.S. Department of Education, P.O. Box 22207, Alexandria, VA 22304. Telephone, toll free: 1–877–433–7827. FAX: (703) 605–6794. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

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

If you request an application package from ED Pubs, be sure to identify this program or competition as follows: CFDA number 84.215X.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting either one of the two individuals listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program. Additional information about this competition and the application requirements also can be found at *http://www.ed.gov/programs/teachinghistory/index.html.*

Notice of Intent to Apply: The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department by sending a short e-mail message indicating the applicant's intent to submit an application for funding. The e-mail need not include information regarding the content of the proposed application, only the applicant's intent to submit it. The Secretary requests that this e-mail notification be sent to Alex Stein at: *teachingamericanhistory@ed.gov.*

Applicants that do not provide this e-mail notification may still apply for funding.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. Applicants are strongly encouraged to limit the application narrative and the appendix to a total of no more than 50 pages, using the following standards:

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

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

3. *Submission Dates and Times:*

Applications Available: January 21, 2010.

Deadline for Notice of Intent to Apply: February 22, 2010.

Deadline for Transmittal of Applications: March 22, 2010.

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

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

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

Deadline for Intergovernmental Review: May 21, 2010.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

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

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the TAH Program—CFDA Number 84.215X must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

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

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

Please note the following:

• You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this competition after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.

• The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: the Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.

• Your electronic application must comply with any page limit requirements described in this notice.

• Prior to submitting your electronic application, you may wish to print a copy of it for your records.

• After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).

• Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

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

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

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

• We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2)(a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** (see VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Dr. Alex Stein, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W206, Washington, DC 20202. FAX: (202) 401–8466.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215X), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.215X), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this program are from the notice of final selection criteria and other application requirements published in the **Federal Register** on April 15, 2005 (70 FR 19939) and from 34 CFR 75.210, as permitted under the notice of final revisions to selection criteria, published in the **Federal Register** on December 23, 2008 (73 FR 78761). The Department intends to conduct a two-tier review process for this competition. All eligible applications will be reviewed and scored on the first four criteria. Only applications that score highly on the first four criteria will then be reviewed and scored on the fifth criterion, *Quality of the Project Evaluation.* The Notes following the selection criteria are guidance to help applicants in preparing their applications and are not required by statute or regulations. The selection criteria are as follows:

(1) *Project quality* (35 points). The Secretary considers the quality of the proposed project by considering:

(a) The likelihood that the proposed project will develop, implement, and strengthen programs to teach traditional American history as a separate academic subject (not as a component of social studies) within elementary school and secondary school curricula.

(b) How specific traditional American history content (including the significant issues, episodes, and turning points in the history of the United States; how the words and deeds of individual Americans have determined the course of our Nation; and how the principles of freedom and democracy articulated in the founding documents of this Nation have shaped America's struggles and achievements and its social, political, and legal institutions and relations) will be covered by the grant; the format in which the project will deliver the history content; and the quality of the staff and consultants responsible for delivering these content-based professional development activities, emphasizing, where relevant, their postsecondary teaching experience and scholarship in subject areas relevant to the teaching of traditional American history. The applicant may also attach curriculum vitae for individuals who will provide the content training to the teachers.

(c) How well the applicant describes a plan that meets the statutory requirement to carry out activities under the grant in partnership with one or more of the following:

(i) An institution of higher education.

(ii) A non-profit history or humanities organization.

(iii) A library or museum.

(d) The applicant's rationale for selecting the partner(s) and its description of specific activities that the partner(s) will contribute to the grant during each year of the project. The applicant should include a memorandum of understanding or detailed letters of commitment from the partner(s) in an appendix to the application narrative.

Note: The Secretary encourages applicants to describe how the proposed history content addresses traditional American history as discussed in section V.(1)(b) of the *Project quality* criterion. Applicants are also encouraged to submit a detailed course of study for project participants, including a rationale for selecting the course of study, and a schedule of activities to be carried out. Finally, applicants are encouraged to discuss the role and commitment of each partner and document that each partner has been apprised of the partner's responsibilities for the project.

(2) *Quality of the project design* (35 points). In determining the quality of the project design, the Secretary considers:

(a) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(b) The extent to which the proposed activities constitute a coherent, sustained program of training in the field.

(c) The extent to which the proposed project is part of a comprehensive effort to improve teaching and learning and support rigorous academic standards for students.

(d) The extent to which the proposed project is designed to build capacity and yield results that will extend beyond the period of Federal financial assistance.

(3) *Need for project* (20 points). In determining the need for the proposed project, the Secretary considers:

(a) The magnitude or severity of the problem to be addressed by the proposed project.

(b) The magnitude of the need for the services to be provided or the activities to be carried out by the proposed project.

(c) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

Note: The Secretary encourages applicants to provide information on the district's history program, including on the number of teachers, the teachers' qualifications and certifications, the history professional development currently being offered in the district, and student performance in American history class. The applicant is also encouraged to address how its proposed professional development strategy will significantly improve both history teachers'

abilities to teach traditional American history content and student performance with regard to traditional American history. The *Need for project* criterion should address the history content needs of the teachers, not the socioeconomic needs of the teachers or the students they serve.

(4) *Quality of the management plan* (10 points). The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(a) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(b) The extent to which the time commitments of the project director and other key project personnel are appropriate and adequate to meet the objective of the proposed project.

(c) The adequacy of procedures for ensuring feedback and continuous improvement in the operation of the proposed project.

Note: Section 75.112 of EDGAR requires that an applicant (a) propose a project period for the project and (b) include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each project objective. The Secretary encourages each applicant to address this criterion by including in this narrative, a clear implementation plan that includes annual timelines, key project milestones, and a schedule of activities, as well as a description of the personnel who would be responsible for each activity and the level of effort each activity entails.

(5) *Quality of the project evaluation* (25 points). The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(a) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(b) How well the evaluation plans are aligned with the project design explained under the *Project quality* criterion.

(c) Whether the evaluation includes benchmarks to monitor progress toward specific project objectives, and outcome measures to assess the impact on teaching and learning or other important outcomes for project participants.

(d) Whether the applicant identifies the individual and/or organization that has agreed to serve as evaluator for the project and includes a description of the qualifications of that evaluator.

(e) The extent to which the applicant indicates the following:

(i) What types of data will be collected.

(ii) When various types of data will be collected.

(iii) What methods will be used to collect data.

(iv) What data collection instruments will be developed.

(v) How the data will be analyzed.

(vi) When reports of results and outcomes will be available.

(vii) How the applicant will use the information collected through the evaluation to monitor the progress of the funded project and to provide accountability information about both success at the initial site and effective strategies for replication in other settings.

(viii) How the applicant will devote an appropriate level of resources to project evaluation.

Note: The Secretary encourages each applicant to specify how the project's evaluation plan will address the TAH performance measures established by the Department under the Government Performance and Results Act of 1993 (GPRA). (The specific performance measures established for the overall TAH Program are discussed under Performance Measures in section VI of this notice.) Further, each applicant is encouraged to describe how the applicant's evaluation plan will be designed to collect both output data (*e.g.,* number of teachers participating in a project, number of workshops held) and outcome data (*e.g.,* improvements in teacher classroom practice, increases in student history achievement). Finally, each applicant is encouraged to select an independent, objective evaluator who has experience in evaluating educational programs and who will play an active role in the design and development of the project. For resources on what to consider in designing and conducting project evaluations, go to *http://www.whatworkshelpdesk.ed.gov/.*

2. *Applicant's Past Performance and Compliance History:* In accordance with 34 CFR 75.217(d)(3)(ii) and (iii), the Secretary may consider an applicant's past performance and compliance history when evaluating applications and in making funding decisions.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* We have established two performance measures for the TAH Program. The measures are: (1) The average percentage change in the scores (on a pre-post assessment of American history) of participants who complete at least 75 percent of the professional development hours offered by the project. The assessment will be aligned with the content provided by the TAH project, and at least 50 percent of its questions will come from a validated test of American history, and (2) the percentage of TAH participants who complete 75 percent or more of the total hours of professional development offered. Grantees will be expected to provide data on the two measures.

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: Alex Stein, Margarita Melendez, or Bonnie Carter, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W206, Washington, DC 20202–5960. Telephone: (202) 205–9085, (202) 260–3548, or (202) 401–3576 or by e-mail: *TeachingAmericanHistory@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) on request to the program contact

persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

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

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

Dated: January 15, 2010.

James H. Shelton III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2010–1083 Filed 1–20–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; List of Correspondence

AGENCY: Department of Education.

ACTION: List of Correspondence from April 1, 2009 through June 30, 2009.

SUMMARY: The Secretary is publishing the following list pursuant to section 607(f) of the Individuals with Disabilities Education Act (IDEA). Under section 607(f) of the IDEA, the Secretary is required, on a quarterly basis, to publish in the **Federal Register** a list of correspondence from the U.S. Department of Education (Department) received by individuals during the previous quarter that describes the interpretations of the Department of the IDEA or the regulations that implement the IDEA.

FOR FURTHER INFORMATION CONTACT: Laura Duos or Mary Louise Dirrigl. Telephone: (202) 245–7468.

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

Individuals with disabilities can obtain a copy of this notice in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the contact persons listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION: The following list identifies correspondence from the Department issued from April 1, 2009 through June 30, 2009. Included on the list are those letters that contain interpretations of the requirements of the IDEA and its implementing regulations, as well as letters and other documents that the Department believes will assist the public in understanding the requirements of the law and its regulations. The date of and topic addressed by each letter are identified, and summary information is also provided, as appropriate. To protect the privacy interests of the individual or individuals involved, personally identifiable information has been redacted, as appropriate.

Part B—Assistance for Education of All Children With Disabilities

Section 611—Authorization; Allotment; Use of Funds; Authorization of Appropriations

Topic Addressed: Use of Amounts by Secretary of the Interior

- Letter dated June 30, 2009, to Bureau of Indian Education (BIE), Supervisory Education Specialist Gloria J. Yepa, regarding whether the BIE can use Part B of IDEA funds reserved for administration to pay a portion of the salary of an attorney who provides advice on the administration of the Grants to States program.

Section 614—Evaluations, Eligibility Determinations, Individualized Education Programs, and Educational Placements

Topic Addressed: Evaluations, Parental Consent, and Reevaluations

- Letter dated April 7, 2009, to Chula Vista Elementary School District Union Representative Johncarlos Torres, regarding when screening of students to determine appropriate instructional strategies is permissible and when an evaluation for special education and related services is required.

Part C—Infants and Toddlers With Disabilities

Section 632—Definitions

Topic Addressed: Early Intervention Services

- Letter dated June 19, 2009, to New York Department of Health, Bureau of Early Intervention Director, Bradley Hutton regarding New York's policy on respite services.

Electronic Access to This Document

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

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

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

(Catalog of Federal Domestic Assistance Number 84.027, Assistance to States for Education of Children with Disabilities)

Dated: January 14, 2010.

Alexa Posny,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2010–1082 Filed 1–20–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Proposed Emergency Agency Information Collection

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) invites public comment on a proposed emergency collection of information that DOE is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before February 4, 2010. Comments should be specific in nature and indicate as precisely as possible the applicable guidance documents. If you anticipate difficulty

in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 725 17th Street, NW., Washington, DC 20503; and Frank Norcross, EE–2K, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290, Fax#: (202) 586–1233, *frank.norcross@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Frank Norcross, EE–2K, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290, Fax#: (202) 586–1233, *frank.norcross@ee.doe.gov.*

Draft reporting guidance concerning the Energy Efficiency and Conservation Block Grant (EECBG) Program, Weatherization Assistance Program (WAP), and State Energy Program (SEP) will be available for review at the following Web site: *http://www.eere.energy.gov/wip/draft_recovery_act_reporting_guidance.cfm.*

SUPPLEMENTARY INFORMATION: This emergency information collection request contains: (1) *OMB No.:* New; (2) *Information Collection Request Title:* Energy Efficiency and Conservation Block Grant (EECBG) Program Status Report; (3) *Type of Request:* Emergency; (4) *Purpose:* The information collected is used by program staff to track the recipients' activities, their progress in achieving scheduled milestones, and funds expended. The information is vital to identifying and addressing deficiencies in project execution within an appropriate timeframe. The information also enables program staff to provide required or requested information on program activities to OMB, Congress and the public; (5) *Annual Estimated Number of Respondents:* 2,357; (6) *Annual Estimated Number of Total Responses:* 28,284; (7) *Annual Estimated Number of Burden Hours:* 85,524; and (8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $3,985.

Statutory Authority: Title V, Subtitle E of the Energy Independence and Security Act of 2007 (EISA; Pub. L. 110–140) establishes the EECBG Program under which DOE makes funds available to States, units of local government, and Indian tribes to develop and implement projects to improve energy efficiency and reduce energy use and fossil fuel emissions in their communities.

Issued in Washington, DC on January 15, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–1057 Filed 1–20–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register.**

DATES: Wednesday, February 10, 2010, 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee.

FOR FURTHER INFORMATION CONTACT: Patricia J. Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–2347 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *http://www.oakridge.doe.gov/em/ssab.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: The main meeting presentation will be on the Environmental Management Program Budget and Prioritization.

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Patricia J. Halsey at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Patricia J. Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Patricia J. Halsey at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/minutes.htm.*

Issued at Washington, DC on January 15, 2010.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. 2010–1061 Filed 1–20–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 459–295]

Union Electric Company dba Ameren/UE; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

January 13, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands and waters.

b. *Project No:* 459–295.

c. *Date Filed:* November 24, 2009.

d. *Applicant:* Union Electric Company dba Ameren/UE.

e. *Name of Project:* Osage Hydroelectric Project.

f. *Location:* The project is located in Benton, Camden, Miller, and Morgan Counties, Missouri. The proposed action would be located at the Ozark Yacht Club near mile marker 0.8+0.6 in Jennings Branch Cove on the Lake of the Ozarks, in Camden County, Missouri.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a—825r.

h. *Applicant Contact:* Mr. Jeff Green, Shoreline Supervisor, Ameren/UE, P.O. Box 993, Lake Ozark, MO 65049, (573) 365–9214.

i. *FERC Contact:* Any questions on this notice should be addressed to

Christopher Yeakel at (202) 502–8132, or e-mail address: *christopher.yeakel@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protest:* February 16, 2010.

All documents (original and eight copies) should be filed with: Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Please include the project number (P–459–295) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* The licensee requests approval to permit Ozark Yacht Club to construct a new 4-slip boat dock and modify the existing fuel dock. The existing fuel dock would be modified by the addition of one boat slip, which would increase the total length of the dock by 26 feet. The docks would be available for use by patrons of the Ozark Yacht Club.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3372 or e-mail *FERCOnlineSupport@ferc.gov;* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filings must bear in all capital letters the title "COMMENTS", "PROTEST", or "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the "e-Filing" link.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–1009 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

January 12, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–37–000.

Applicants: Mountain View Power Partners, LLC, Indianapolis Power & Light Company, AES Eastern Energy, LP, AES Energy Storage, LLC, AEE 2 LLC, AES CREATIVE RESOURCES LP, AES IRONWOOD LLC, AES Redondo Beach, LLC, Lake Benton Power Partners LLC, Condon Wind Power, LLC, AES Placerita, Inc., AES Huntington Beach, LLC, AES Armenia Mountain Wind, LLC, China Investment Corporation, AES Alamitos, LLC, AES RED OAK LLC, Storm Lake Power Partners II LLC.

Description: Application for Authorization under Section 203 of the Federal Power Act and Request for Expedited action of AES Applicants and China Investment Corporation.

Filed Date: 01/11/2010.

Accession Number: 20100111–5146.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER94–1384–000; ER99–2329–000.

Applicants: Morgan Stanley Capital Group, Inc.; South Eastern Electric Development Corporation.

Description: Morgan Stanley Capital Group Inc *et al.* submits letter notifying FERC that they sell electric energy at market-based rates at wholesale and do not sell electric to any purchaser for the purposes other than for resale.

Filed Date: 01/08/2010.

Accession Number: 20100111–0042.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER97–4345–026; ER98–511–014.

Applicants: Oklahoma Gas and Electric Company, OGE Energy Resources, Inc.

Description: Notice of Non-Material Change in Status of Oklahoma Gas and Electric Company, *et al.*

Filed Date: 01/11/2010.

Accession Number: 20100111–5147.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–65–001.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc submits proposed revisions to its Market Administration and Control Area Services Tariff, FERC Electric Tariff, Original Volume 2.

Filed Date: 01/08/2010.

Accession Number: 20100111–0209.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–90–002.

Applicants: Lonestar Energy Partners LLC.

Description: Lonestar Energy Partners, LLC submits an Amended Petition for Acceptance of Initial Rate Schedule, Waivers and Blanket Authority.

Filed Date: 01/08/2010.

Accession Number: 20100111–0206.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–354–001.

Applicants: Starion Energy Inc.

Description: Starion Energy Inc. submits supplement its Application for

Order Accepting Rates for filing and Granting Waivers and Blanket Approvals.

Filed Date: 01/07/2010.

Accession Number: 20100107–0212.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: ER10–566–000.

Applicants: Coso Geothermal Power Holdings, LLC.

Description: Petition of Coso Geothermal Power Holdings, LLC for order accepting market-based rate tariff for filing and granting waivers and blanket approvals and request for expedited action.

Filed Date: 01/08/2010.

Accession Number: 20100111–0207.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–572–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits an Agreement for the Engagement of Study Services for SGIP with San Diego Gas & Electric Company.

Filed Date: 01/08/2010.

Accession Number: 20100111–0211.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–573–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc submits proposed revisions to Attachment S of its Open Access Transmission Tariff to combine the Class Year 2009 and 2010 Interconnection Facilities Studies etc.

Filed Date: 01/08/2010.

Accession Number: 20100111–0208.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–574–000.

Applicants: NRG Solar Blythe LLC.

Description: NRG Solar Blythe LLC submits Notice of Succession notifying the Commission of a name change from FSE Blythe 1, LLC, to NGR Solar Blythe LLC under FERC's Electric Tariff, Original Volume 1.

Filed Date: 01/08/2010.

Accession Number: 20100111–0204.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–575–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnecction submits the executed interconnection service agreements.

Filed Date: 01/11/2010.

Accession Number: 20100111–0218.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–576–000.

Applicants: Midwest Independent System Transmission Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits proposed revisions to Schedule 10 *etc.*

Filed Date: 01/11/2010.

Accession Number: 20100111–0217.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–577–000.

Applicants: SOWEGA Power LLC.

Description: SOWEGA Power LLC submits a notice of cancellation *et al.*

Filed Date: 01/07/2010.

Accession Number: 20100111–0224.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: ER10–578–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits the Meter Agent Services Agreement.

Filed Date: 01/11/2010.

Accession Number: 20100111–0225.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–579–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc submits an Amended and Restated Large Generator Interconnection Agreement with American Transmission Co, LLC *et al.*

Filed Date: 01/11/2010.

Accession Number: 20100111–0226.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–580–000.

Applicants: Silverhill Investments Corp.

Description: Notification of Jurisdictional status of Silverhill Investments Corp and request for Waivers and request for Blanket Approval under 18 CFR Part 34 for all future issuances of securities.

Filed Date: 01/11/2010.

Accession Number: 20100111–0229.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–581–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Service Agreement for Network Integration Transmission Service with Westar Energy *et al.*

Filed Date: 01/11/2010.

Accession Number: 20100111–0228.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–1011 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

January 8, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC10–35–000.

Applicants: Integrys Energy Services, Inc., Macquarie Cook Power Inc.

Description: Joint Application for Authorization under Section 203 of the federal power act to dispose of jurisdictional facilities and requests for expedited consideration and confidential treatment re Integrys Energy Service, Inc. et al.

Filed Date: 01/05/2010.

Accession Number: 20100106–0222.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 26, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER01–462–002.

Applicants: DPL Energy Resources, Inc.

Description: DPL Energy Resources, Inc. submits withdrawal of its Application to Modify Market Based Rate Tariffs, To Request Waivers of Requirements for Transaction Among Affiliates, etc.

Filed Date: 01/06/2010.

Accession Number: 20100107–0043.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–56–001.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits an Original Sheet 13 to FERC Rate Schedule 111 of the Joint Pricing Zone Revenue Allocation Agreement, etc.

Filed Date: 01/06/2010.

Accession Number: 20100106–0218.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–451–001.

Applicants: Saracen Power LP.

Description: Saracen Power LP resubmits tariff sheets associated with the 12/17/09 "Notice of Succession" and enclosed clean and redline versions of First Revised Rate Schedule FERC 1, *et al.*

Filed Date: 01/06/2010.

Accession Number: 20100106–0217.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–548–000.

Applicants: Duke Energy Carolinas, LLC.

Description: Duke Energy Carolinas, LLC submits Power Purchase Agreement with Town of Highlands, *et al.*

Filed Date: 12/30/2009.

Accession Number: 20100104–0157.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 20, 2010.

Docket Numbers: ER10–553–000.

Applicants: Hannaford Energy, LLC.

Description: Hannaford Energy, LLC submits an application for market-based rate authorization.

Filed Date: 01/06/2010.

Accession Number: 20100107–0214.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–558–000.

Applicants: Florida Power Corporation.

Description: Florida Power Corporation submits revised schedule sheets amending the notice of termination provision for the Agreement, etc.

Filed Date: 01/06/2010.

Accession Number: 20100107–0207.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–560–000.

Applicants: Commonwealth Edison Company.

Description: Commonwealth Edison Company submits the Transmission Interconnection Upgrade Agreement with Northern Public Service Co.

Filed Date: 01/06/2010.

Accession Number: 20100107–0205.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 27, 2010.

Docket Numbers: ER10–562–000.

Applicants: MidAmerican Energy Company.

Description: MidAmerican Energy Company submits a First Revised 1–5, *et al.*, to the Joint Pricing Zone Revenue Allocation Agreement between MidAmerican and Cedar Falls.

Filed Date: 01/07/2010.

Accession Number: 20100107–0215.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: ER10–563–000.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc., submits an executed Amended and Restated Generator Interconnection Agreement.

Filed Date: 01/07/2010.

Accession Number: 20100107–0220.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: ER10–564–000.

Applicants: Entergy Services, Inc.

Description: Entergy Services, Inc., submits amendment to the ICT Agreement and requests for shortened notice and comment period, etc.

Filed Date: 01/07/2010.

Accession Number: 20100108–0202.

Comment Date: 5 p.m. Eastern Time on Thursday, January 14, 2010.

Docket Numbers: ER10–565–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits Third Revised Service Agreement No. 66.

Filed Date: 01/07/2010.

Accession Number: 20100108–0201

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA10–4–000.

Applicants: Canandaigua Power Partners, LLC, Evergreen Wind Power V, LLC, Canandaigua Power Partners II, LLC, Evergreen Wind Power III, LLC, Stetson Wind II, LLC, Evergreen Gen Lead, LLC, First Wind Energy Marketing, LLC, Champlain Wind, LLC.

Description: Evergreen Wind Power V, LLC, *et al.* Request for waivers of OATT, OASIS, and Standards of Conduct requirements.

Filed Date: 01/07/2010.

Accession Number: 20100107–5091

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: OA10–5–000.

Applicants: ConocoPhillips Company.

Description: Request for Waiver of Order Nos. 888, 889, and 890 and Part 358 of ConocoPhillips Company.

Filed Date: 01/07/2010.

Accession Number: 20100107–5105.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Take notice that the Commission received the following PURPA 210(m)(3) filings:

Docket Numbers: QM10–4–000

Applicants: Public Service Company of New Hampshire.

Description: Northeast Utilities Service Co., submits the Application of Public Service Company of New Hampshire for Authorization to Terminate the Mandatory Power Purchase Obligation, etc.

Filed Date: 01/07/2010.

Accession Number: 20100107–0216.

Comment Date: 5 p.m. Eastern Time on Thursday, February 4, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a

compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–1013 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

January 13, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–3564–016.

Applicants: FPL Energy Wyman IV LLC.

Description: Notice of Change in Status One Day Out-of-Time of FPL Energy Wyman IV LLC.

Filed Date: 01/12/2010.

Accession Number: 20100112–5138.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 2, 2010.

Docket Numbers: ER08–1281–004.

Applicants: New York Independent System Operator, Inc.

Description: Report on Broader Regional Market Long-Term Solutions to Lake Erie Loop Flow of New York Independent System Operator, Inc.

Filed Date: 01/12/2010.

Accession Number: 20100112–5141.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 2, 2010.

Docket Numbers: ER09–1727–003.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. *et al.* submits compliance filing.

Filed Date: 01/11/2010.

Accession Number: 20100111–0230.

Comment Date: 5 p.m. Eastern Time on Monday, February 1, 2010.

Docket Numbers: ER10–276–001.

Applicants: Rolling Thunder I Power Partners, LLC.

Description: Rolling Thunder I Power Partners, LLC supplements its 11/17/09 application for a proposed market-based rate wholesale power sales tariff, effective of 12/18/09.

Filed Date: 01/12/2010.

Accession Number: 20100111–0210.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 2, 2010.

Docket Numbers: ER10–482–001.

Applicants: Duke Energy Commercial Enterprises, Inc.

Description: Duke Energy Commercial Enterprises, Inc submits substitute Sheet 1 *et al.* to FERC Electric Rate Schedule, Third Revised Volume 1.

Filed Date: 01/08/2010.

Accession Number: 20100111–0205.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–561–000.

Applicants: Westar Energy, Inc.

Description: Westar Energy, Inc submits Notice of Cancellation to First Revised Rate Schedule FERC 250, the Electric Power Supply Agreement, between Westar and the City of Burlingame Kansas.

Filed Date: 01/07/2010.

Accession Number: 20100107–0213.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: ER10–582–000.

Applicants: Midwest Independent Transmission System.

Description: Midwest Independent Transmission System Operator, Inc. submits revisions to Section 8.2 in Attachment X of the Midwest Independent Transmission System Operator, Inc. Open Access Transmission.

Filed Date: 01/12/2010.

Accession Number: 20100112–0202.

Comment Date: 5 p.m. Eastern Time on Tuesday, February 2, 2010.

Docket Numbers: ER10–589–000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Company submits Supplemental 4 to it Rate Schedule FERC 80 and request waiver of the sixty day prior notice requirement to permit the Supplement, to become effective 1/21/10.

Filed Date: 01/13/2010.

Accession Number: 20100113–0204.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 3, 2010.

Docket Numbers: ER10–590–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits executed Wholesale Market Participation Agreement entered with Milton Regional Sewer Authority *et al.*

Filed Date: 01/13/2010.

Accession Number: 20100113–0205.

Comment Date: 5 p.m. Eastern Time on Wednesday, February 3, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–1014 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

January 11, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER03–428–009.

Applicants: ConocoPhillips Company.

Description: Errata to the February 17, 2009 submission to Appendix B Asset Tables of ConocoPhillips Company.

Filed Date: 01/07/2010.

Accession Number: 20100107–5107.

Comment Date: 5 p.m. Eastern Time on Thursday, January 28, 2010.

Docket Numbers: ER10–189–001.

Applicants: Niagara Mohawk Power Corporation.

Description: Compliance Refund Report of Niagara Mohawk Power Corporation.

Filed Date: 01/08/2010.

Accession Number: 20100108–5136.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–206–001.

Applicants: Mississippi Power Company.

Description: Mississippi Power Company submits Amended and Restated FERC Rate Schedule No 108 etc.

Filed Date: 01/08/2010.

Accession Number: 20100108–0211.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–567–000.

Applicants: Westar Energy, Inc.

Description: Westar Energy, Inc submits Electric Interconnection Agreement Rate Schedule 332 with Mid Kansas Electric Company, LLC.

Filed Date: 01/08/2010.

Accession Number: 20100108–0208.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–568–000.

Applicants: NSTAR Electric Company.

Description: NSTAR Electric Company submits a notice of succession in order to change the name on Boston Edison Company's Rate Schedule FERC No 205 which is a Wholesale Distribution Service Agreement.

Filed Date: 01/08/2010.

Accession Number: 20100108–0210.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–569–000.

Applicants: Powerex Corp.

Description: Powerex Corp submits Certificate of Concurrence, in lieu of filing to the hourly Coordination Agreement filed by Washington Water Power Co.

Filed Date: 01/08/2010.

Accession Number: 20100108–0219.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Docket Numbers: ER10–570–000.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Company submits First Revised Sheet 70 *et al.* to FERC Rate Schedule 217.

Filed Date: 01/08/2010.

Accession Number: 20100108–0220.

Comment Date: 5 p.m. Eastern Time on Friday, January 29, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–1012 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 12462–020]

Indian River Power Supply, LLC; Notice of Availability of Environmental Assessment

January 13, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed an application for amendment of exemption for the Indian River Hydroelectric Project (FERC No. 12462). An environmental assessment (EA) has been prepared as part of staff's review of the proposal. The exempted project is located on the Westfield River, in the Town of Russell, in Hampden County, Massachusetts.

In the application, Indian River Power Supply, LLC (exemptee) proposes to replace the project's existing cylinder-gate Holyoke turbine with a large,

horizontal, Francis wicket-gate turbine, which would add another 800 kilowatts of nameplate capacity and approximately 428 cubic feet per second of hydraulic capacity. The EA contains Commission staff's analysis of the probable environmental impacts of the proposal and concludes that approval of the proposal would not constitute a major federal action significantly affecting the quality of the human environment.

The EA is attached to a Commission order titled "Order Amending Exemption and Revising Annual Charges," which was issued January 12, 2010, and is available for review and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426. The EA may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the "elibrary" link. Enter the docket number (P–12462) in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3372, or for TTY, (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–1008 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–5–000]

Minnesota Energy Resources Corporation; Notice of Filing

January 13, 2010.

Take notice that on December 29, 2009, Minnesota Energy Resources Corporation (MERC) filed to update the state approved rate for services under its limited jurisdictional certificate, to seek waiver of the electronic tariff filing requirements of section 284.123(f) and an Operating Statement.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Friday, January 22, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–1006 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC10–27–000]

Empire Generating Co, LLC; Notice of Filing

January 13, 2010.

Take notice that on January 11, 2010, Empire Generating Co, LLC filed a clarification to its December 01, 2009, section 203 application, in response to the Commission's request.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 21, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–1010 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC10–31–000]

Denver City Energy Associates; Notice of Filing

January 13, 2010.

Take notice that on January 11, 2010, Denver City Energy Associates filed a supplemental filing to its December 18, 2009, section 203 application, in response to the Commission's request.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion

to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 21, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–1007 Filed 1–20–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2009–1013; FRL–8807–9]

Claims of Confidentiality of Certain Chemical Identities Submitted under Section 8(e) of the Toxic Substances Control Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing a new general practice of reviewing submissions under section 8(e) of the Toxic Substances Control Act (TSCA) for confidential business information (CBI) claims of chemical identities listed on the public portion of the TSCA Chemical Substances Inventory. Where a health and safety study submitted under section 8(e) of TSCA involves a chemical identity that is already listed on the public portion of the TSCA Chemical Substances Inventory, EPA expects to find that the chemical identity clearly is not entitled to confidential treatment. EPA believes this new general practice will make more health and safety information available to the public and support an important part of the Agency's mission: To promote public understanding of the potential risks posed by chemicals in commerce.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Scott M. Sherlock, Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8257; e-mail address: *sherlock.scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This notice is directed to the public in general. It may, however, be of particular interest to you if you manufacture (defined by statute to include import) and/or process chemicals covered by TSCA (15 U.S.C. 2601 *et seq.*). You may be identified by the North American Industrial Classification System (NAICS) codes 325 and 32411. Because this notice is directed to the general public and other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

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

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2009–1013. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

2. *Other related information.* For information about EPA's programs to evaluate new and existing chemicals and their potential risks, go to *http://www.epa.gov/oppt/index.htm*. For more information about reporting under TSCA section 8(e), go to *http://www.epa.gov/opptintr/tsca8e/index.htm*.

II. What Action is the Agency Taking?

The Agency expects to respond to certain CBI claims regarding chemical identities with a determination letter under 40 CFR 2.306(d) and 40 CFR 2.204(d)(2). This **Federal Register** document only serves to announce this new general practice and is not itself a final Agency action; rather, any determination letter issued by EPA will constitute the Agency's final determination that the chemical identity at issue clearly is not entitled to confidential treatment under TSCA section 14 (15 U.S.C. 2613).

At this time, EPA expects to issue these letters only when the chemical identity claimed as CBI: (1) Is already publicly available on the TSCA Chemical Substances Inventory, and (2) is submitted under TSCA section 8(e) as part of—or data from—a health and safety study.

Each letter will provide a contact person within the Agency whom the recipient of the letter can contact with any questions or concerns about the determination related to their submission.

This action is part of a broader effort to increase transparency and provide more valuable information to the public by identifying programs where non-CBI may have been claimed and treated as CBI in the past. For such information, EPA is considering what actions might be appropriate in accordance with its regulations at 40 CFR part 2, subpart B.

III. What is the Agency's Authority for Taking this Action?

As a general rule, TSCA section 14(b)(1) provides that health and safety studies and data from health and safety studies are not entitled to treatment as CBI, with an exception for information that "discloses processes used in the manufacturing or processing of a chemical substance or mixture," or, in the case of a mixture, where release of the data discloses the portion of a mixture comprised by a particular substance. 15 U.S.C. 2613(b)(1).

EPA considers information contained in a notice of substantial risk under TSCA section 8(e) to be health and safety information and, therefore, covered by the term "health and safety study," as defined in section 3(6) of TSCA. See "TSCA Section 8(e); Notification of Substantial Risk; Policy Clarification and Reporting Guidance," 68 FR 33129 at 33136, June 3, 2003 (FRL–7287–4). Chemical identity is part of a health and safety study. See e.g., 40 CFR 716.3 and 40 CFR 720.3(k). As such, chemical identity associated with a health and safety study in a TSCA section 8(e) submission is not entitled to confidential treatment unless it falls into the exemption under TSCA section 14(b)(1). Where the identity of a chemical substance is already contained on the public portion of the TSCA Chemical Substances Inventory, which is publicly available from the National Technical Information Service and other sources, EPA believes that the identity itself, even assuming it might otherwise be CBI, as well as any information that might be derived from it about processes or portions, has already been disclosed.

EPA's regulations regarding CBI at 40 CFR part 2, subpart B provide for a process where the relevant office determines that certain information clearly is not entitled to confidential treatment. See 40 CFR 2.306(d); 40 CFR 2.204(d)(2); and 40 CFR 2.205(f). As provided in the regulations, the letters will serve as the final EPA determinations concerning the subject confidentiality claims, and recipients of the letters may seek judicial review under 5 U.S.C. 701 *et seq*.

IV. Why is EPA Taking this Action?

Part of the Agency's mission is to promote public understanding of potential risks by providing understandable, accessible and complete information on potential chemical risks to the broadest audience possible. In support of this mission, EPA posts useful information about chemicals regulated under TSCA for the public on its website (*http://www.epa.gov/oppt/index.htm*). One important source of this information is submissions to the Agency under TSCA section 8(e). TSCA section 8(e) requires that:

> Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.
> 15 U.S.C. 2607(e).

When EPA receives submissions under TSCA section 8(e), it makes this information available on its website. Previously, EPA's general practice had been to redact chemical identity from TSCA section 8(e) postings where the identity was claimed as CBI even when the chemical identity was listed on the public portion of the TSCA Chemical Substances Inventory. EPA believes that the posting of the TSCA section 8(e) information received is incomplete and far less informative where the public is not able to view the chemical identity associated with the new health and safety information posted. Where the identity of the chemical is already publicly available on the TSCA Chemical Substances Inventory, the new general practice will allow the public to link the TSCA section 8(e) information with the relevant chemical and will support the Agency's mission of promoting public understanding of potential risks.

List of Subjects

Environmental protection, Chemicals, Confidential business information, Reporting and recordkeeping.

Dated: January 14, 2010.

Steve A. Owens,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. 2010–1105 Filed 1–20–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9104–9]

Cross-Media Electronic Reporting Rule State Authorized Program Revision Approval: State of North Carolina

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval, under regulations for Cross-Media Electronic Reporting, of the State of North Carolina's request to revise its EPA-authorized program to allow electronic reporting.

DATES: EPA's approval is effective January 21, 2010.

FOR FURTHER INFORMATION CONTACT: Evi Huffer, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1697, *huffer.evi@epa.gov,* or David Schwarz, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 566–1704, *schwarz.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Subpart D of CROMERR requires that state, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and get EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, in § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On October 15, 2008, the State of North Carolina Department of Environment and Natural Resources (NCDENR) submitted an application for its Integrated Build Environment for Application Management (IBEAM) electronic document receiving system

for revision of its EPA-authorized program under title 40 CFR. EPA reviewed NCDENR's request to revise its EPA-authorized program and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve North Carolina's request for revision to its authorized program is being published in the **Federal Register**.

Specifically, EPA has approved the State of North Carolina's request to revise its Part 52—Approval and Promulgation of Implementation Plans authorized program for electronic reporting of air emissions information under 40 CFR part 51, for electronic submissions that do not include an electronic signature, but instead provide for a handwritten signature on a separate paper submission report.

NCDENR was notified of EPA's determination to approve its application with respect to the authorized program listed above.

Dated: January 7, 2010.

Lisa Schlosser,

Director, Office of Information Collection.

[FR Doc. 2010–1103 Filed 1–20–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9104–8]

Notice of a Regional Project Waiver of Section 1605 (Buy American) of the American Recovery and Reinvestment Act of 2009 (ARRA) to Gwinnett County Department of Water Resources, Gwinnett County, GA

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA is hereby granting a waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(1) [inconsistent with the public interest] to Gwinnett County Department of Water Resources, Gwinnett County, Georgia ("County") for the purchase of a foreign manufactured submersible pump. This is a project specific waiver and only applies to the use of the specified product for the ARRA project being proposed. Any other ARRA recipient that wishes to use the same product must apply for a separate waiver based on project specific circumstances. The County's tunnel and tunnel lift station project will include installation of two submersible pumps as well as the purchase of one spare pump. The project was originally designed between 2003 and 2006, and bids were taken on March 1, 2007. The County standardized ITT Flygt Corporation as the sole manufacturer of submersible pumps in 2003, when design of the project started. At the time of design, the County already had in operation 88 Flygt pumps out of the 106 pumps in the system. The County has submitted a detailed memorandum dated October 17, 2003, explaining the rationale for standardization. According to the memorandum, the County desired to, "standardize on a single brand of submersible pumps for wastewater pump stations in order to provide greater reliability in the operation of pump stations and avoid the increased costs of inventory, service, maintenance, and engineering associated with using several different brands." This is a project whose earlier phases began prior the enactment of ARRA and was undertaken for the principal purpose of Clean Water Act compliance. The procurement for those prior phases standardized on a particular manufactured good that is subject to ARRA section 1605 requirements for its ARRA-funded phase but the performance from and operation and maintenance of such good in the performance of the facility would be detrimentally affected by a requirement to use a non-standardized good(s). Based on the review of the information provided, EPA has concluded that a waiver of the Buy American provisions is justified. The Assistant Administrator of the Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the County to purchase Flygt submersible pumps, manufactured by ITT Flygt Corporation, as specified in its September 1, 2009, request.

DATES: *Effective Date:* December 18, 2009.

FOR FURTHER INFORMATION CONTACT: Cynthia Y. Edwards, Project Officer, Grants and SRF Section, Water Protection Division (WPD), (404) 562–9340, USEPA Region 4, 61 Forsyth St. SW., Atlanta, GA 30303.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a project waiver of the requirements of Sections 1605(a) of Public Law 111–5, Buy American requirements, to Gwinnett County Department of Water Resources, Gwinnett County, Georgia, for the purchase of Flygt submersible pumps, manufactured by ITT Flygt Corporation of Sweden. EPA has evaluated the County's basis for standardizing to the Flygt submersible pumps. Based on the information provided by the applicant, EPA has determined that it is inconsistent with the public interest for the County to pursue the purchase of a domestically manufactured submersible pump.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project is produced in the United States, or unless a waiver is provided to the recipient by the head of the appropriate agency, here the EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with public the interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The County has requested a waiver from the Buy American Provision for the purchase of the foreign made submersible pumps as part of its tunnel and tunnel lift station project. The purchase of the submersible pumps is part of a project that, according to the County, "consists of a wastewater conveyance and linear storage tunnel from the existing Jack's Creek wastewater treatment facility to the existing No Business Creek pump station to convey wastewater flows from the tunnel to the pump station and a lift station to lift the flow from the tunnel invert to the pump station. The tunnel is an approximate 16,000 linear feet, 12-foot diameter hard rock bore. The lift station is constructed inside an approximate 180 feet deep shaft constructed through hard rock and lined with concrete and shotcrete. The completed project will have a design flow capacity of 7.5 million gallons per day (mgd) and overflow storage capacity in excess of 13 million gallons of raw sewage."

The project requires the installation of two submersible pumps, plus an additional spare submersible pump. The pumps are specified at a maximum 335 hp and 5.5 mgd pumping capacity at a total head of 207 feet. The project specification provided prospective bidders with one acceptable

manufacturer of submersible pumps: ITT Flygt Corporation. ITT Flygt was specified as the sole acceptable manufacturer of submersible pumps because the County had standardized on such pumps in 2003, when the project started. At the time, 88 out of 106 pump systems in the County were equipped with Flygt submersible pumps. The County standardized to these pumps, according to the standardization agreement with ITT Flygt Corporation, to provide greater reliability in the operation of pump stations and avoid the increased costs of inventory, service, maintenance, and engineering associated with using several different brands of pumps. Additionally, according to the County, standardization would allow the County to further its efforts to avoid sanitary sewer overflows by allowing maximum flexibility to interchange pumps during emergencies. Due to the difference in the design of pumps, guide rail systems, and electrical control systems, pumps from one manufacturer cannot be installed in a pump station outfitted for a different manufacturer's pumps. If there is a catastrophic failure or concurrent failure of pumps at a given station, interchangeability allows the immediate replacement of the failed pumps in one station with little-used pumps removed from other comparably sized stations. This ability is, according to the County, critically important in the event of a catastrophic failure or concurrent pump failures. This minimizes the downtime of the failed pump station and mitigates the risks of a major wastewater overflow. It also eliminates the necessity of maintaining spare pumps as a contingency measure against such situations. EPA has determined that the County has provided ample cause for standardization. Furthermore, standardization took place well before ARRA funding was available, so such a decision by the County was clearly not an attempt to avoid application of the Buy American provisions of ARRA.

The purpose of the ARRA is to stimulate economic recovery by funding current infrastructure construction, not to delay projects that are already "shovel ready" by requiring SRF eligible recipients such as the County to revise their design standards and specifications. The imposition of ARRA Buy American requirements in this case would result in unreasonable delay for this project, and an unnecessary burden to the County, in the form of increased maintenance costs in the future, as well as decreased performance of its system due to incompatible pumps. To delay this construction would directly conflict with a fundamental economic purpose of ARRA, which is to create or retain jobs.

The information provided is sufficient to meet the following criteria listed under Section 1605(b) of the ARRA, OMB's regulations at 2 CFR 176.60–176.170, and in the April 28, 2009, EPA Memorandum: Applying the Buy American requirements of ARRA would be inconsistent with the public interest.

The March 31, 2009, Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients.

Having established both a proper basis to specify the particular good required for this project and that application of the Buy American requirements would be inconsistent with the public interest, the County is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5. This waiver permits use of ARRA funds for the purchase of the specified ITT Flygt Corporation submersible pumps documented in the County's waiver request submittal dated September 1, 2009. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b)(1).

Authority: Public Law 111–5, section 1605.

Dated: December 18, 2009.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2010–1119 Filed 1–20–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Sunshine Act Meeting; Deletion of Agenda Item from January 20, 2010, Open Meeting

Date: January 15, 2010.

The following item has been deleted from the list of Agenda items scheduled for consideration at the January 20, 2010, Open Meeting and previously listed in the Commission's Notice of January 13, 2010. This item has been adopted by the Commission.

ITEM NO.	BUREAU	SUBJECT
2	WIRELESS TELE– COMMUNICATIONS	TITLE: Amendment of Parts 15, 74 and 90 of the Commission's Rules Regarding Low Power Auxiliary Stations, Including Wireless Microphones (WT Docket No. 08–166) SUMMARY: The Commission will consider an Order and Further Notice of Proposed Rulemaking to complete an important component of the DTV transition by prohibiting the further distribution and sale of devices that operate in the 700 MHz frequency and setting a date by which existing devices must clear the band to enable the rollout of public safety services and accelerate the deployment of next generation wireless networks.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2010–1200 Filed 1–19–10; 4:15 pm]

BILLING CODE 6712–01–S

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, January 14, 2010, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC. (Ninth Floor).

STATUS: Meeting open to the public.

THE FOLLOWING ITEM WAS WITHDRAWN FROM THE AGENDA:

DRAFT ADVISORY OPINION 2009–27: American Future Fund Political Action by its counsel, Jason Torchinsky.

* * * * *

PREVIOUSLY SCHEDULED DATE AND TIME: Thursday, January 28, 2010 (meeting open to the public). This meeting was rescheduled for Friday, January 29, 2010.

* * * * *

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Darlene Harris, Deputy Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Darlene Harris,

Deputy Secretary of the Commission.

[FR Doc. 2010–1024 Filed 1–20–10; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than February 4, 2010.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. Richard T. Alger, the Richard T. Alger Revocable Trust, Richard T. Alger, trustee, and the Mason W. Alger and Dorothy Turner Alger Irrevocable Trust for Thomas M. Alger, Richard T. Alger, trustee, all of Homestead, Florida; to acquire voting shares of Hometown of Homestead Banking Company, and thereby indirectly acquire voting shares of 1st National Bank of South Florida, both of Homestead, Florida.

2. William Hall Losner, Homestead, Florida; to acquire voting shares of Hometown of Homestead Banking Company, and thereby indirectly acquire voting shares of 1st National Bank of South Florida, both of Homestead, Florida.

B. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. A.C. Schwethelm, Comfort, Texas; to retain voting shares of, and acquire additional shares of Paint Rock Bancshares, Inc., and thereby indirectly retain voting shares of, and acquire additional voting shares of First State Bank, both of Paint Rock, Texas.

Board of Governors of the Federal Reserve System, January 15, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–1038 Filed 1–20–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 16, 2010.

A. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. Grandpoint Capital, Inc., Los Angeles, California; to become a bank holding company by acquiring 100 percent of the voting shares of Santa Ana Business Bank, Santa Ana, California.

In connection with this application, Applicant also has applied to engage *de novo* through its subsidiary, Grandpoint Capital Advisors, Inc., Los Angeles, California, in financial advisory acitivites to businesses and individuals, pursuant to section 225.28(b)(6) and in private placement of debt and equity securities activities, pursuant to section 225.28(b)(7)(iii), of Regulation Y.

Board of Governors of the Federal Reserve System, January 15, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–1037 Filed 1–20–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. A copy of the

agreement is available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012048–001.

Title: The Container Trades Statistics Agreement.

Parties: A.P. Moeller-Maersk A/S; China Shipping Container Lines Co., Ltd.; COSCO Container Lines Company Ltd.; CMA CGM S.A.; Compania Sudamericana de Vapores S.A.; Evergreen Line Joint Service Agreement; Hamburg Sud KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Independent Container Line Ltd.; Mediterranean Shipping Co. S.A.; Orient Overseas Container Line Ltd.; Pacific International Lines (PTE) Ltd.; United Arab Shipping Co. (SAG); Yangming Marine Transport Corp.; and Zim Integrated Shipping Services, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The agreement deletes Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., and Nippon Yusen Kaisha Line as parties to the agreement.

By Order of the Federal Maritime Commission.

Dated: January 15, 2010.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–1073 Filed 1–20–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier—Ocean Transportation Intermediary

Hoya International Corp., 1921 Hanford Drive, Pasadena, CA 91104, *Officer:* Hung Fang, President/VP/Treasurer/Secretary, (Qualifying Individual).

Aviation Import/Export Inc. dba Aviation Import/Export, 614 S. 8th Street, Suite #339, Philadelphia, PA 19147, *Officers:* Henry E. Charlton, Director, (Qualifying Individual). David Gannon, President.

Banacle Enterprise LLC, 204–12 104 Avenue, St. Albans, NY 11412, *Officers:* Corny Francis, Manager, (Qualifying Individual). Patrick Turner, Member Manager.

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

Princess Cargo, 3225 Long Beach Blvd., #308, Long Beach, CA 90807, *Officers:* Tom Miller, Shipping Manager, Frank Krotzer, Secretary. (Qualifying Individuals)

AK Solutions, Inc., 10034 Halston Drive, Sugarland, TX 77498, *Officer:* Adnan Qureshi, President/Secretary. (Qualifying Individual)

Tri-Vi-U.S. Logistics Ltd., 147–35 Farmers Blvd., Jamaica, NY 11434, *Officers:* Yehudit Gabbay Turgeman, Vice President/Secretary. (Qualifying Individual) Uri Yaron, President.

Carlo Shipping International, Inc., 250 North Avenue East, Elizabeth, NJ 07201, *Officer:* Carlos E. Rodriguez, President/Secretary/Treasurer. (Qualifying Individual)

EB Logistics, LLC, 300 Colonial Center Parkway, Suite 100, Roswell, GA 30076, *Officer:* Edgar Bagdasaryan, President/CFO/Secretary. (Qualifying Individual)

Ascend Logistics LLC, 6 Emerald Court, Princeton Junction, NJ 08550, Yongpeng Jin, Owner. *Officer:* (Qualifying Individual)

World Commerce Services, LLC, 920 E. Algonquin, Schaumburg, IL 60173, *Officer:* David Duke, Director of Operations. (Qualifying Officer)

Eagle Maritime of America, 115 River Road, Edgewater, NJ 07020, *Officer:* Rajiv Dixit, President. (Qualifying Officer)

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants

Panamerican Shipping, Inc., 710 Franklin Avenue, Brooklyn, NY 11238, *Officers:* Lamar Bailey, President. (Qualifying Individual) Cristine Bailey, Vice President.

Royal Shipping Co., 11959 S. Cicero Avenue, Alsip, IL 60803, *Officers:* Hassan Hwajj, Vice President. (Qualifying Individual) Naser Alshoweat, President.

Dated: January 15, 2010.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–1071 Filed 1–20–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Reissuance

Notice is hereby given that the following Ocean Transportation Intermediary license has been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR Part 515.

License No.	Name/address	Date reissued
020056N	A.M.C. Shipping, LLC 79 Edna Avenue, Bridgeport, CT 06610	November 1, 2009.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2010–1072 Filed 1–20–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 009585N.

Name: 21st Century Maritime, Inc.

Address: PO Box 40056, 254–15 83rd Ave., Glen Oaks, NY 11004.

Date Revoked: December 16, 2009.

Reason: Surrendered license voluntarily.

License Number: 002005F.

Name: Commercial International Forwarding, Inc.

Address: 309 Charleston Place, Hurst, TX 76054.

Date Revoked: January 1, 2010.

Reason: Surrendered license voluntarily.

License Number: 021442N.

Name: FERM Holdings, Inc.

Address: 3640 NW 115th Ave., Miami, FL 33178.

Date Revoked: December 15, 2009.

Reason: Surrendered license voluntarily.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2010–1078 Filed 1–20–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds For Section 7A of the Clayton Act

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for the Hart-Scott-Rodino Antitrust Improvements Act of 1976 required by the 2000 amendment of Section 7A of the Clayton Act. Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1390 (“the Act”), requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). The new thresholds, which take effect 30 days after publication in the **Federal Register**, are as follows:

SUBSECTION OF 7A	ORIGINAL THRESHOLD	ADJUSTED THRESHOLD
7A(a)(2)(A)	$200 million	$253.7 million
7A(a)(2)(B)(i)	$50 million	$63.4 million
7A(a)(2)(B)(i)	$200 million	$253.7 million
7A(a)(2)(B)(ii)(I)	$10 million	$12.7 million
7A(a)(2)(B)(ii)(I)	$100 million	$126.9 million
7A(a)(2)(B)(ii)(II)	$10 million	$12.7 million
7A(a)(2)(B)(ii)(II)	$100 million	$126.9 million
7A(a)(2)(B)(ii)(III)	$100 million	$126.9 million
7A(a)(2)(B)(ii)(III)	$10 million	$12.7 million
Section 7A note: Assessment and Collection of Filing Fees[1] (3)(b)(1)	$100 million	$126.9 million
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2)	$100 million	$126.9 million
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(2)	$500 million	$634.4 million
Section 7A note: Assessment and Collection of Filing Fees (3)(b)(3)	$500 million	$634.4 million

[1] Pub.L 106-553, Sec. 630(b) amended Sec. 18a note.

Any reference to these thresholds and related thresholds and limitation values in the HSR rules (16 C.F.R. Parts 801-803) and the Antitrust Improvements Act Notification and Report Form and its Instructions will also be adjusted, where indicated by the term “(as adjusted)”, as follows:

ORIGINAL THRESHOLD	ADJUSTED THRESHOLD
$10 million	$12.7 million
$50 million	$63.4 million
$100 million	$126.9 million
$110 million	$139.6 million
$200 million	$253.7 million
$500 million	$634.4 million
$1 billion	$1,268.7 million

DATES: *Effective Date:* February 22, 2010.

FOR FURTHER INFORMATION CONTACT: B. Michael Verne, Bureau of Competition, Premerger Notification Office (202) 326-3100.

Authority: 16 U.S.C. § 7A.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2010–1039 Filed 1–20–10: 12:08 pm]

BILLING CODE 6750–01–S

FEDERAL TRADE COMMISSION

Revised Jurisdictional Thresholds For Section 8 of the Clayton Act

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The Federal Trade Commission announces the revised thresholds for interlocking directorates required by the 1990 amendment of Section 8 of the Clayton Act. Section 8 prohibits, with certain exceptions, one person from serving as a director or officer of two competing corporations if two thresholds are met. Competitor corporations are covered by Section 8 if each one has capital, surplus, and undivided profits aggregating more than $10,000,000, with the exception that no corporation is covered if the competitive sales of either corporation are less than $1,000,000. Section 8(a)(5) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product. The new thresholds, which take effect immediately, are $25,841,000 for Section 8(a)(1), and $2,584,100 for Section 8(a)(2)(A).

DATES: *Effective Date:* January 21, 2010.

FOR FURTHER INFORMATION CONTACT: James F. Mongoven, Bureau of Competition, Office of Policy and Coordination, (202) 326-2879.

Authority: 15 U.S.C. § 19(a)(5)).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2010–1040 Filed 1–20–10: 10:52 am]

BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Oak Ridge Hospital in Oak Ridge, Tennessee, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On December 10, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and its contractors and subcontractors who worked in any location at the Oak Ridge Hospital in Oak Ridge, Tennessee, from May 15, 1950 through December 31, 1959, for a number of work days aggregating at least 250 work days or in combination with work days within the parameters established for one or more other classes of employees in the SEC.

This designation became effective on January 9, 2010, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on January 9, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–1093 Filed 1–20–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Hanford site in Richland, Washington, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On December 10, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and its contractors and subcontractors who worked at the Hanford site in Richland, Washington, from October 1, 1943 through June 30, 1972, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees included in the Special Exposure Cohort.

This designation became effective on January 9, 2010, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on January 9, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–1089 Filed 1–20–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Piqua Organic Moderated Reactor site in Piqua, Ohio, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On December 10, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and its contractors and subcontractors who worked at the Piqua Organic Moderated Reactor site during the covered period from May 2, 1966 through February 28, 1969, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for

one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on January 9, 2010, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on January 9, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–1088 Filed 1–20–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Metals and Controls Corp. in Attleboro, Massachusetts, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On December 10, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All Atomic Weapons Employees who worked at Metals and Controls Corp. in Attleboro, MA, from January 1, 1952 to December 31, 1967, for a number of work days aggregating at least 250 work days, occurring either solely under this employment or in combination with work days within the parameters established for one or more other classes of employees included in the SEC.

This designation became effective on January 9, 2010, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on January 9, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–1096 Filed 1–20–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Final Effect of Designation of a Class of Employees for Addition to the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice concerning the final effect of the HHS decision to designate a class of employees at the Brookhaven National Laboratory in Upton, New York, as an addition to the Special Exposure Cohort (SEC) under the Energy Employees Occupational Illness Compensation Program Act of 2000. On December 10, 2009, as provided for under 42 U.S.C. 7384q(b), the Secretary of HHS designated the following class of employees as an addition to the SEC:

All employees of the Department of Energy, its predecessor agencies, and its contractors and subcontractors who worked at the Brookhaven National Laboratory in Upton, New York, from January 1,1947 to December 31,1979, for a number of work days aggregating at least 250 work days, occurring either solely under this employment, or in combination with work days within the parameters established for one or more other classes of employees in the Special Exposure Cohort.

This designation became effective on January 9, 2010, as provided for under 42 U.S.C. 7384l(14)(C). Hence, beginning on January 9, 2010, members of this class of employees, defined as reported in this notice, became members of the Special Exposure Cohort.

FOR FURTHER INFORMATION CONTACT: Stuart L. Hinnefeld, Interim Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C–46, Cincinnati, OH 45226, Telephone 513–533–6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to *OCAS@CDC.GOV.*

John Howard,

Director, National Institute for Occupational Safety and Health.

[FR Doc. 2010–1090 Filed 1–20–10; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Tribal Child Support Enforcement Direct Funding Request: 45 CFR 309—Plan Form OCSE 34A; Statistical Reporting.

OMB No.: 0970–0218.

Description: The final rule within 45 CFR part 309, published in the **Federal Register** on March 30, 2004, contains a regulatory reporting requirement that, in order to receive funding for a Tribal IV–D program a Tribe or Tribal organization must submit a plan describing how the Tribe or Tribal organization meets or plans to meet the objectives of section 455(f) of the Social Security Act, including establishing paternity, establishing, modifying, and enforcing support orders, and locating noncustodial parents. The plan is required for all Tribes requesting funding; however, once a Tribe has met the requirements to operate a comprehensive program, a new plan is not required annually unless a Tribe makes changes to its title IV–D program. Tribes and Tribal organizations must respond if they wish to operate a fully funded program. In addition, any Tribe or Tribal organization participating in the program will be required to submit form OCSE 34A. This paperwork collection activity is set to expire in September, 2010.

Respondents: Tribes and Tribal Organizations.

Annual Burden Estimates

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
45 CFR 309—Plan	33	1	480	15,840
Form OCSE 34A	49	4	8	1,568
Estimated total burdenhours				17,408

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: January 14, 2010.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2010–963 Filed 1–20–10; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0470]

International Conference on Harmonisation; Guidance on M3(R2) Nonclinical Safety Studies for the Conduct of Human Clinical Trials and Marketing Authorization for Pharmaceuticals; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance entitled "M3(R2) Nonclinical Safety Studies for the Conduct of Human Clinical Trials and Marketing Authorization for Pharmaceuticals." The guidance was prepared under the auspices of the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The guidance, which is a revision of an existing guidance, discusses the types of nonclinical studies, their scope and duration, and their relation to the conduct of human clinical trials and marketing authorization for pharmaceuticals. The guidance is intended to facilitate the timely conduct of clinical trials and reduce the unnecessary use of animals and other drug development resources.

DATES: Submit written or electronic comments on agency guidance at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002, or the Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. The guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. Send two self-addressed adhesive labels to assist the office in processing your requests.

Submit electronic comments to *http://www.regulations.gov*. Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT:

Regarding the guidance: Abigail Jacobs, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave, Bldg. 22, rm. 6484, Silver Spring, MD 20993–0002, 301–796–0174; or Martin D. Green, Center for Biologics Evaluation and Research (HFM–475), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–3070.

Regarding the ICH: Michelle Limoli, Office of International Programs (HFG–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4480.

SUPPLEMENTARY INFORMATION:

I. Background

In recent years, many important initiatives have been undertaken by regulatory authorities and industry associations to promote international harmonization of regulatory requirements. FDA has participated in many meetings designed to enhance harmonization and is committed to seeking scientifically based harmonized technical procedures for pharmaceutical development. One of the goals of harmonization is to identify and then reduce differences in technical requirements for drug development among regulatory agencies.

ICH was organized to provide an opportunity for tripartite harmonization initiatives to be developed with input from both regulatory and industry representatives. FDA also seeks input from consumer representatives and others. ICH is concerned with harmonization of technical requirements for the registration of pharmaceutical products among three

regions: The European Union, Japan, and the United States. The six ICH sponsors are the European Commission; the European Federation of Pharmaceutical Industries Associations; the Japanese Ministry of Health, Labour, and Welfare; the Japanese Pharmaceutical Manufacturers Association; the Centers for Drug Evaluation and Research and Biologics Evaluation and Research, FDA; and the Pharmaceutical Research and Manufacturers of America. The ICH Secretariat, which coordinates the preparation of documentation, is provided by the International Federation of Pharmaceutical Manufacturers Associations (IFPMA).

The ICH Steering Committee includes representatives from each of the ICH sponsors and the IFPMA, as well as observers from the World Health Organization, Health Canada, and the European Free Trade Area.

In the **Federal Register** of September 3, 2008 (73 FR 51491), FDA published a notice announcing the availability of a draft guidance entitled "M3(R2) Nonclinical Safety Studies for the Conduct of Human Clinical Trials and Marketing Authorization for Pharmaceuticals." The notice gave interested persons an opportunity to submit comments by October 20, 2008.

After consideration of the comments received and revisions to the guidance, a final draft of the guidance was submitted to the ICH Steering Committee and endorsed by the three participating regulatory agencies in June 2009.

Guidance is provided on the various nonclinical studies recommended to support conduct of clinical trials and marketing. The guidance further harmonizes the recommendations in a number of areas and includes a new section on exploratory clinical trials. The recommendations should promote safe and ethical development and availability of new pharmaceuticals.

The guidance reflects revisions made in response to comments received on the draft guidance. The revisions include more detailed discussions of some types of nonclinical studies and editorial changes to provide further clarification in a number of areas.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) electronic or written comments on the guidance. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

Persons with access to the Internet may obtain the document at *http://www.regulations.gov*, *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*, or *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/default.htm*.

Dated: January 15, 2010.

David Dorsey,

Acting Deputy Commissioner for Policy, Planning and Budget.

[FR Doc. 2010–1027 Filed 1–20–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Microbiology, Infectious Diseases and AIDS Initial Review Group; Microbiology and Infectious Diseases B Subcommittee.

Date: February 11–12, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Gary S. Madonna, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID, National Institutes of Health, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–496–3528, *gm12w@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Planning (R34) Grants and Implementation (U01) Cooperative Agreements.

Date: February 12, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza Hotel—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: B. Duane Price, PhD, Scientific Review Officer, Scientific Review Program, HHS/NIH/NIAID/DEA, Room 3139, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, (301) 451–2592, *pricebd@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1050 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NIDDK KUH-Fellowship Review.

Date: February 19, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Xiaodu Guo, MD, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, R13 Conference.

Date: February 19, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: D.G. Patel, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7682, *pateldg@niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Fellowships in Digestive Diseases and Nutrition.

Date: February 22, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Washington DC, 1250 22nd Street NW., Washington, DC 20037.

Contact Person: Thomas A. Tatham, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 760, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–3993, *tathamt@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, NIDDK–BCBC U01 Review.

Date: March 2, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Xiaodu Guo, MD, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 761, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–4719, *guox@extra.niddk.nih.gov*.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Obesity Centers Review.

Date: March 10–11, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Churchill Hotel, 1914 Connecticut Avenue, NW., Washington, DC 20009.

Contact Person: Thomas A. Tatham, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 760, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–3993, *tathamt@mail.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Digestive Diseases Core Centers.

Date: March 25–26, 2010.

Time: 5 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Maria E. Davila-Bloom, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 758, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7637, *davila-bloomm@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Energy Balance Program Projects.

Date: March 31, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: The Ritz-Carlton Hotel, 1150 22nd Street, NW., Washington, DC.

Contact Person: Paul A. Rushing, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–8895, *rushingp@extra.niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1052 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Child Psychopathology.

Date: January 27, 2010.

Time: 9 a.m. to 8 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: Melissa Gerald, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7848, Bethesda, MD 20892, (301) 408–9107, *geraldmel@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: CASE and KNOD.

Date: January 27, 2010.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: Jose Fernando Arena, PhD, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3135, MSC 7770, Bethesda, MD 20892, 301–408–9072, *arenaj@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Study of Osteoporotic Fractures Clinical Centers.

Date: February 4–5, 2010.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel, 1515 Rhode Island Avenue, Washington, DC 20005.

Contact Person: Heidi B. Friedman, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301–435–0906, *hfriedman@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Sensory, Motor, and Cognitive Neuroscience Fellowship Study Section.

Date: February 19, 2010.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Washington Circle Hotel, One Washington Circle, NW., Washington, DC 20037.

Contact Person: John Bishop, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1054 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Communication Disorders Review Committee.

Date: February 4–5, 2010.

Time: February 4, 2010, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Disney's Paradise Pier Hotel, 1717 S. Disneyland Drive, Anaheim, CA 92802.

Time: February 5, 2010, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Disney's Paradise Pier Hotel, 1717 S. Disneyland Drive, Anaheim, CA 92802.

Contact Person: Christopher A. Moore, PhD, Scientific Review Officer, National Institute of Health, NIDCD, 6120 Executive Blvd., MSC 7180, Bethesda, MD 20892, 301–496–8683, *moorechristopher@nidcd.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1066 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; CDRC Member Conflicts.

Date: February 17, 2010.

Time: 10 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Christine A. Livingston, PhD, Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Research Core.

Date: February 19, 2010.

Time: 11 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Susan Sullivan, PhD, Scientific Review Officer, National Institute of Deafness and Other Communication Disorders, 6120 Executive Blvd. Ste. 400C, Rockville, MD 20852, 301–496–8683, *sullivas@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Clinical Trials.

Date: February 23, 2010.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Christine A. Livingston, PhD, Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Clinical Trial.

Date: February 25, 2010.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6120 Executive Blvd., Rockville, MD 20852. (Telephone Conference Call)

Contact Person: Christine A. Livingston, PhD, Scientific Review Officer, Division of Extramural Activities, National Institutes of Health/NIDCD, 6120 Executive Blvd.—MSC 7180, Bethesda, MD 20892, (301) 496–8683, *livingsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1067 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Environmental Health Sciences Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial

property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Environmental Health Sciences Council.

Date: February 18–19, 2010.

Open: February 18, 2010, 8:30 a.m. to 5 p.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Open: February 19, 2010, 8:30 a.m. to 10:30 a.m.

Agenda: Discussion of program policies and issues.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709.

Closed: February 19, 2010, 10:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Inst. of Environmental Health Sciences, Building 101, Rodbell Auditorium, 111 T. W. Alexander Drive, Research Triangle Park, NC 27709.

Contact Person: Gwen W Collman, PhD, Interim Director, Division of Extramural Research & Training, National Institutes of Health, Nat. Inst. of Environmental Health Sciences, 615 Davis Dr., KEY615/3112, Research Triangle Park, NC 27709, (919) 541–4980, *collman@niehs.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niehs.nih.gov/dert/c-agenda.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: January 14, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1065 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute Of Neurological Disorders and Stroke; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of meetings of the National Advisory Neurological Disorders and Stroke Council.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Neurological Disorders and Stroke Council; Training, Career Development, and Special Programs Subcommittee.

Date: February 3, 2010.

Open: 8 p.m. to 9:30 p.m.

Agenda: To discuss the training plan of the institute.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Closed: 9:30 p.m. to 10 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Stephen J. Korn, PhD, Training and Special Programs Officer, National Institute of Neurological, Disorders and Stroke, National Institutes of Health, 6001 Executive Blvd., Suite 2154, MSC 9527, Bethesda, MD 20892–9527, (301) 496–4188.

Name of Committee: National Advisory Neurological Disorders and Stroke Council; Basic and Preclinical Programs Subcommittee.

Date: February 4, 2010.

Open: 8 a.m. to 9:30 a.m.

Agenda: To discuss basic and preclinical programs policy.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 7, Bethesda, MD 20892.

Closed: 9:30 a.m. to 10 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 7, Bethesda, MD 20892.

Contact Person: William D Matthew, PhD, Director, Office of Translational Research, NINDS, National Institutes of Health, 6001 Executive Blvd., Room 2137, Bethesda, MD 20892, 301–496–1779, *bill.matthew@nih.gov*.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.ninds.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 7, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–618 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Pediatric Neurology Training Review.

Date: February 8–9, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Hotel, 1250 22nd Street, Washington, DC 20037.

Contact Person: Joann Mcconnell, PhD, Scientific Review Administrator, Scientific Review Branch, NIH/NINDS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, Msc 9529, Bethesda, MD 20892–9529, (301) 496–5324, *mcconnej@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1053 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individualsassociated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Clinical Services.

Date: January 29, 2010.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Ramesh Vemuri, PhD, Chief, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C–212, Bethesda, MD 20892, 301–402–7700, *rv23r@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–1051 Filed 1–20–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2491–10; DHS Docket No. USCIS]

RIN 1615–ZA96

Designation of Haiti for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: The Department of Homeland Security announces that the Secretary of Homeland Security (Secretary) has designated Haiti for temporary protected status (TPS) for a period of 18 months. Under section 244(b)(1) of the Immigration and Nationality Act, the Secretary is authorized to designate a foreign state for TPS or parts of such state upon finding that such state is experiencing ongoing armed conflict, an environmental disaster, or "extraordinary and temporary conditions." The Secretary may grant TPS to individual nationals of the designated foreign state (or to eligible aliens having no nationality who last habitually resided in such state) who have been both continuously physically present in the United States since the effective date of the designation and continually residing in the United States since a date determined by the Secretary, and who meet other eligibility criteria. TPS is available only to persons who were continuously physically present in the United States as of the effective date of the designation.

Under this designation, Haitian nationals (and aliens having no nationality who last habitually resided in Haiti) who have continuously resided in the United States since January 12, 2010, and who remain in continual physical presence in the United States from the effective date of the notice, may apply for TPS within the 180-day registration period that begins on the date of publication of the notice. These nationals also may apply for employment authorization documents and for permission to depart from and return to the United States.

This notice also sets forth procedures necessary for nationals of Haiti (or aliens having no nationality who last habitually resided in Haiti) to register and to apply for TPS and employment authorization documents with U.S. Citizenship and Immigration Services.

DATES: This designation of Haiti for TPS is effective on January 21, 2010, and will remain in effect through July 22, 2011. The 180-day registration period for eligible individuals to submit their TPS applications begins January 21, 2010, and will remain in effect until July 20, 2010.

FOR FURTHER INFORMATION CONTACT:

- For further information on TPS, including guidance on the application process and additional information on eligibility, please visit the USCIS Web site at *http://www.uscis.gov*. Select "Temporary Protected Status" from the homepage under "Humanitarian." You can find detailed information about this Haitian designation on our Web site at the Haitian Questions & Answers Section.
- Applicants seeking information about the status of their individual cases can check Case Status Online available at the USCIS Web site *(http://www.uscis.gov)*, or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).
- Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

ASC—USCIS Application Support Center
DHS—Department of Homeland Security
DOS—Department of State
EAD—Employment Authorization Document
Government—United States Government
INA—Immigration and Nationality Act
OSC—U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
USCIS—U.S. Citizenship and Immigration Services

What Is Temporary Protected Status?

TPS is a temporary immigration status granted to eligible nationals of a country (or to persons without nationality who last habitually resided in the designated country) that the Secretary has designated for TPS because the country is experiencing an ongoing armed conflict, an environmental disaster, or extraordinary and temporary conditions. During the period for which the Secretary has designated a country for TPS, TPS beneficiaries are eligible to remain in the United States and may

obtain work authorization, so long as they continue to meet the terms and conditions of their TPS status. The granting of TPS is available only to persons who were continuously physically present in the United States as of the effective date of this designation and does not lead to permanent resident status.

When the Secretary terminates a country's TPS designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status has since expired or been terminated) or to any other status they may have obtained while registered for TPS.

What Authority Does the Secretary of Homeland Security Have To Designate Haiti for TPS?

The Immigration and Nationality Act (INA), authorizes the Secretary, after consultation with appropriate agencies of the government, to designate a foreign State (or part thereof) for TPS.[1] One of the bases for TPS designation is "there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety, *unless* [she] finds that permitting the aliens to remain temporarily in the United States is contrary to the national interest of the United States." INA section 244(b)(1)(C) (emphasis added); 8 U.S.C. 1254a(b)(1)(C). The Secretary has determined, after consulting with the Department of State (DOS) and other government agencies, that there exists in Haiti "extraordinary and temporary conditions," preventing Haitian nationals from returning to Haiti in safety and that permitting eligible Haitian nationals to remain temporarily in the United States would not be contrary to the national interest.

Following the designation of a country for TPS, the Secretary may grant TPS to eligible nationals of that foreign State (or aliens having no nationality who last habitually resided in that State) who have been both continually physically present in the United States since the effective date of the notice and continually residing in the United States since a date determined by the Secretary, and who meet all other eligibility criteria. INA section 244(a)(1)(A) and (c); 8 U.S.C. 1254a(a)(1)(A) and (c). Persons convicted of any felony, or two or more misdemeanors, committed in the United States are ineligible for TPS. Applicants may also be ineligible if one of the bars to asylum eligibility applies. *Id.* at section 244(c)(2)(B)(i–ii).

Why Is the Secretary Designating Haiti for TPS?

On January 12, 2010, Haiti was struck by a 7.0-magnitude earthquake. DHS and DOS have conducted an initial review of the conditions in Haiti following the earthquake. Based on this review, the Secretary has determined to designate Haiti for TPS for 18-months pursuant to section 244(b)(1)(C) of the INA for reasons discussed below. The Department of State concurs in the designation of Haiti for a period of 18 months.

The epicenter of the earthquake was off the coast of Haiti, and only 17 km from the capital, Port-au-Prince, an area where some three million of the nation's nine million residents reside. Aftershocks have been measured at 5.9 and 5.5 respectively, and more aftershocks are expected.

Reports indicate that the earthquake destroyed most of the capital city. Initial estimates indicate that the death toll is substantial. The International Red Cross indicates that about three million people—one-third of Haiti's population—have been affected by the earthquake.

Reports also indicate that concrete homes have collapsed and hospitals are overflowing with victims. The Presidential Palace, the Ministry of Justice, Parliament, the tax office and other government buildings, as well as the United Nations headquarters, and the World Bank offices are among the buildings reported to be destroyed or damaged. Hospitals and schools have been destroyed. The Ministry of Public Works and the Ministry of Communication and Culture have also been damaged.

The country's critical infrastructure, including its capacity for the provision of electricity, water, and telephone services, has been severely affected. Food and water are increasingly scarce. Fuel shortages are emerging as an immediate concern.

There is limited access to the capital city. Roads are blocked by debris and other obstacles, and the collapse of the Croix de Mission Bridge has cut off a major artery between Port-au-Prince and the northern part of the country, making it more difficult to transport food, fresh water, and medical supplies. Haiti's main airport in Port-au-Prince, Toussaint L'Ouverture International Airport, also has suffered significant damage that is hindering access to the country.

Haiti has limited resources to cope with a natural disaster, and now has been struck by its strongest earthquake in 200 years. Although a number of organizations and countries have pledged humanitarian aid, the magnitude of the disaster is substantial.

Given the size of the destruction and humanitarian challenges, there clearly exist extraordinary and temporary conditions preventing Haitian nationals from returning to Haiti in safety. Moreover, allowing eligible Haitian nationals to remain temporarily in the United States, as an important complement to the U.S. government's wider disaster relief and humanitarian aide response underway on the ground in Haiti, would not be contrary to the public interest.

DHS estimates that there are 100,000 to 200,000 nationals of Haiti (or otherwise eligible aliens having no nationality who last habitually resided in Haiti) who are eligible for TPS under this designation.

Designation of Haiti for TPS

Based upon these unique, specific, and extreme factors, the Secretary has determined, after consultation with the appropriate Government agencies, that there exist extraordinary and temporary conditions in Haiti preventing aliens who are nationals of Haiti from returning to Haiti in safety. The Secretary further finds that it is not contrary to the national interest of the United States to permit Haitian nationals (or aliens having no nationality who last habitually resided in Haiti) who meet the eligibility requirements of TPS to remain in the United States temporarily. *See* INA section 244(b)(1)(C); 8 U.S.C. 1254a(b)(1)(C). On the basis of these findings and determinations, the Secretary concludes that Haiti should be designated for TPS for an 18-month period. *See* INA section 244(b)(2)(B); 8 U.S.C. 1254a(b)(2)(B).

Nationals of Haiti (and aliens having no nationality who last habitually resided in Haiti) who have been "continuously physically present" in the United States since January 21, 2010 and have "continuously resided" in the United States since January 12, 2010, may apply for TPS within the registration period that begins on January 21, 2010 and ends on July 20, 2010. Except as specifically provided in this notice, applications for TPS by nationals of Haiti (and aliens having no nationality who last habitually resided in Haiti) must be filed pursuant to the

[1] As of March 1, 2003, in accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Public Law No. 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions transferred under the HSA from the Department of Justice to the Department of Homeland Security "shall be deemed to refer to the Secretary" of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, tit. XV, sec. 1517).

provisions of 8 CFR part 244. Aliens who wish to apply for TPS must file an Application for Temporary Protected Status, Form I–821, together with an Application for Employment Authorization, Form I–765, in accordance with the form's instructions and applicable regulations during the registration period.

Janet Napolitano,

Secretary.

Required Application Forms and Application Fees To Register for TPS

To register for TPS, an applicant must submit two applications:

1. Form I–821, Application for Temporary Protected Status, and pay the Form I–821 application fee, which is $50. If you are unable to pay the fee, you may submit a fee waiver request with appropriate documentation.

2. Form I–765, Application for Employment Authorization.

- If you want an employment authorization document (EAD), you must pay the Form I–765 application fee, which is $340, or submit a fee waiver request.
- However, if you are filing an initial TPS registration and you are under the age of 14 or above the age of 65, you do not pay the Form I–765 fee to obtain an EAD.
- If you are not requesting an EAD, you do not pay the Form I–765 fee.

3. Individuals who may apply for TPS pursuant to this notice and who are in removal proceedings will be provided an opportunity to apply in accordance with 8 CFR 244.7(d).

You must submit both applications together. For more information on the application forms and application fees for TPS, please visit the USCIS Web site at *http://www.uscis.gov.*

Biometric Services Fee

Biometrics (such as fingerprints) are required for all applicants 14 years of age or older. Those applicants must submit a biometric services fee of $80. If you are unable to pay the fee, you may submit a fee waiver request with appropriate documentation. For more information on the biometric services fee, please visit the USCIS Web site at *http://www.uscis.gov.*

Mailing Information

Mail your application for TPS to the proper address in Table 3:

TABLE 3—MAILING ADDRESSES

Residence	Filing location
If you live in the state of Florida	US Postal Service: USCIS, PO Box 4464, Chicago, IL 60680–4464. For Express mail and courier deliveries: USCIS, Attn: Haiti TPS, 131 South Dearborn, 3rd Floor, Chicago, IL 60603–5520.
If you live in the state of New York	US Postal Service: USCIS, PO Box 660167, Dallas, TX 75266–0167. For Express mail and courier deliveries: USCIS, Attn: Haiti TPS, 2501 S. State Hwy. 121 Business, Suite 400, Lewisville, TX 75067.
All other	US Postal Service: USCIS, PO Box 24047, Phoenix, AZ 85074–4047. For Express mail and courier deliveries: USCIS, Attn: Haiti TPS, 1820 E. Skyharbor Circle S, Suite 100, Phoenix, AZ 85034.

E-Filing

You cannot E-file your application when applying for initial registration for TPS. Please mail your application to the mailing address listed in Table 3 above.

Supporting Documents

What type of basic supporting documentation must I submit?

To meet the basic eligibility requirements for TPS, you must submit evidence that you:

- Are a national of Haiti or an alien of no nationality who last habitually resided in Haiti (such as a copy of your passport, birth certificate with English translation, etc.);
- Continually resided in the United States since January 12, 2010 (see 8 CFR 244.9(a)(2));
- Have been continually physically present in the United States since January 21, 2010; and
- Two color passport-style photographs of yourself.

The filing instructions on Form I–821, Application for Temporary Protected Status, list all the documents needed to establish basic eligibility for TPS.

Do I need to submit additional supporting documentation?

If one or more of the questions listed in Part 4, Question 2 of the Form I–821 applies to you, then you must submit an explanation on a separate sheet(s) of paper, and/or additional documentation. Depending on the nature of the question(s) you are addressing, additional documentation alone may suffice, but usually a written explanation will also be needed.

Employment Authorization Document (EAD)

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to TPS applicants at USCIS local offices.

What documents may a qualified individual show to his or her employer as proof of employment authorization and identity when completing Form I–9, Employment Eligibility Verification?

TPS beneficiaries under the designation of Haiti who have timely registered with USCIS as directed under this Notice and obtained an EAD, may present their valid EAD to their employers as proof of employment authorization and identity. Employers may not accept EADs that are no longer valid.

Individuals may also present any other legally acceptable document or combination of documents listed on the Form I–9 as proof of identity and employment eligibility.

Note to Employers

Employers are reminded that the laws requiring employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth re-verification requirements. For questions, employers may call the USCIS Customer Assistance Office at 1–800–357–2099. Employers may also call the U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155.

Note to Employees

Employees or applicants may call the OSC Employee Hotline at 1–800–255–7688 for information. Additional information is available on the OSC

Web site at *http://www.justice.gov/crt/osc/index.php.*

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5364–N–01]

Mortgagee Review Board: Administrative Actions

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, Department of Housing and Urban Development (HUD).

ACTION: Notice.

SUMMARY: In compliance with Section 202(c) of the National Housing Act, this notice advises of the cause and description of administrative actions taken by HUD's Mortgagee Review Board against HUD-approved mortgagees.

FOR FURTHER INFORMATION CONTACT: Julie Shaffer, Acting Secretary to the Mortgagee Review Board, 451 Seventh Street, SW., Room 3150, Washington, DC 20410–8000; telephone: (215) 861–7216. A Telecommunications Device for Hearing- and Speech-Impaired Individuals (TTY) is available at (800) 877–8339 (Federal Information Relay Service).

SUPPLEMENTARY INFORMATION: Section 202(c)(5) of the National Housing Act (added by Section 142 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. 101–235, approved December 15, 1989), requires that HUD "publish a description of and the cause for administrative action against a HUD-approved mortgagee" by the Department's Mortgagee Review Board (Board). In compliance with the requirements of Section 202(c)(5), this notice advises of actions that have been taken by the Board from July 10, 2008 to August 4, 2009.

I. Settlement Agreements, Civil Money Penalties, Withdrawal of FHA Approval, Suspensions, Probations, Reinstatement and Reprimand

1. Ascella Mortgage, LLC, Manchester, CT [Docket No. 09–9610–MR]

Action: On August 4, 2009, the Board voted to immediately withdraw Ascella Mortgage LLC's (Ascella) FHA approval for a period of one year.

Cause: The Board took this action based on the following violation of HUD/FHA requirements alleged by HUD: Ascella failed to notify HUD that it voluntarily surrendered its license to originate mortgages.

2. Americare Investment Group, Inc. d/b/a/Premiere Capital Lending, Arlington, TX [Docket No. 08–8082–MR]

Action: On October 8, 2009, the Board entered into a settlement with Americare Investment Group, Inc's., d/b/a Premiere Capital Lending (Americare) requiring, without the admission of fault or liability, the payment of a civil money penalty of $124,000 and placing Americare on probation for a period of six months. During the period of probation, Americare will be required to obtain and provide to HUD post-closing reviews on all construction-to-permanent loans closed during the period.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: (1) Failing to include required loan documents and information and (2) failing to ensure that the maximum mortgage amount was properly calculated, resulting in over-insured mortgages.

3. Beneficial Mortgage Corp., San Juan, PR [Docket No. 09–9626–MR]

Action: On June 3, 2009, the Board immediately suspended Beneficial Mortgage's (Beneficial) FHA approval pending the outcome of a HUD review and any ensuing legal proceedings.

Cause: The Board took this action based on the following violation of HUD/FHA requirements alleged by HUD: Beneficial failed to notify HUD of a business change affecting the information upon which Beneficial was originally approved. Specifically, Beneficial failed to notify HUD that it was the subject of an investigation by the Puerto Rico Financial Institutions Commissioner's Office.

4. Community Home Lending, Inc., Birmingham, AL [Docket No. 09–8041–MR]

Action: On July 1, 2009, the Board entered into a settlement agreement with Community Home Lending, Inc.'s (Community) requiring Community to pay a civil money penalty in the amount of $11,500 without admitting fault or liability.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Community violated third party origination restrictions by allowing non-employees to originate FHA-insured mortgages; allowed an employee to originate FHA-insured mortgages and simultaneously work in the fields of property management and real estate; failed to maintain a quality control (QC) plan conforming to all HUD/FHA requirements, including allowing its reviews to be conducted by a loan officer; and failing to conduct QC reviews in 15 early default cases.

5. Eagle Nationwide Mortgage Company, Chadds Ford, PA [Docket No. 09–9003–MR]

Action: On July 29, 2009, the Board entered into a settlement agreement with Eagle Nationwide Mortgage Company's (Eagle) requiring Eagle to pay a $3,500 civil money penalty without admitting fault or liability.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Eagle distributed a direct mail solicitation which improperly used the name of the Federal Housing Administration, thereby implying FHA endorsement of Eagle's programs. Additionally, the text of the advertisement implied that Eagle employed FHA personnel.

6. Golden First Mortgage Corp., Great Neck, New York [Docket No. 09–9625–MR]

Action: On June 3, 2009, the Board immediately suspended Golden First Mortgage's (Golden First) FHA approval pending the outcome of the Office of Inspector General's investigation and any ensuing legal proceedings.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Golden First failed to notify HUD of a business change affecting the information upon which Golden First was originally approved. Specifically, Golden First Mortgage failed to notify HUD that its president was under investigation by the Office of Thrift Supervision, U.S. Department of Treasury, and was a party to a civil money penalty proceeding.

7. Great Country Mortgage Bankers, Corp., Coral Gables, FL [Docket No. 09–9618–MR]

Action: On June 3, 2009, the Board immediately suspended Great Country Mortgage Bankers Corporation's (Great Country) FHA approval pending the outcome of a HUD review and any ensuing legal proceedings.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Great Country failed to implement a QC plan in compliance with HUD/FHA requirements by failing to conduct QC reviews on loans defaulting within six months of origination; failed to

assure exclusive employment with the company for all staff; failed to disclose business affiliations with the owners/sellers of mortgages properties; and failed to verify borrowers' previous rental histories.

8. Liberty Trust Mortgage Corporation, Towson, MD [Docket No. 09–9820–MR]

Action: On August 4, 2009, the Board immediately withdrew Liberty Trust Mortgage Corporation's (Liberty) FHA approval for a period of one year.

Cause: The Board took this action based on the following violation of HUD/FHA requirements alleged by HUD: Liberty failed to notify HUD of the closure of its only office.

9. Madison Home Equities, Inc., Carle Place, NY [Docket No. 09–9820–MR]

Action: The Board entered into an administrative agreement with Madison Home Equities, Inc. (Madison), and Madison's president. The agreement required Madison and its president to: (1) Accept a permanent withdrawal of Madison's FHA-approval; (2) pay HUD a civil money penalty in the amount of $90,000; (3) indemnify HUD for 12 loans; and (4) post security totaling $600,000 to guarantee payments on the indemnifications. The agreement also required Madison's president to notify HUD within ten days of new employment or change in employment with an FHA-approved mortgagee, a business entity associated with the origination, processing, and/or servicing of Federally-related and/or government-insured mortgage loans, or any entity providing consulting services relating to Federally-related and/or government-insured mortgage loan origination, processing, and/or servicing. Furthermore, Madison's president agreed to notify, in writing, any current or future employer that originates, processes, and/or services Federally-related or government-insured mortgage loans that she has entered into a Consent Decree with the United States in connection with activities relating to Federally-related or government-insured loans.

Cause: The Board took this action based on violations of HUD/FHA requirements which were identified and alleged by the United States Attorney's Office for the Eastern Division of New York.

10. Mortgage America Bankers, LLC, Kensington, MD [Docket No. 08–8072–MR]

Action: On September 18, 2009, the Board entered into a settlement agreement with Mortgage America Bankers' (Mortgage America) requiring the payment of a civil money penalty of $10,000 without admitting fault or liability.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Mortgage America failed to implement and maintain an acceptable QC plan and was unable to provide QC reports for loans that closed in the years 2006 and 2007, indicating a failure to conduct QC reviews.

11. Mortgage Depot, Inc., Las Vegas, NV [Docket No. 09–9796–MR]

Action: On August 4, 2009, the Board immediately withdrew Mortgage Depot, Inc.'s, (Mortgage Depot) FHA approval for a period of one year.

Cause: The Board took this action based on the following violation of HUD/FHA requirements alleged by HUD: Mortgage Depot failed to notify HUD of its receipt of a sanction notice by the State of Nevada, Division of Mortgage Lending, which proposed a fine and revocation of Mortgage Depot's mortgage broker license.

12. Taylor, Bean and Whitaker Mortgage Corporation, Ocala, FL [Docket No. 09–9607–MR]

Action: On August 4, 2009, the Board immediately suspended Taylor, Bean and Whitaker Mortgage Corporation's (Taylor, Bean and Whitaker) FHA approval to originate and underwrite FHA loans pending completion of an investigation by the HUD Office of Inspector General and completion of a review by HUD's Office of Housing and any ensuing legal proceedings.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Taylor, Bean and Whitaker failed to timely file an annual audit report and audited financial statements; submitted false certification and/or misleading information to Ginnie Mae; failed to report irregularities in connection with its FY 2008 audit by Deloitte & Touche; failed to report irregularities in connection with its loan origination practices; failed to comply with HUD/FHA's approval requirements; and submitted false certification on its yearly verification report to HUD.

13. Transland Financial Services, Inc., Maitland, FL [Docket No. 08–8066–MR]

Action: On September 25, 2008, the Board immediately and permanently withdrew Transland Financial Services Inc.'s (Transland) FHA approval.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: Transland failed to honor the terms of indemnification agreements it had signed with the Department on February 18, 2003, and February 10, 2005. As of July 27, 2008, Transland is indebted to HUD for $278,901. Transland failed to respond to an April 8, 2008, inquiry from HUD's Financial Operations Center in Albany, NY regarding this debt.

14. Universal Bancorp, Ltd., Downers Grove, IL [Docket No. 09–9553–MR]

Action: The Board immediately withdrew Universal Bancorp, Ltd.'s (Universal), FHA approval for a period of one year.

Cause: The Board took this action based on the following violation of HUD/FHA requirements alleged by HUD: Universal failed to notify HUD that it had closed its only FHA-approved branch office.

15. World Alliance Financial Corporation (formerly Vertical Lend, Inc.), Melville, NY [Docket No. 07–7036–MR]

Action: On April 3, 2009, the Board entered into a settlement agreement with World Alliance Financial Corporation's (World Alliance) requiring the payment, without admitting fault or liability, of a civil money penalty in the amount of $13,000.

Cause: The Board took this action based on the following violations of HUD/FHA requirements alleged by HUD: World Alliance failed to implement and maintain a QC plan containing all required elements for the period April 2004 through September 2006. World Alliance also failed to include any FHA insured mortgages in its QC review sample for the period June 2006 to September 2006, despite World Alliance's origination of 320 FHA-insured mortgages during that time period.

II. Lenders That Failed To Meet Requirements for Annual Recertification of HUD/FHA Approval

Action: The Board voted to immediately withdrew the FHA approval of each of the lenders listed below for a period of one year.

Cause: The Board took this action based upon allegations that the lenders were not in compliance with the Department's annual recertification requirements.

1. 1st Point Lending LLC, Milwaukee, WI [Docket No. 09–9628–MR]

2. Aadus Banc Corp., Palatine, IL [Docket No. 09–9630–MR]

3. AccessAmerica Mortgage LLC, Duluth, GA [Docket No. 09–9631–MR]

4. Advantage Home Finance, Pacifica, CA [Docket No. 09–9632–MR]
5. Advent Mortgage LLC, Cranford, NJ [Docket No. 09–9636–MR]
6. Affordable Mortgage Company, Waterford, CT [Docket No. 09–9637–MR]
7. Aggressive Mortgage Corp., Richmond, VA [Docket No. 09–9639–MR]
8. Alaska State Mortgage Inc., Anchorage, AK [Docket No. 09–9640–MR]
9. American Home Mortgage Corp., Melville, NY [Docket No. 09–9642–MR]
10. American Mortgage Lending Services, Inc., Chicago, IL [Docket No. 09–9644–MR]
11. American Residential Mortgage LP, Saint Paul, MN [Docket No. 09–9645–MR]
12. Arrow Service Corp., Inc., Morrison, CO [Docket No. 09–9647–MR]
13. Aurora Financial Services, Inc., New Orleans, LA [Docket No. 09–9648–MR]
14. Bayside Financial Group, Inc., Annapolis, MD [Docket No. 09–9650–MR]
15. BBCP Holdings, Ltd., North Palm Beach, FL [Docket No. 09–9651–MR]
16. BH Mortgage Partners LLC, Suwanee, GA [Docket No. 09–9652–MR]
17. Citizens Trust Financial Group, Inc., Cockeysville, MD [Docket No. 09–9661–MR]
18. Continental Financial Group, Inc., Houma, LA [Docket No. 09–9018–MR]
19. Cosmopolitan Mortgage, Inc., Orange, NJ [Docket No. 09–9665–MR]
20. Cresland Mortgage Company LLC, Plymouth, MN [Docket No. 09–9667–MR]
21. Dove Capital Corporation, Corona, CA [Docket No. 09–9674–MR]
22. Eclipse Mortgage, LLC, Lombard, IL [Docket No. 09–9676–MR]
23. Equity Financial, Inc., East Brunswick, NJ [Docket No. 09–9679–MR]
24. Executive World Corp., d/b/a Executive Mortgage, Montebello, CA [Docket No. 09–9135–MR]
25. Evolution Funding Inc., Wellington, FL [Docket No. 09–9680–MR]
26. Fallon County Federal Credit Union, Baker, MT [Docket No. 09–9681–MR]
27. Financial Capital, Inc., Redding, CA [Docket No. 09–9682–MR]
28. First Capital Group, LP, Irvine, CA [Docket No. 09–9683–MR]
29. First Fidelity Mortgage, Inc., Cranford, NJ [Docket No. 09–9684–MR]
30. First Independent Mortgage LLC, Burlington, MA [Docket No. 09–9685–MR]
31. First Magnus Financial Corp., Tucson, AZ [Docket No. 09–9686–MR]
32. First National Bank and Trust, Beatrice, NE [Docket No. 09–9687–MR]
33. Genesis Mortgage Services, Inc., Lutz, FL [Docket No. 09–9691–MR]
34. Godwin Mortgage Group, Inc., Louisville, KY [Docket No. 09–9692–MR]
35. Great American Mortgage Services Corp., Hamilton Square, NJ [Docket No. 09–9695–MR]
36. Greenbrier Mortgage LLC, Charlotte, NC [Docket No. 09–9697–MR]
37. Home Source Lending Group LLC, Alpharetta, GA [Docket No. 09–9698–MR]
38. Homebuyers Funding LLC, Orlando, FL [Docket No. 09–9700–MR]
39. Hunter Partners, Inc., Bakersfield, CA [Docket No. 09–9701–MR]
40. Investors Mortgage Lending, Orlando, FL [Docket No. 09–9703–MR]
41. Lebanon Valley Farmers Bank, Lebanon, PA [Docket No. 09–9136–MR]
42. Lendia LLC, Marlborough, MA [Docket No. 09–9706–MR]
43. Main Street Bank and Trust, Champaign, IL [Docket No. 09–9707–MR]
44. Mid America Bank FSB, Downers Grove, IL [Docket No. 09–9711–MR]
45. Midtowne Mortgage, Inc., Midvale, UT [Docket No. 09–9712–MR]
46. Midwest Residential Lending LLC, Tipp City, OH [Docket No. 09–9713–MR]
47. Millennium Capital Mortgage Co., Longwood, FL [Docket No. 09–9714–MR]
48. Moneyfirst Financial, Inc., Dallas, TX [Docket No. 09–9715–MR]
49. NCW Community Bank, Wenatchee, WA [Docket No. 09–9717–MR]
50. Nuestra Casa Mortgage, Inc., Santa Ana, CA [Docket No. 09–9718–MR]
51. Phelan Financial Services, Inc., Phelan, CA [Docket No. 09–9721–MR]
52. Premier Mortgage Funding, Inc., Clearwater, FL [Docket No. 09–9723–MR]
53. Premier Mortgage Group, Inc., Lexington, KY [Docket No. 09–9582–MR]
54. Prestige Capital Funding, Inc., Littleton, CO [Docket No. 09–9724–MR]
55. Prime Financial Corporation, Berwyn, IL [Docket No. 09–9725–MR]
56. Professional Mtg Serv of Central Florida, Inc., Orlando, FL [Docket No. 09–9728–MR]
57. TCSB Mortgage Company, Traverse City, MI [Docket No. 09–9739–MR]
58. The First National Bank & Trust, Beatrice, NE [Docket No. 09–9740–MR]
59. The Mortgage House, Inc., Hialeah, FL [Docket No. 09–9741–MR]
60. Traders National Bank-Tullahoma, Tullahoma, TN [Docket No. 09–9742–MR]
61. Trinity Wealth Mortgage Corp., Lincoln, CA [Docket No. 09–9744–MR]
62. Truepointe Mortgage, Layton, UT [Docket No. 09–9745–MR]
63. UMS LLC, Paramus, NJ [Docket No. 09–9746–MR]
64. Velocity Lending LLC, Clark, NJ [Docket No. 09–9751–MR]
65. Wes Holding Corporation, Charlotte, NC [Docket No. 09–9256–MR]
66. West Michigan Finance, Inc., Portage, MI [Docket No. 09–9752–MR]
67. Wow Financial LLC, Conshohocken, PA [Docket No. 09–9754–MR]

III. Lenders That Failed To Timely Meet Requirements for Annual Recertification of HUD/FHA Approval

Action: The Board entered into settlement agreements with the lenders listed below, which required each lender to pay a $3,500 civil money penalty, without admitting fault or liability.

Cause: The Board took this action based upon allegations that the lenders listed below failed to comply with the Department's annual recertification requirements in a timely manner.

1. 1st Choice Mortgage, Inc., Shelby Township, MI [Docket No. 09–9376–MR]
2. 1st Elite Home Loans LLC, Mount Laurel, NJ [Docket No. 09–9382–MR]
3. Access Financial Group, Inc., McDonough, GA [Docket No. 09–9378–MR]
4. Ace Mortgage LLC, Mandeville, LA [Docket No. 09–9763–MR]
5. All American Home Mortgages LLC, Henderson, NV [Docket No. 09–9764–MR]
6. American Capital Mortgage Corp., Portland, OR [Docket No. 09–9765–MR]
7. America Funding, Inc., McLean, VA [Docket No. 09–9502–MR]
8. American Pioneer Mortgage Serv., Boynton Beach, FL [Docket No. 09–9505–MR]
9. Bank of Tennessee, Kingsport, TN [Docket No. 09–9768–MR]
10. Blue Chicago Financial Corp. Chicago, IL [Docket No. 09–9514–MR]
11. Citigroup Global Markets Realty Corp., New York, NY [Docket No. 09–9306–MR]
12. Community One Mortgage LLC, Colorado Springs, Co [Docket No. 09–9385–MR]
13. Drexel Mortgage Corp., South Richmond Hill, NY [Docket No. 09–9364–MR]
14. Five Star Mortgage Services, Inc., Jacksonville, FL [Docket No. 09–9400–MR]
15. Flatbush Federal Savings Ala, Brooklyn, NY [Docket No. 09–9772–MR]
16. Genesis Home Mortgage Corporation, Hauppauge, NY [Docket No. 09–9412–MR]
17. Griffith & Blair American Home Mtg LLC, a/k/a Legacy Lenders Group, [Docket No. 09–9356–MR]
18. Hartford Financial Group, Dublin, OH [Docket No. 09–9392–MR]
19. Home Source Mortgage, Inc., Tustin, CA [Docket No. 09–9506–MR]
20. Hutchinson Government ECU, Hutchinson, KS [Docket No. 09–9237–MR]
21. Intercontinental Capital Group, Inc., New York, NY [Docket No. 09–9388–MR]
22. Liberty Mortgage Funding, Inc., Shelby Township, MI [Docket No. 09–9333–MR]
23. Magnolia Mortgage Company LLC, Mobile, AL [Docket No. 09–9417–MR]
24. Milford Bank, Milford, CT [Docket No. 09–9775–MR]
25. Minnwest Bank Montevideo, Montevideo, MN [Docket No. 09–9776–MR]
26. Minnwest Bank MV, Redwood Falls, MN [Docket No. 09–9120–MR]
27. Mutual Security Credit Union, Wilton, CT [Docket No. 09–9249–MR]
28. Now Mortgage Services, Inc., Kennewick, WA [Docket No. 09–9346–MR]
29. Numerica Mortgage LLC, Virginia Beach, VA [Docket No. 09–9510–MR]
30. Paladin Financial Services Corporation, Longwood, FL [Docket No. 09–9516–MR]
31. PHH Preferred Mortgage, Conshohocken, PA [Docket No. 09–9381–MR]
32. Pilot Bank, Tampa, FL [Docket No. 09–9777–MR]
33. Priority Mortgage Corp. of Wichita, Wichita, KS [Docket No. 09–6504–MR]
34. Pro Buy Equities Corp., Los Angeles, CA [Docket No. 09–9778–MR]
35. Remington Mortgage, Ltd., Plano, TX [Docket No. 09–9469–MR]
36. Republic Mortgage Financial Serv. Corp., Fenton, MI [Docket No. 09–9425–MR]
37. The First National Bank & Trust Co., Iron Mountain, MI [Docket No. 09–9783–MR]
38. Trinity Financial, Inc., Verona, PA [Docket No. 09–9507–MR]

39. Utah Mortgage Loan Corp., Midvale, UT [Docket No. 09–9472–MR]
40. Williamette Valley Bank, Salem, OR [Docket No. 09–9784–MR]
41. Zuniga Enterprises, Inc., Santa Ana, CA [Docket No. 09–09–9391–MR]

IV. Lenders That Failed To Meet Annual FHA Approval Requirements and Later Cured the Violations

Action: The Board entered into settlement agreements with each lender listed below, which required the lenders to pay, without admitting fault or liability, a $1,000 administrative fee and cure the violations within 30 days

Cause: The Board took this action based upon allegations that each of the lenders failed to timely meet the annual recertification requirements.

1. 1st Alliance Banc Corporation, Chicago, IL [Docket No. 09–9044–MR]
2. Aarow Mortgage Services, Inc., Laurel, MD [Docket No. 09–9053–MR]
3. Accunet Mortgagecom LLC, Butler, WI [Docket No. 09–9309–MR]
4. Albina Community Bank, Portland, OR [Docket No. 09–9231–MR]
5. Allied Credit Union, Houston, TX [Docket No. 9178–MR]
6. Amber Financial Group, LLC, San Diego, CA [Docket No. 09–9176–MR]
7. American Momentum Bank, Tampa, FL [Docket No. 09–9122–MR]
8. American Mortgage Services, Melrose, MA [Docket No. 09–9021–MR]
9. Amerilending and Associates Corp., Miami, FL [Docket No. 09–9005–MR]
10. Amston Mortgage Company, Inc., Moodus, CT [Docket No. 09–9288–MR]
11. Amwest Capital Mortgage, Inc., Escondido, CA [Docket No. 08–8060–MR]
12. Bank of Tucson, Tucson, AZ [Docket No. 09–9295–MR]
13. Beacon Financial Group, Inc., Melbourne, FL [Docket No. 09–9282–MR]
14. Best Mortgage Services LLC, Detroit, MI [Docket No. 09–9521–MR]
15. Blue Eagle Corporation, Elgin, IL [Docket No. 09–9201]
16. Bogman, Inc., Silver Spring, MD [Docket No. 09–9095–MR]
17. C&A Financial Enterprises, Inc., Macon, GA [Docket No. 09–9347–MR]
18. Capital Access Mortgage, Denver, CO [Docket No. 09–9351–MR]
19. Carrollton Mortgage Co., Modesto, CA [Docket No. 09–9523–MR]
20. Centerline Capital Group, Inc. New York, NY [Docket No. 09–9160–MR]
21. Central Kentucky Federal Savings Bank, Danville, KY [Docket No. 09–9299–MR]
22. CFCU Community Credit Union, Ithaca, NY [Docket No. 09–9130–MR]
23. Chicagoland Mortgage Exchange, Inc., Chicago, IL [Docket No. 09–9139–MR]
24. Citizens National Bank, Meridian, MS [Docket No. 09–9243–MR]
25. Clayton Peters & Associates, Inc., Baltimore, MD [Docket No. 09–9013–MR]
26. CMS Mortgage Solutions, Inc., Chesapeake, VA [Docket No. 09–9526–MR]
27. Colonial Mortgage Service Company, Montgomeryville, PA [Docket No. 09–9208–MR]
28. Connecticut Housing Inv. Fund, Inc., Hartford, CT [Docket No. 08–8046–MR]
29. Crestwood Mortgage Company, Bensalem, PA [Docket No. 09–9371–MR]
30. DLF Enterprises, Inc., West Bend, WI [Docket No. 09–9529–MR]
31. Drew Mortgage Associates, Inc., Shrewsbury, MA [Docket No. 09–9247–MR]
32. E and S Financial Group, Inc., Farmington Hills, MI [Docket No. 09–9312–MR]
33. Exigent Mortgage Corporation, Palm Harbor, FL [Docket No. 09–9134–MR]
34. Farmers State Bank, Watkins, MN [Docket No. 09–9081–MR]
35. Fidelity Mortgage Group, West Memphis, AR [Docket No. 09–9099–MR]
36. Financial Security Bank, Kerkhoven, MN [Docket No. 09–9116–MR]
37. First Financial Bank, Stephenville, TX [Docket No. 09–9111–MR]
38. First Home Equity, Inc., Mauldin, SC [Docket No. 09–9533–MR]
39. First Sentinel Bank, Richlands, VA [Docket No. 09–9106–MR]
40. Frontier Bank, Rock Rapids, IA [Docket No. 09–9181–MR]
41. Fullerton National Bank, Fullerton, NE [Docket No. 09–9167–MR]
42. Gateway Bank Mortgage, Inc., Raleigh, NC [Docket No. 09–9109–MR]
43. Griffith & Blair American Home Mortgage, [Docket No. 09–9356–MR],
44. Home Mortgage Bankers, Carolina, PR [Docket No. 09–9206]
45. Homeownership Solutions, LLC, West Hartford, CT [Docket No. 09–9150–MR]
46. InterNational Bank, McAllen, TX [Docket No. 09–9109–MR]
47. Inventive Mortgage Corp., Westchester, IL [Docket No. 09–9210–MR]
48. Keystone Community Bank, Kalmazoo, MI [Docket No. 09–9186–MR]
49. Lapeer County Bank & Trust Co., Lapeer, MI [Docket No. 09–9066–MR]
50. Leiman Mortgage Network, Lakewood, NJ [Docket No. 09–9079–MR]
51. Live Well Financial, Inc., Richmond, VA [Docket No. 09–9352–MR]
52. Mainstream Finance, Bangor, ME [Docket No. 08–8064–MR]
53. Marine Funding, Inc., South Richmond Hill, NY [Docket No. 09–9352–MR]
54. Massachusetts Housing Investment Corp., Boston, MA [Docket No. 09–9073–MR]
55. Midwest Custom Mortgage, Inc., Elgin, IL [Docket No. 09–9270–MR]
56. Money Connection, Inc., Fairlawn, OH [Docket No. 09–9273–MR]
57. Mortgage Options of America, Inc., Winchester, MA [Docket No. 09–9102–MR]
58. Mortgage Security, Inc., East Falmouth, MA [Docket No. 09–9289–MR]
59. Mortgage Services of Louisiana, Inc., Harahan, LA [Docket No. 09–9274–MR]
60. Mountainside Mortgage LLC, Salt Lake City, UT [Docket No. 09–9188–MR]
61. MSI Mortgage Services III, LLC, Bloomington, IL [Docket No. 09–9330–MR]
62. NetCentral Mortgage, LLC, Milwaukee, WI [Docket No. 09–9254–MR]
63. North Atlantic Mortgage Corp., Silver Spring, MD [Docket No. 09–9156–MR]
64. Northern Corridor Community Federal Credit Union, Rouses Point, NY [Docket No. 09–9223–MR]
65. Odin State Bank, Odin, MN [Docket No. 09–9300–MR]
66. Old J Corporation, Riverside, CA [Docket No. 08–8055–MR]
67. Oriental Bank and Trust, San Juan, PR [Docket No. 09–9538–MR]
68. Pacific Community Credit Union, Fullerton, CA [Docket No. 09–9539–MR]
69. Palace Home Mortgage Corporation, Olympia Fields, IL [Docket No. 09–9301–MR]
70. Peoples Federal Savings Bank, Auburn, IN [Docket No. 09–9144–MR]
71. Performance Residential Capital Corp., Farmingdale, NY [Docket No. 09–9540–MR]
72. Pinnacle Bank Wyoming, Cody, WY [Docket No. 9214–MR]
73. Premier Financial Funding, Inc., Fulton, MD [Docket No. 09–9355–MR]
74. Premium Mortgage Corp., Rochester, NY [Docket No. 09–9315–MR]
75. Pro-Buy Equities Corporation, Los Angeles, CA [Docket No. 09–9193–MR]
76. Proficio Mortgage Ventures LLC, Jacksonville, FL [Docket No. 09–9105–MR]
77. Rapid City Telco Federal Credit Union, Rapid City, SD [Docket No. 09–9216–MR]
78. RF Mortgage and Investment Corp., San Juan, PR [Docket No. 09–9108–MR]
79. RMK Financial Corporation, Rancho Cucamonga, CA [Docket No. 09–9209–MR]
80. Rockland Savings Bank, FSB, Rockland, ME [Docket No. 09–9245–MR]
81. Ryland Mortgage, Calabasa, CA [Docket No. 09–9033–MR]
82. Shell Lake State Bank, Shell Lake, WI [Docket No. 09–9257–MR]
83. Shore Community Bank, Toms River, NJ [Docket No. 09–9174–MR]
84. Skyline Mortgage, LLC, a/k/a Alpha Mortgage Associates, Inc., [Docket No. 09–9195–MR]
85. Society Financial Corp., Farmington, CT [Docket No. 09–9324–MR]
86. South DeKalb Church Federal Credit Union, Decatur, GA [Docket No. 09–9265–MR]
87. Southern Missouri Bank of Marshfield, Marshfield, MO [Docket No. 09–9286–MR]
88. Sunrise Vista Mortgage Corp., Citrus Heights, CA [Docket No. 09–9541–MR]
89. TBI Mortgage Company, Horsham, PA [Docket No. 09–9542–MR]
90. Texoma Community Credit Union, Wichita Falls, TX [Docket No. 09–9032–MR]
91. Total Mortgage Services LLC, Milford, CT [Docket No. 09–9345–MR]
92. Traco Financial Corporation, Salibury, MD [Docket No. 09–9544–MR]
93. Troy Mortgage Corporation, Inc., Greenwood Village, Co [Docket No. 09–9275–MR]
94. Union Bank Benton, Benton, AZ [Docket No. 09–9222–MR]
95. Urban Trust Bank, Lake Mary, FL [Docket No. 09–9251–MR]
96. US Mortgage Network, Sewickley, PA [Docket No. 09–9335–MR]
97. Village Oaks Financial Group, Bullhead City, AZ [Docket No. 08–8057–MR]
98. Wachovia Equity Servicing LLC (Title II), Charlotte, NC [Docket No. 09–9255–MR]
99. Westerly Community Credit Union, Westerly, RI [Docket No. 09–9119–MR]

100. Westfield Bank FSB, Medina, OH [Docket No. 09–9207–MR]
101. Westsound Bank, Bremerton, WA [Docket No. 09–9281–MR]
102. Wholesale Capital Corp., Moreno Valley, CA [Docket No. 08–8038–MR]
103. Willamette Valley Bank, Salem, OR [Docket No. 09–9067–MR]
104. Yankee Mortgage Company LLC, Glastonbury, CT [Docket No. 09–9072–MR]

Dated: December 18, 2009.

David H. Stevens,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 2010–1091 Filed 1–20–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-LE-2010-N008] [99011-1220-0000-9B]

Proposed Information Collection; OMB Control Number 1018-0129; Captive Wildlife Safety Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on June 30, 2010. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by March 22, 2010.

ADDRESSES: Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey by mail or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Captive Wildlife Safety Act (CWSA) amends the Lacey Act by making it illegal to import, export, buy, sell, transport, receive, or acquire, in interstate or foreign commerce, live lions, tigers, leopards, snow leopards, clouded leopards, cheetahs, jaguars, or cougars, or any hybrid combination of any of these species, unless certain exceptions are met. There are several exceptions to the prohibitions of the CWSA, including accredited wildlife sanctuaries.

There is no requirement for wildlife sanctuaries to submit applications to qualify for the accredited wildlife sanctuary exemption. Wildlife sanctuaries themselves will determine if they qualify. To qualify, they must meet all of the following criteria:

- Approval by the United States Internal Revenue Service (IRS) as a corporation that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1986, which is described in sections 501(c)(3) and 170(b)(1)(A)(vi) of that code.
- Do not engage in commercial trade in the prohibited wildlife species including offspring, parts, and products.
- Do not propagate the prohibited wildlife species.
- Have no direct contact between the public and the prohibited wildlife species.

The basis for this information collection is the recordkeeping requirement that we place on accredited wildlife sanctuaries. We require accredited wildlife sanctuaries to maintain complete and accurate records of any possession, transportation, acquisition, disposition, importation, or exportation of the prohibited wildlife species as defined in the CWSA (50 CFR 14, subpart K). Records must be up to date and include: (1) the names and addresses of persons to or from whom any prohibited wildlife species has been acquired, imported, exported, purchased, sold, or otherwise transferred; and (2) the dates of these transactions. Accredited wildlife sanctuaries must:

- Maintain these records for 5 years.
- Make these records accessible to Service officials for inspection at reasonable hours.
- Copy these records for Service officials, if requested.

II. Data

OMB Control Number: 1018-0129.

Title: Captive Wildlife Safety Act, 50 CFR 14.250 - 14.255.

Service Form Number(s): None.

Type of Request: Extension of currently approved collection.

Affected Public: Accredited wildlife sanctuaries.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Ongoing.

Estimated Annual Number of Respondents: 750.

Estimated Total Annual Responses: 750.

Estimated Time Per Response: 1 hour

Estimated Total Annual Burden Hours: 750.

III. Request for Comments

We invite comments concerning this IC on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: January 14, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

FR Doc. 2010–1076 Filed 1–20–10; 8:45 am

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Availability of the Draft Site Progress Report to the World Heritage Committee, Yellowstone National Park

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability of the Draft Site Progress Report to the World Heritage Committee, Yellowstone National Park.

SUMMARY: Pursuant to the Decisions adopted by the 27th and 32nd Sessions of the World Heritage Committee (Documents WHC–03/72.COM/7A.12, WHC 32.COM.7B.39) accepted by the

United States Government, the National Park Service (NPS) announces the publication for comment of a Draft Site Progress Report to the World Heritage Committee for Yellowstone National Park, Wyoming, Idaho, and Montana.

DATES: There will be a 30-day public review period for comments on this document. Comments must be received on or before February 22, 2010.

ADDRESSES: The Draft Site Report is posted on the park's Web site at: *http://www.nps.gov/yell/planyourvisit/world-heritage-committee-report.htm.* Copies are also available by writing to Suzanne Lewis, Superintendent, Yellowstone National Park, P.O. Box 168, Yellowstone National Park, WY 82190–0168; by telephoning 307–344–2002; by sending an e-mail message to *yell_world_heritage@nps.gov;* or by picking up a copy in person at the park's headquarters in Mammoth Hot Springs, Wyoming 82190.

FOR FURTHER INFORMATION CONTACT: Suzanne Lewis, Superintendent, Yellowstone National Park, P.O. Box 168, Yellowstone National Park, WY 82190–0168, or by calling 307–344–2002.

SUPPLEMENTARY INFORMATION: The draft report summarizes the status of several issues, including threats to bison, threats to cutthroat trout, water quality, and visitor use impacts, which raised the concerns of the World Heritage Committee in 1995 and led to the park's inclusion on the List of World Heritage in Danger that year. The World Heritage Committee removed Yellowstone National Park from the In Danger List in 2003, and at that time requested that the United States submit a report to the Committee on the status of these issues every two years.

Persons wishing to comment may do so by any one of several methods. They may mail comments to Suzanne Lewis, Superintendent, Yellowstone National Park, P.O. Box 168, Yellowstone National Park, WY 82190–0168. They also may comment via e-mail to *yell_world_heritage@nps.gov* (include name and return address in the e-mail message). Finally, they may hand-deliver comments to park headquarters in Mammoth Hot Springs, Wyoming 82190. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public view, we cannot guarantee that we will be able to do so. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Mickey Fearn,

Deputy Director, Communications and Community Assistance.

[FR Doc. 2010–1095 Filed 1–20–10; 8:45 am]

BILLING CODE 4312–CT–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2009–N229; 40136–1265–0000–S3]

Carolina Sandhills National Wildlife Refuge, Chesterfield and Marlboro Counties, SC

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: draft comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a draft comprehensive conservation plan and environmental assessment (Draft CCP/EA) for Carolina Sandhills National Wildlife Refuge (NWR) for public review and comment. In this Draft CCP/EA, we describe the alternative we propose to use to manage this refuge for the 15 years following approval of the final CCP.

DATES: To ensure consideration, we must receive your written comments by February 22, 2010.

ADDRESSES: Send comments, questions, and requests for information to: Ms. Allyne Askins, Refuge Manager, Carolina Sandhills NWR, 23734 U.S. Highway 1, McBee, SC 29101, or to the following e-mail address: *allyne_askins@fws.gov.* The Draft CCP/EA is available on compact disk or in hard copy. The Draft CCP/EA may also be accessed and downloaded from the Service's Internet Site: *http://southeast.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: Ms. Allyne Askins; telephone: 843/335–6023; fax: 843/335–8406.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we continue the CCP process for Carolina Sandhills NWR. We started the process through a notice in the **Federal Register** on August 22, 2007 (72 FR 47062).

Carolina Sandhills NWR is in rural northeast South Carolina. The refuge is comprised of 47,850 acres, including fee ownership of 45,348 acres, and 9 conservation easements totaling 2,502 acres. The majority of the refuge lies in Chesterfield County, with one fee title tract totaling 210 acres in Marlboro County. The refuge is managed to restore the longleaf pine/wiregrass ecosystem for the benefit of the red-cockaded woodpecker (RCW) and other endangered species, provide habitat for migratory and upland game birds, provide opportunities for environmental education and interpretation and wildlife-dependent recreational opportunities, and demonstrate sound land management practices that enhance natural resource conservation. The refuge's primary wildlife-dependent recreational use is hunting, although wildlife observation, hiking, and fishing are also popular.

The refuge contains 30 small man-made impoundments, 1,200 acres of fields and forest openings, and more than 42,000 acres of forested woodland—habitats which contribute to the refuge's diversity of flora and fauna. Management of the refuge's unique blend of pinelands, pocosin bottoms, freshwater ponds and lakes, fields, and wildlife openings provide habitat for nearly 200 species of birds, 42 species of mammals, 41 species of reptiles, 25 species of amphibians, and more than 750 species of plants. The largest population of RCWs within the National Wildlife Refuge System is found on the refuge. Also, rare plants, including several species of carnivorous pitcher plants and the unusual Pine Barrens tree frog are found in the refuge.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year strategy for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing,

wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

CCP Alternatives, Including Our Proposed Alternative

We developed three alternatives for managing the refuge and chose Alternative C as the proposed alternative. A full description of each alternative is in the Draft CCP/EA. We summarize each alternative below.

Alternative A—Current Management (No Action)

Alternative A would continue existing levels of management activities on the refuge. We would maintain RCW monitoring and recovery. We would maintain and improve habitat required for RCWs by conducting even-aged silviculture and transitioning to uneven-aged management. We would use prescribed fire during the early growing season and mechanical and chemical treatments to confine turkey oaks to understory stratum.

We would monitor eagles, waterfowl, neotropical migratory birds, game species, and other wildlife. We would maintain the wood duck nest box program. We would manage the annual drawdown of ponds to encourage growth of desirable vegetation and restoration of wetland communities. There would be no actions focused specifically on marsh and water birds, raptors, or Pine Barrens tree frogs. We would manage for the restoration of native plants and manage non-native species on an "as needed" basis.

Visitors would be welcomed and oriented with existing visitor center displays, kiosks, and brochure racks. The existing hunting and fishing programs would continue. The hunting program would include deer, quail, rabbit, raccoon, and turkey. Fishing would be permitted in most ponds and some would be occasionally stocked. Wildlife observation and photography would be supported with existing facilities. We would provide quality environmental education and interpretation programs as requested and as time would permit.

We would maintain refuge boundaries, consider acquisition of inholdings from willing sellers, and protect archaeological and historical resources on the refuge. We would work with private landowners near the refuge to promote refuge goals and objectives. We would maintain facilities and equipment and manage operations with existing staff.

Alternative B—Maximize Native Wildlife and Habitat Diversity

Alternative B includes many of the actions under Alternative A, with additional focus on managing native wildlife and habitat diversity, and maintaining the existing visitor services program. We would enhance RCW habitat by accelerating the transition to uneven-aged forest management to improve forest structure and composition, increasing growing season burning, and considering use of fall burning for hazardous fuel reduction and seed bed preparation.

We would enhance management of the floristic communities on the refuge, including seepage bogs, Atlantic white cedar and cane bottoms, and old field species at Oxpen Farm. We would develop and implement habitat management surveys to identify species' responses to treatments in longleaf pine and pocosin habitat sites.

We would enhance management of the impoundments and wetlands, implement moist-soil management, restore natural stream drainage at selected sites, and establish and expand rare and sensitive plant communities. We would conduct a baseline population survey of Pine Barrens tree frogs in seeps, monitor populations of concern to discern population trends and effects of habitat management, coordinate with the South Carolina Department of Natural Resources (SCDNR) to conduct surveys and assess effects of habitat management, and participate in amphibian and reptile conservation initiatives.

We would manage grasslands for birds of conservation concern, conduct baseline population surveys of grassland birds, and survey to assess effects of habitat management. We would restore longleaf pine/wiregrass and native grasslands, establish native warm season grass demonstration areas, and eradicate non-native plants (*e.g.,* fescue, love grass, lespedeza, and bamboo). We would also establish a native seed nursery/orchard for native warm season grasses and native groundcover and engage in native plant botanical research.

Visitor services activities, except for hunting and fishing, would be the same as under Alternative A. We would eliminate fisheries enhancement and reduce hunting days by 30 percent. This reduction would be necessary to implement the proposed biological and habitat initiatives.

We would target land acquisitions to those that would maximize opportunities for management of trust species and connectivity of gaps and corridors to protect important habitats. We would increase easement inspections and develop management plans for each easement to meet wildlife diversity goals. We would increase our efforts to protect archaeological and historical resources on the refuge.

We would increase cooperation with State and Federal agencies to institute a structured monitoring program, determine sources, and investigate means to reduce impacts from any contaminants. We would add additional wells and monitoring stations to key locations throughout the refuge in an effort to determine effects of water withdrawals on refuge resources. We would expand monitoring to include a water quality study.

We would minimize heavy equipment use to prevent soil disturbance and discontinue use of roller choppers. We would increase staffing in wildlife and habitat management programs; however, staffing in visitor services would be the same as under Alternative A.

Alternative C—Proposed Alternative

Alternative C would optimize refuge operations by balancing habitat and wildlife population management with enhanced visitor services. This alternative would include implementation of a majority of actions under Alternative B, while improving visitor experiences and providing educational and recreational opportunities for the surrounding communities.

We would enhance RCW habitat by improving forest structure and composition, by increasing growing season burning, and by using fall burning for hazardous fuel reduction and seed bed preparation. We would use all available tools to control midstory growth.

RCW monitoring would be reduced to a core population in line with management practices of other large RCW populations. The refuge would participate on the Southern Range Translocation Team and would provide juvenile RCWs as donors to populations in Georgia, South Carolina, and North Carolina. As under Alternative B, we would increase partnership activities with SCDNR, Cheraw State Park, and Sand Hills State Forest to manage area RCWs as one recovery unit. We would upgrade our mapping systems to GIS and integrate spatial components of programs and plans into GIS.

We would enhance management of the unique floristic communities on the refuge and develop and implement habitat management surveys to identify response to treatments in longleaf pine and pocosin habitat sites.

We would continue wildlife and habitat management activities as under Alternative A, while establishing and expanding rare and sensitive plant community surveys and management of seepage slopes. As under Alternative B, we would conduct a baseline population survey of Pine Barrens tree frogs. We would monitor populations of concern to discern population trends and effects of habitat management, coordinate with SCDNR to conduct surveys and assess effects of habitat management, and participate in amphibian and reptile conservation initiatives.

We would survey and manage for birds of conservation concern, assessing effects of habitat management. We would restore longleaf pine/wiregrass and native grasslands, establish native warm season grass demonstration areas, and eradicate non-native plants. We would also establish a native seed nursery/orchard for native warm season grasses and native groundcover and engage in native plant botanical research. We would manage dove fields and plant annual cool season crops. We would also work with cooperative farmers to establish native warm season grasses as a seed source or for biofuel production.

Most visitor services activities would be improved. We would enhance interpretation with additional wayside exhibits and an updated, interactive Web site. Hunting and fishing opportunities would be increased. Wildlife observation and photography opportunities would be improved by providing additional trails with better interpretation, an observation tower, and a photo blind. A portable viewing blind would be established in active RCW clusters along the wildlife drive during the nesting season. The environmental education program would be enhanced by developing a comprehensive program to be operated by volunteers and funded by grants. We would enhance appropriate recreational uses (*e.g.,* biking and picnicking) to encourage families to use the refuge and pursue outdoor recreational activities. Communication about key issues would be enhanced by hosting an annual public lands and private landowner demonstration day to showcase restoration and management practices. We would target land acquisitions that would maximize ecosystem management objectives, provide opportunities for public use and environmental education, and identify and evaluate important gaps and corridors to ensure landscape-level conservation and connectivity. We would search for opportunities to enter into cooperative wildlife management agreements with private landowners. We would increase protection of refuge visitors and the protection of archaeological and natural resources on the refuge. We would add visitor services facilities to provide more recreation and education programs and opportunities. We would add equipment to the fleet for producing and harvesting native warm season grass seed. In addition to increasing staff, we would utilize a cadre of career seasonal, temporary, and student employees.

Next Step

After the comment period ends, we will analyze the comments and address them.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: January 15, 2010.

Jeffrey M. Fleming,

Acting Regional Director.

[FR Doc. 2010–1049 Filed 1–20–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

Susquehanna to Roseland 500kV Transmission Line, Environmental Impact Statement, Delaware Water Gap National Recreation Area, Middle Delaware National Scenic and Recreational River, and Appalachian National Scenic Trail, Pennsylvania and New Jersey

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of intent to prepare an Environmental Impact Statement (EIS) for a construction and right-of-way permit requested from Delaware Water Gap National Recreation Area, Middle Delaware National Scenic and Recreational River, and Appalachian National Scenic Trail, in connection with the Susquehanna to Roseland 500kV Transmission Line.

SUMMARY: Pursuant to National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) is preparing an Environmental Impact Statement (EIS) and conducting public scoping meetings for a construction and right-of-way permit requested from Delaware Water Gap National Recreation Area, Middle Delaware National Scenic and Recreational River, and Appalachian National Scenic Trail, in connection with the proposed Susquehanna (Berwick, Pennsylvania) to Roseland, New Jersey 500 kilovolt (kV) Transmission Line. The line is being proposed by Pennsylvania Power and Light Electric Utilities (PPL) and Public Service Electric and Gas Company (PSE&G), and would cross the Delaware Water Gap National Recreation Area (DEWA), Middle Delaware National Scenic and Recreational River, and Appalachian National Scenic Trail (AT), in Pennsylvania and New Jersey. This NPS EIS will examine a range of feasible alternatives and evaluate potential impacts on the natural resource and cultural resource values, and the human environment in the areas of these NPS units.

PPL and PSE&G, applicants for an NPS permit, have proposed expansion of an existing electric transmission line right-of-way that crosses the three NPS units. The Applicants currently have a 230 kV transmission line running through their existing right-of-way. They are proposing to replace the existing line with a double circuit 500 kV transmission line with one circuit being operated at 500 kV and the second circuit being energized at 230 kV. The two circuits would be separate but carried on the same structures. The existing single 230 kV power line and towers currently on the right-of-way would be removed and replaced with larger towers. This would necessitate widening the cleared area, and the granting of additional rights to expand the width of the transmission line right-of-way beyond the Applicant's current holdings. The Applicants are also proposing to build new roads and rehabilitate and widen existing roads in DEWA for accessing the transmission line corridor. The Applicant's stated purpose for the project is to strengthen the grid at the direction of the Regional Transmission Operator, PJM Interconnection (PJM). PJM oversees the overall movement of wholesale electricity between many electric utilities throughout a 13 state region. PJM's 2007 load forecast model

identified 23 projected reliability criteria violations, starting in 2012 and beyond, that the proposed project is designed to alleviate.

The Federal action under consideration in this EIS is the Applicant's proposal that the National Park Service grant the permits it has requested. The National Park Service's purpose in taking action is to respond to the Applicant's expressed need to expand its current right-of-way to construct new and taller power lines and add an additional 500kV power line, in light of the purposes and resources of the affected units of the National Park System, as expressed in statutes, regulations, and policies. Federal action is needed because the applicant has submitted the required applications and construction plan to replace and expand the existing line in accordance with 36 CFR Part 14 and applicable NPS Management Policies. The NPS therefore has a duty to consider whether, and with what conditions, if any, to issue the requested permits.

The NPS will analyze the proposed action and no action alternatives, as well as other possible alternatives including granting of the permits as requested, granting of the permits with stipulations, or denying the permits, and alternatives to the proposed line both within and outside the park. The NPS expects to identify additional alternatives, issues concerning the alternatives, and alternative mitigation strategies during the public scoping process.

This notice initiates the public participation and scoping process for the EIS. The public is invited to comment on the purpose, need, objectives, preliminary alternatives, or any other issues associated with the proposal. Information that details the purpose, need, and issues identified to date is available from the NPS Planning, Environment and Public Comment (PEPC) website at *http://parkplanning.nps.gov/dewa/*.

Dates and Meeting Notices: The public scoping period will commence on the date this notice is published in the **Federal Register** and last for at least 30 days. The NPS will hold public meetings near the parks and surrounding region to provide the public an opportunity to review the proposal and project information. All public meetings will be announced through local media, mailings, and the NPS PEPC Web site at *http://parkplanning.nps.gov/dewa/*. Comments will be accepted within 30 days after this publication date and/or until at least 15 days after the last public scoping meeting.

ADDRESSES: Comments on issues, potential impacts, or suggestions for additional alternatives can be submitted using any one of the following methods. You may submit comments through the NPS PEPC Web site at *http://parkplanning.nps.gov/dewa/*, which is the preferred method. You may mail your comments to the National Park Service, Attention: DEWA PPL EIS Planning Team, Denver Service Center—Planning, P.O. Box 25287, Denver, CO 80225. Comments may also be submitted at any of the three public meetings to be announced.

FOR FURTHER INFORMATION CONTACT: Kara Deutsch, NEPA Compliance Specialist, Delaware Water Gap National Recreation Area, HQ River Rd. off Route 209, Bushkill, PA 18324–9999, telephone 570–426–2491.

SUPPLEMENTARY INFORMATION: Before including your address, phone number, e-mail address or other personal identifying information in your comment, you should be aware your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold identifying information from public review, we cannot guarantee that we will be able to do so. The NPS will not consider anonymous comments. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

Michael T. Reynolds,

Acting Regional Director, Northeast Region, National Park Service.

[FR Doc. 2010–1094 Filed 1–20–10; 8:45 am]

BILLING CODE 4312–J6–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

DEPARTMENT OF AGRICULTURE

Forest Service

[LLNV912000 L16400000.PH0000 LXSS006F0000 261A; MO#4500011786; 10–08807; TAS: 14X1109]

Notice of Public Meeting: Recreation Subcommittee of the Sierra Front-Northwestern Great Basin, Northeastern Great Basin, and Mojave-Southern Great Basin Resource Advisory Councils, Nevada

AGENCY: Bureau of Land Management, Interior and Forest Service, Agriculture.

ACTION: Notice of recreation advisory subcommittee meeting.

SUMMARY: In accordance with the Federal Lands Recreation Enhancement Act of 2004 (FLREA) (Pub. L. 108–447), the Recreation Subcommittee of the Bureau of Land Management's (BLM) Nevada Resource Advisory Committees (RACs) will hold a meeting to discuss fee proposals at the Red Rock Canyon National Conservation Area (NCA) Scenic Loop managed by the Bureau of Land Management.

Date and Time: The Recreation Subcommittee will meet on Wednesday, February 17, 2010, at 12:30 p.m. A time for general public comment, where the public may submit oral or written comments to the Recreation Subcommittee, will be provided during the meeting.

ADDRESSES: Red Rock Canyon NCA Visitor Center, Highway 159, Las Vegas, Nevada.

FOR FURTHER INFORMATION CONTACT: Barbara Keleher, Outdoor Recreation Planner, telephone (775) 861–6628, e-mail: *barbara_keleher@blm.gov,* or mail: BLM Nevada State Office, 1340 Financial Blvd., Reno, NV 89502.

SUPPLEMENTARY INFORMATION: FLREA directs the secretaries of Interior and Agriculture to establish Recreation Resource Advisory Committees to provide advice and recommendations on recreation fees and fee areas in each state or region for Federal recreational lands and waters managed by the BLM or Forest Service. Nevada's recreation subcommittee includes members of the three existing BLM RACs and has responsibilities pertaining to both BLM and Forest Service managed Federal lands and waters according to a national interagency agreement between the Forest Service and the BLM. This subcommittee will recommend new

amenity fees and fee change proposals to the respective RACs for each geographic region.

All meetings are open to the public. A final agenda will be available at *http://www.blm.gov/nv/st/en/res/resource_advisory/recreation_rac.html.* A news release will be sent to local and regional media at least 14 days before the meeting. Individuals who need special assistance such as sign language interpretation or other reasonable accommodations, or who wish a printed copy of the agenda, should contact Barbara Keleher no later than 10 days prior to the meeting.

Ron Wenker,

BLM, Nevada State Director,

Jeremiah C. Ingersoll,

USFS, Acting Supervisor, Humboldt-Toiyabe National Forest.

[FR Doc. 2010–1102 Filed 1–20–10; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

Flight 93 National Memorial Advisory Commission

AGENCY: National Park Service.

ACTION: Notice of February 6, 2010 meeting.

SUMMARY: This notice sets forth the date of the February 6, 2010 meeting of the Flight 93 Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on Saturday, February 6, 2010, from 10 a.m. to 1 p.m. (Eastern). The Commission will meet jointly with the Flight 93 Memorial Task Force.

Location: The meeting will be held at the Somerset County Courthouse, Court Room #1, located at 111 E. Union Street, Somerset, PA 15501.

Agenda:

The February 6, 2010 joint Commission and Task Force meeting will consist of:

1. Opening of Meeting and Pledge of Allegiance.
2. Review and Approval of Commission Minutes from February 7, 2009.
3. Reports from the Flight 93 Memorial Task Force and National Park Service.
4. Old Business.
5. New Business.
6. Public Comments.
7. Closing Remarks.

FOR FURTHER INFORMATION CONTACT: Joanne M. Hanley, Superintendent, Flight 93 National Memorial, 109 West Main Street, Somerset, PA 15501, 814.443.4557.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. Address all statements to: Flight 93 Advisory Commission, 109 West Main Street, Somerset, PA 15501.

Joanne M. Hanley,

Superintendent, Flight 93 National Memorial.

[FR Doc. 2010–1092 Filed 1–20–10; 8:45 am]

BILLING CODE 4310–25–P

DEPARTMENT OF THE INTERIOR

National Park Service

Acadia National Park; Bar Harbor, ME; Acadia National Park Advisory Commission; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App. 1, Sec. 10), that the Acadia National Park Advisory Commission will hold a meeting on Friday, February 19, 2010.

The Commission was established pursuant to Public Law 99–420, Sec. 103. The purpose of the commission is to consult with the Secretary of the Interior, or his designee, on matters relating to the management and development of the park, including but not limited to the acquisition of lands and interests in lands (including conservation easements on islands) and termination of rights of use and occupancy.

The meeting will convene at Park Headquarters, Bar Harbor, Maine, at 1 p.m., to consider the following agenda:

1. Committee reports:

—Land Conservation.
—Park Use.
—Science and Education.
—Historic.

2. Old business.
3. Superintendent's report.
4. Public comments.
5. Proposed agenda for next Commission meeting in June 2010.

The meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days prior to the meeting.

Further information concerning this meeting may be obtained from the Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, Maine 04609, tel: (207) 288–3338.

Dated: January 7, 2010.

Sheridan Steele,

Superintendent.

[FR Doc. 2010–1064 Filed 1–20–10; 8:45 am]

BILLING CODE 4310–2N–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Public Meetings for the National Park Service Alaska Region's Subsistence Resource Commission (SRC) Program

AGENCY: National Park Service, Interior.

ACTION: Notice of public meetings for the National Park Service Alaska Region's Subsistence Resource Commission (SRC) program.

SUMMARY: The Lake Clark National Park Subsistence Resource Commission (LACL SRC), Wrangell-St. Elias National Park Subsistence Resource Commission (WRST SRC) and Denali National Park Subsistence Resource Commission (DENA SRC) will meet to develop and continue work on National Park Service (NPS) subsistence hunting program recommendations and other related subsistence management issues. These meetings are open to the public and will have time allocated for public testimony. The public is welcomed to present written or oral comments to the SRC. Each meeting will be recorded and meeting minutes will be available upon request from the park superintendent for public inspection approximately six weeks after each meeting. The NPS SRC program is authorized under Title VIII, Section 808 of the Alaska National Interest Lands Conservation Act, Public Law 96–487, to operate in accordance with the provisions of the Federal Advisory Committee Act.

LACL SRC Meeting Date and Location: The LACL SRC meeting will be held on Thursday, February 12, 2010, from 1 p.m. to 5 p.m. at the Lake Clark National Park and Preserve Visitor Center in Port Alsworth, AK.

For Further Information on the LACL SRC Meeting Contact: Michelle Ravenmoon, Subsistence Manager, Tel. (907) 781–2135 or Mary McBurney, Subsistence Manager, Tel. (907) 235–7891, Address: 240 W. 5th Avenue, Suite 236, Anchorage, AK 99501 or Clarence Summers, Subsistence Manager, Tel. (907) 644–3603.

WRST SRC Meeting Dates and Location: The WRST SRC meeting will be held on Wednesday, February 17, 2010, from 10 a.m. to 5 p.m., and on Thursday, February 18, 2010, from 9 a.m. to 5 p.m. at the Wrangell-St. Elias

National Park and Preserve Headquarters in Copper Center, AK. On February 17, 2010, between 6 p.m. and 10 p.m., an evening session may be scheduled at the call of the Chair. Should this meeting be postponed due to inclement weather or lack of a quorum, the alternate meeting dates are Wednesday, March 24, 2010, from 10 a.m. to 5 p.m., and, on Thursday, March 25, 2010, from 9 a.m. to 5 p.m. at the Wrangell-St. Elias National Park and Preserve Headquarters in Copper Center, AK.

For Further Information on the WRST SRC Meeting Contact: Barbara Cellarius, Subsistence Manager, Tel. (907) 822–7236, Address: P.O. Box 439, Copper Center, AK 99573 or Clarence Summers, Subsistence Manager, Tel. (907) 644–3603.

DENA SRC Meeting Dates and Location: The DENA SRC meeting will be held on Saturday, February 20, 2010, from 7 p.m. to 8:30 p.m. and Sunday, February 21, 2010, from 9 a.m. to 1 p.m. at the Denali West Lodge in Lake Minchumina, AK. Should this meeting be postponed due to inclement weather, or lack of a quorum, the alternate meeting dates are Saturday, March 6, 2010, from 7 p.m. to 8:30 p.m., and Sunday, March 7, 2010, from 9 a.m. to 1 p.m. at the Denali West Lodge in Lake Minchumina, AK.

For Further Information on the DENA SRC Meeting Contact: Amy Craver, Subsistence Manager, Tel. (907) 683–9544, Address: Denali National Park and Preserve, P.O. Box 9, Denali Park, AK 99755 or Clarence Summers, Subsistence Manager, Tel. (907) 644–3603.

The proposed meeting agenda for each meeting includes the following:

1. Call to order.
2. SRC Roll Call and Confirmation of Quorum.
3. SRC Chair and Superintendent's Welcome and Introductions.
4. Approval of Minutes From Last SRC Meeting.
5. Review and Approve Agenda.
6. Status of SRC Membership.
7. SRC Member Reports.
8. Park Subsistence Manager's Report.
9. Park Staff Reports.
   a. Resource Management Update.
   b. Ranger Division Update.
   c. Subsistence Uses of Horns, Antlers, Bones and Plants EA Update.
10. Federal Subsistence Board Update.
11. Alaska Board of Game Update.
12. Old Business.
13. New Business.
14. Public and Other Agency Comments.
15. SRC Work/Training Session.
16. Set Time and Place for Next SRC Meeting.
17. Adjournment.

SUPPLEMENTARY INFORMATION: SRC meeting locations and dates may need to be changed based on lack of quorum, inclement weather or local circumstances. If the meeting date and location are changed, a notice will be published in local newspapers and announced on local radio stations prior to the meeting date. The SRC meeting may end early if all business is completed.

Dated: December 30, 2009.

J. Mark Vaughn,

Associate Regional Director.

[FR Doc. 2010–1063 Filed 1–20–10; 8:45 am]

BILLING CODE 4312–64–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMTC 00900.L16100000.DP0000]

Notice of Public Meeting, Eastern Montana Resource Advisory Council Meeting

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Eastern Montana Resource Advisory Council (RAC), will meet as indicated below.

DATES: The next regular meeting of the Eastern Montana Resource Advisory Council will be held on March 4, 2010, in Billings, MT. The meeting will start at 8 a.m. and adjourn at approximately 3:30 p.m. When determined, the meeting location will be announced in a news release.

FOR FURTHER INFORMATION CONTACT: Mark Jacobsen, Public Affairs Specialist, BLM Eastern Montana/Dakotas District, 111 Garryowen Road, Miles City, Montana 59301, (406) 233–2831.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior through the Bureau of Land Management on a variety of planning and management issues associated with public land management in Montana. At these meetings, topics will include: Miles City and Billings Field Office manager updates, subcommittee briefings, work sessions and other issues that the council may raise. All meetings are open to the public and the public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations should contact the BLM as provided above.

Dated: January 8, 2010.

M. Elaine Raper,

District Manager.

[FR Doc. 2010–1104 Filed 1–20–10; 8:45 am]

BILLING CODE 4310–DN–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. TA–131–034 and TA 2104–026]

U.S.-Trans-Pacific Partnership Free Trade Agreement: Advice on Probable Economic Effect of Providing Duty-Free Treatment for Imports

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and scheduling of hearing.

SUMMARY: Following receipt on December 15, 2009, of a request from the United States Trade Representative (USTR), the Commission instituted investigation nos. TA–131–034 and TA–2104–026, *U.S.-Trans-Pacific Partnership Free Trade Agreement: Advice on Probable Economic Effect of Providing Duty-Free Treatment for Imports.*

DATES: *February 16, 2010:* Deadline for filing requests to appear at the public hearing. *February 18, 2010:* Deadline for filing pre-hearing briefs and statements. *March 2, 2010:* Public hearing. *March 16, 2010:* Deadline for filing post-hearing briefs and statements. *March 23, 2010:* Deadline for filing all other written submissions. *June 2, 2010:* Transmittal of Commission report to the Office of the United States Trade Representative.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW., Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street, SW., Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS)

at *http://www.usitc.gov/secretary/edis.htm.*

FOR FURTHER INFORMATION CONTACT: Doug Newman, Project Leader (202–205–3328; *douglas.newman@usitc.gov*), or Craig Thomsen, Deputy Project Leader (202–205–3226, *craig.thomsen@usitc.gov*), of the Commission's Office of Industries, for information specific to this investigation. For information on the legal aspects of these investigations, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: On December 14, 2010, the USTR notified the Congress of the President's intent to enter into negotiations for a free trade agreement with Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam, collectively known as the Trans-Pacific Partnership (TPP). Accordingly, the USTR, under authority delegated by the President and pursuant to section 131 of the Trade Act of 1974 (19 U.S.C. 2151), requested that the Commission provide a report containing its advice as to the probable economic effect of providing duty-free treatment for imports of products from the seven TPP countries (i) on industries in the United States producing like or directly competitive products, and (ii) on consumers. The USTR asked that the Commission's analysis consider each article in chapters 1 through 97 of the Harmonized Tariff Schedule of the United States (HTS) for which tariffs will remain, taking into account implementation of U.S. commitments in the World Trade Organization and under U.S. free trade agreements that the United States has with a TPP country. The USTR asked that the advice be based on the HTS in effect during 2010 and trade data for 2008. The USTR also requested that the Commission, in preparing its advice, assume that any known U.S. non-tariff barrier will not be applicable to such imports, and that the Commission note in its report any instance in which the continued application of a U.S. non-tariff barrier would result in different advice with respect to the effect of the removal of the duty.

In addition, the USTR requested that the Commission prepare an assessment, pursuant to section 2104(b)(2) of the Trade Act of 2002 (19 U.S.C. 3804(b)(2)), of the probable economic effects of eliminating tariffs on imports from the TPP countries of those agricultural products on the list attached to his letter on (i) industries in the United States producing the product concerned, and (ii) the U.S. economy as a whole.

As requested, the Commission will provide its report to the USTR by June 2, 2010. The USTR indicated that those sections of the Commission's report that relate to the advice and assessment of probable economic effects will be classified. The USTR also indicated that he considers the Commission's report to be an inter-agency memorandum that will contain pre-decisional advice and be subject to the deliberative process privilege.

Public Hearing: A public hearing in connection with this investigation will be held at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC, beginning at 9:30 a.m., March 2, 2010. Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., February 16, 2010, in accordance with the requirements in the "Submissions" section below. All pre-hearing briefs and statements should be filed not later than 5:15 p.m., February 18, 2010; and all post-hearing briefs and statements should be filed not later than 5:15 p.m., March 16, 2010.

Written Submissions: In lieu of or in addition to participating in the hearing and filing briefs and statements relating to the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary, and should be received not later than 5:15 p.m., March 23, 2010. All written submissions must conform with the provisions of section 201.8 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.8). Section 201.8 requires that a signed original (or a copy so designated) and fourteen (14) copies of each document be filed. In the event that confidential treatment of a document is requested, at least four (4) additional copies must be filed, in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). The Commission's rules authorize filing submissions with the Secretary by facsimile or electronic means only to the extent permitted by section 201.8 of the rules (see Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/documents/handbook_on_electronic_filing.pdf*). Persons with questions regarding electronic filing should contact the Secretary (202–205–2000).

Any submissions that contain confidential business information must also conform with the requirements of section 201.6 of the *Commission's Rules of Practice and Procedure* (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

Issued: January 11, 2010

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 2010–962 Filed 1–20–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Parole Commission

Public Announcement Pursuant to the Government in the Sunshine Act (Pub. L. 94–409) [5 U.S.C. Section 552b]

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

DATE AND TIME: 12 p.m., Thursday, January 21, 2010.

PLACE: U.S. Parole Commission, 5550 Friendship Boulevard, 4th Floor, Chevy Chase, Maryland 20815.

STATUS: Closed.

MATTERS CONSIDERED: The following matter will be considered during the closed meeting:

Consideration of two original jurisdiction cases pursuant to 28 CFR 2.27.

AGENCY CONTACT: Patricia W. Moore, Staff Assistant to the Chairman, United States Parole Commission, (301) 492–5933.

Dated: January 12, 2010.

Rockne Chickinell,

General Counsel, U.S. Parole Commission.

[FR Doc. 2010–1025 Filed 1–20–10; 8:45 am]

BILLING CODE 4410–31–M

DEPARTMENT OF JUSTICE

Parole Commission

Public Announcement Pursuant to the Government in the Sunshine Act (Pub. L. 94–409) [5 U.S.C. Section 552b]

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

TIME AND DATE: 10 a.m., Thursday, January 21, 2010.

PLACE: 5550 Friendship Blvd., Fourth Floor, Chevy Chase, MD 20815.

STATUS: Open.

MATTERS TO BE CONSIDERED: The following matters have been placed on the agenda for the open Parole Commission meeting:

1. Approval of Minutes of October 6, 2009 Quarterly Business Meeting.
2. Reports from the Chairman, Commissioners, and Section Administrators.
3. Public Comment on Interim Rules Implementing the Equitable Street Time Credit Amendment Act.
4. *Summons* vs. *Warrant Pilot.*
5. Residential Substance Abuse Treatment Program (RSAT) & Secure Residential Treatment Program (SRTP) Funding.
6. Victims Witness Program.

AGENCY CONTACT: Patricia W. Moore, Staff Assistant to the Chairman, United States Parole Commission, (301) 492–5933.

Dated: January 12, 2010.

Rockne J. Chickinell,

General Counsel, U.S. Parole Commission.

[FR Doc. 2010–1026 Filed 1–20–10; 8:45 am]

BILLING CODE 4410–31–M

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Attorney-Advisor, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* February 4, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for American, British, and Anglophone Literature in Scholarly Editions, submitted to the Division of Research Programs at the October 29, 2009 deadline.

2. *Date:* February 8, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Archaeology: Old World/Ancient History in Collaborative Research, submitted to the Division of Research Programs at the October 29, 2009 deadline.

3. *Date:* February 9, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Archaeology: New World in Collaborative Research, submitted to the Division of Research Programs at the October 29, 2009 deadline.

4. *Date:* February 10, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for History of Science/Religion/Philosophy in Collaborative Research, submitted to the Division of Research Programs at the October 29, 2009 deadline.

5. *Date:* February 11, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Philosophy and Religion in Scholarly Editions, submitted to the Division of Research Programs at the October 29, 2009 deadline.

6. *Date:* February 12, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Literature and the Arts in Collaborative Research, submitted to the Division of Research Programs at the October 29, 2009 deadline.

7. *Date:* February 16, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Literature, History, and the Arts in Scholarly Editions, submitted to the Division of Research Programs at the October 29, 2009 deadline.

8. *Date:* February 17, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for American Studies in Collaborative Research, submitted to the Division of Research Programs at the October 29, 2009 deadline.

9. *Date:* February 18, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for American History/American Studies in Scholarly Editions, submitted to the Division of Research Programs at the October 29, 2009 deadline.

10. *Date:* February 22, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Political Science/Anthropology/Jurisprudence in Collaborative Research, submitted to the Division of Research Programs at the October 29, 2009 deadline.

11. *Date:* February 23, 2010.
Time: 8:30 a.m. to 5 p.m.
Room: 315.
Program: This meeting will review applications for Archaeology: Old World/Asian Studies/Middle Eastern Studies in Collaborative Research, submitted to the Division of Research

Programs at the October 29, 2009 deadline.

Lisette Voyatzis,

Attorney-Advisor.

[FR Doc. 2010–1100 Filed 1–20–10; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB Review; Comment Request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 74 FR 60300, and one comment was received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street, NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 295, Arlington, Virginia 22230 or send email to *splimpto@nsf.gov.* Comments regarding this information collection are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Suzanne H. Plimpton at (703) 292–7556 or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION: On November 20, 2009, we published in the **Federal Register** (74 FR 60300) a 60-day notice of our intent to request renewal of this information collection authority from OMB. In that notice, we solicited public comments for 60 days ending January 19, 2009. We received one comment regarding this notice.

Comment: One comment was received from Roger Clegg, President and General Counsel, Center for Equal Opportunity: "The ADVANCE Program is described as "address[ing] the underrepresentation and inadequate advancement of women," and "gender equity outcomes," for STEM faculty. We hope that the Program does not contemplate the use of quotas, numerical goals, or other discrimination or preferences as ways to address underrepresentation (a dubious term) or gender equity (likewise dubious). Such discrimination and preference is presumptively unconstitutional when engaged in by government, including federal government agencies (*see Mississippi University for Women* v. *Hogan,* 458 U.S. 718 (1982) (gender discrimination requires an "exceedingly persuasive justification"), and faculty discrimination on the basis of sex is illegal under Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.*"

Response: We responded via email on November 30, 2009: Thank you for your comment in response to the **Federal Register** notice published November 20, 2009 "National Science Foundation Agency Information Collection Activities: Proposed Collection, Comment Request." The NSF ADVANCE program does not use quotas, numerical goals, or other discrimination or preferences. Further information on the ADVANCE program is available at: *http://www.nsf.gov/advance.*

Title of Collection: Quantitative Evaluation of the ADVANCE Program.

OMB Control No.: 3145–NEW.

Abstract: The ADVANCE Program was established by the National Science Foundation in 2001 to address the underrepresentation and inadequate advancement of women on STEM (Science, Technology, Engineering, and Mathematics) faculties at postsecondary institutions. The evaluation being conducted by Westat focuses on the outcomes of two ADVANCE program components: (a) The first two (2001 and 2003) cohorts of Institutional Transformation (IT) awardees, and (b) both (2002 and 2004) cohorts of individuals receiving ADVANCE Fellows awards. The study will rely on a thorough review of project documents and relevant literature; a survey (facilitated online via WebEx) and an outcome indicator data form (distributed and completed electronically) for the 19 IT awardee institutions; and a mail survey, with telephone followup as needed, of all 59 former Fellows.

In addition, the study will use data from the 2001 and 2008 administrations of the Survey of Doctorate Recipients (SDR) for comparison purposes.

The evaluation of the IT component has two primary goals: To compare selected gender equity outcomes for STEM faculty at the 19 IT Cohorts 1 and 2 institutions and at other similar U.S. four-year colleges and universities that have not subsequently received ADVANCE IT awards, and to develop innovative institutional-level measures of changes in gender equity climate and practices that can be applied to evaluating the outcomes of the IT award. The primary goal of the Fellows evaluation is to compare the career trajectories of ADVANCE Fellows with those of similar individuals who were not awarded these fellowships.

Respondents: Faculty and staff at institutions of higher education and individuals holding doctoral degrees in STEM fields awarded an NSF ADVANCE Fellowship.

Estimated Number of Annual Respondents: 139.

Burden on the Public: 1,859 hours.

Dated: January 14, 2010.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2010–1004 Filed 1–20–10; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Physics; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting.

Name: University of Nebraska Site Visit in Physics (1208).

Date and Time: Monday, February 1, 2010; 8 a.m.–6 p.m.; Tuesday, February 2, 2010: 8 a.m.–3 p.m.

Place: University of Nebraska, Lincoln, Nebraska.

Type of Meeting: Partially Closed.

Contact Person: Dr. James Reidy, Program Director for Elementary Particle Physics, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. Telephone: (703) 292–7392.

Purpose of Meeting: To provide an evaluation concerning the proposal submitted to the National Science Foundation.

Agenda

Monday. February 1, 2010

Closed 8–9
Executive Session.
Open 9–3
Open Discussions and/or presentations.
Closed 3–3:30
Executive Session.
Open 3:30–6
Open Discussions and/or presentations.

Tuesday, February 2, 2010

Closed 8–9
Executive Session.
Open 9–11:30
Open Discussions and/or presentations.
Closed 11:30–3:30
Executive Session & Close out with Lab Leaders.

Reason For Closing: The proposal contains proprietary or confidential material including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are exempt under 5 U.S.C. 552b (c) and (6) of the Government in the Sunshine Act.

Dated: January 14, 2010.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2010–967 Filed 1–20–10; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–275 and 50–323; NRC–2009–0552]

Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License Nos. DPR–80 and DPR–82 for an Additional 20-Year Period; Pacific Gas & Electric Company, Diablo Canyon Nuclear Power Plant, Units 1 and 2; and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation

The U.S. Nuclear Regulatory Commission (NRC) is considering an application for the renewal of operating licenses DPR–80 and DPR–82, which authorize Pacific Gas & Electric Company (PG&E) to operate the Diablo Canyon Nuclear Power Plant (DCPP), Units 1 and 2, at 3411 megawatts thermal, each. The renewed licenses would authorize the applicant to operate DCPP, Units 1 and 2, for an additional 20 years beyond the period specified in the current licenses. DCPP, Units 1 and 2, are located near San Luis Obispo, California. The current operating licenses expire on November 2, 2024, and August 26, 2025, respectively.

PG&E submitted the application dated November 23, 2009, pursuant to Title 10 of the *Code of Federal Regulations*, Part 54 (10 CFR part 54) to renew operating licenses DPR–80 and DPR–82. A notice of receipt and availability of the license renewal application (LRA) was published in the **Federal Register** on December 11, 2009 (74 FR 65811).

The Commission has determined that PG&E has submitted sufficient information in accordance with 10 CFR Sections 2.101, 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c), to enable the staff to undertake a review of the application, and the application is therefore acceptable for docketing. The Commission will retain the current Docket Nos. 50–275 and 50–323 for operating license Nos. DPR–80 and DPR–82. The determination to accept the LRA for docketing does not constitute a determination that the renewed licenses should be issued, and does not preclude the NRC staff from requesting additional information as the review proceeds.

Before issuance of the requested renewed licenses, the NRC will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review, and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB) and that any changes made to the plant's CLB will comply with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement that is a supplement to the Commission's NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants," dated May 1996. In considering the LRA, the Commission must find that the applicable requirements of subpart A of 10 CFR part 51 have been satisfied, and that matters raised under 10 CFR 2.335 have been addressed. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold public scoping meetings. Detailed information regarding the environmental scoping meetings will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** notice, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the renewal of the licenses. Requests for a hearing or petitions for leave to intervene must be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852 and is accessible from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to the Internet or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 1–800–397–4209, or 301–415–4737,

or by e-mail at *PDR.Resource@nrc.gov.* If a request for a hearing/petition for leave to intervene is filed within the 60-day period, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel will issue a notice of a hearing or an appropriate order. In the event that no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR parts 51 and 54, renew the licenses without further notice.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR parts 51 and 54. The petition must specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

The Commission requests that each contention be given a separate numeric or alpha designation within one of the following groups: (1) Technical (primarily related to safety concerns); (2) environmental; or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners must jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing

system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this **Federal Register** notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at *http://www.nrc.gov/reactors/operating/licensing/renewal.html* on the NRC's Web site. Copies of the application to renew the operating licenses for DCPP are available for public inspection at the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852–2738, and at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html*, the NRC's Web site while the application is under review. The application may be accessed in ADAMS through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession Number ML093340125. As stated above, persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS may contact the NRC PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *PDR.Resource@nrc.gov*.

The NRC staff has verified that a copy of the license renewal application is also available to local residents near the site at the San Luis Obispo Public Library, 995 Palm Street, San Luis Obispo, California 93401, and at the Paso Robles Public Library, 1000 Spring Street, Paso Robles, California 93446.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A "potential party" is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requestor shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov*, respectively.[1] The request must include the following information:

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requestor may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requestor may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this *14th* day of January 2010.

For the Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of FEDERAL REGISTER notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requestor of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requestor to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

Day	Event/activity
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2010–1080 Filed 1–20–10; 8:45 am]
BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–247 and 50–286; NRC–2010–0006]

Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC,: Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity To Request a Hearing, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of amendment and opportunity to request a hearing and to petition for leave to intervene.

DATES: Request for a hearing and/or petition for leave to intervene must be filed within 60 days after the date of publication of this notice in the **Federal Register**. Any potential party as defined in 10 CFR 2.4 who believes access to Sensitive Unclassified Non-Safeguards Information and/or Safeguards Information is necessary to respond to this notice must request document access within 10 days after the date of publication of this notice in the **Federal Register**.

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering an application for amendment to Facility Operating License Nos. DPR–26 and DPR–64, issued to Entergy Nuclear Operations, Inc. (Entergy) and Entergy Nuclear Indian Point 2, LLC, for operation of the Indian Point Nuclear Generating Unit No. 2 (IP2) and to Entergy and Entergy Nuclear Indian Point 3, LLC, for operation of the Indian Point Nuclear Generating Unit No. 3 (IP3), both located in Westchester County, New York.

The proposed amendment would revise the IP2 and IP3 operating licenses to permit the transfer of spent fuel from IP3 to IP2, using a newly-designed transfer cask, with plans for further transfer to the onsite independent spent fuel storage installation, on an as-needed basis as determined by Entergy's fuel management needs. The July 8, 2009, application (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091940177 and ML091940178), as supplemented by letters dated September 28 and October 26, 2009 (ADAMS Accession Nos. ML092950437 and ML093020080) contains proprietary information, which the Commission classifies as sensitive unclassified non-safeguards information (SUNSI). Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations. These findings will be documented in a Safety Evaluation Report and an Environmental Assessment and/or an Environmental Impact Statement.

II. Opportunity To Request a Hearing

Within 60 days after the date of publication of this notice in the **Federal Register**, any person(s) whose interest may be affected by this action and who desires to participate as a party to this action, may file a request for a hearing and a petition to intervene with respect to whether the amendment to the subject facility operating licenses should be issued. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, "Hearing Requests, Petitions to Intervene, Requirements for Standing, and Contentions," which is available at the Commission's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

III. Petitions for Leave To Intervene

As required by 10 CFR 2.309, a petition for leave to intervene or request for hearing shall set forth with particularity the interest of the petitioner/requester in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requester or petitioner; (2) the nature of the requester's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requester's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requester's/petitioner's interest.

The petition must also identify the specific contentions which the petitioner/requester seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. The petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings that the NRC must make to support the granting of the license amendment in response to the application. The petition must also include a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely.

Finally, the petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to specific portions of the application for amendment that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application for amendment fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. Contentions shall be limited to matters within the scope of the license amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requester to relief. A petitioner/requester who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit proposed Board questions or a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Licensing Board, if one is appointed, will set the time and place for any prehearing conferences and evidentiary hearings.

Non-timely petitions for leave to intervene and contentions, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission, the Licensing Board or a Presiding Officer that the petition should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

A State, county, municipality, Federally-recognized Indian Tribe, or agencies thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission within 60 days after the date of publication of this notice in the **Federal Register**. The petition must be filed in accordance with the filing instructions in section IV of this document, and should meet the requirements for petitions for leave to intervene set forth in this section, except that States and Federally-recognized Indian tribes do not need to address the standing requirements in 10 CFR 2.309(d)(1) if the facility is located within their boundaries. The entities listed above could also seek to participate in a hearing as a nonparty participant pursuant to 10 CFR 2.315(c).

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting

documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

V. Hybrid Hearing Procedures

The Commission hereby provides notice that this is a proceeding on an application for a license amendment falling within the scope of section 134 of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10154. Under section 134 of the NWPA, the Commission, at the request of any party to the proceeding, must use hybrid hearing procedures with respect to "any matter which the Commission determines to be in controversy among the parties."

The hybrid procedures in section 134 provide for oral argument on matters in controversy, preceded by discovery under the Commission's rules and the designation, following argument of only those factual issues that involve a genuine and substantial dispute, together with any remaining questions of law, to be resolved in an adjudicatory hearing. Actual adjudicatory hearings are to be held on only those issues found to meet the criteria of section 134 and set for hearing after oral argument.

The Commission's rules implementing section 134 of the NWPA are found in 10 CFR Part 2, Subpart K, "Hybrid Hearing Procedures for Expansion of Spent Fuel Storage Capacity at Civilian Nuclear Power Reactors." Under those rules, any party to the proceeding may invoke the hybrid hearing procedures by filing with the presiding officer a written request for oral argument under 10 CFR 2.1109. To be timely, the request must be filed together with a request for hearing/petition to intervene, filed in accordance with 10 CFR 2.309. If it is determined a hearing will be held, the presiding officer must grant a timely request for oral argument. The presiding officer may grant an untimely request for oral argument only upon a showing of good cause by the requesting party for the failure to file on time and after providing the other parties an opportunity to respond to the untimely request. If the presiding officer grants a request for oral argument, any hearing held on the application must be conducted in accordance with the hybrid hearing procedures. In essence, those procedures limit the time available for discovery and require that an oral argument be held to determine whether any contentions must be resolved in an adjudicatory hearing. If no party to the proceeding timely requests oral argument, and if all untimely requests for oral argument are denied, then the usual procedures in 10 CFR Part 2, Subpart L apply.

For further details with respect to this license amendment application, see the application for amendment dated July 8, 2009, (ADAMS Accession Nos. ML091940177 and ML091940178), as supplemented by letters dated September 28 and October 26, 2009 (ADAMS Accession Nos. ML092950437 and ML093020080) which are available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Attorney for the licensee: William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation

A. This Order contains instructions regarding how potential parties to this proceeding may request access to documents containing Sensitive Unclassified Non-Safeguards Information (SUNSI).

B. Within 10 days after publication of this notice of hearing and opportunity to petition for leave to intervene, any potential party who believes access to SUNSI is necessary to respond to this notice may request such access. A "potential party" is any person who intends to participate as a party by demonstrating standing and filing an admissible contention under 10 CFR 2.309. Requests for access to SUNSI submitted later than 10 days after publication will not be considered absent a showing of good cause for the late filing, addressing why the request could not have been filed earlier.

C. The requester shall submit a letter requesting permission to access SUNSI to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and provide a copy to the Associate General Counsel for Hearings, Enforcement and Administration, Office of the General Counsel, Washington, DC 20555–0001. The expedited delivery or courier mail address for both offices is: U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852. The e-mail address for the Office of the Secretary and the Office of the General Counsel are *Hearing.Docket@nrc.gov* and *OGCmailcenter@nrc.gov,* respectively.[1] The request must include the following information:

[1] While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

(1) A description of the licensing action with a citation to this **Federal Register** notice;

(2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the action identified in C.(1);

(3) The identity of the individual or entity requesting access to SUNSI and the requester's basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. In particular, the request must explain why publicly-available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention;

D. Based on an evaluation of the information submitted under paragraph C.(3) the NRC staff will determine within 10 days of receipt of the request whether:

(1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in this NRC proceeding; and

(2) The requestor has established a legitimate need for access to SUNSI.

E. If the NRC staff determines that the requestor satisfies both D.(1) and D.(2) above, the NRC staff will notify the requestor in writing that access to SUNSI has been granted. The written notification will contain instructions on how the requestor may obtain copies of the requested documents, and any other conditions that may apply to access to those documents. These conditions may include, but are not limited to, the signing of a Non-Disclosure Agreement or Affidavit, or Protective Order [2] setting forth terms and conditions to prevent the unauthorized or inadvertent disclosure of SUNSI by each individual who will be granted access to SUNSI.

F. Filing of Contentions. Any contentions in these proceedings that are based upon the information received as a result of the request made for SUNSI must be filed by the requestor no later than 25 days after the requestor is granted access to that information. However, if more than 25 days remain between the date the petitioner is granted access to the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.

G. Review of Denials of Access.

(1) If the request for access to SUNSI is denied by the NRC staff either after a determination on standing and need for access, or after a determination on trustworthiness and reliability, the NRC staff shall immediately notify the requestor in writing, briefly stating the reason or reasons for the denial.

(2) The requester may challenge the NRC staff's adverse determination by filing a challenge within 5 days of receipt of that determination with: (a) The presiding officer designated in this proceeding; (b) if no presiding officer has been appointed, the Chief Administrative Judge, or if he or she is unavailable, another administrative judge, or an administrative law judge with jurisdiction pursuant to 10 CFR 2.318(a); or (c) if another officer has been designated to rule on information access issues, with that officer.

H. Review of Grants of Access. A party other than the requester may challenge an NRC staff determination granting access to SUNSI whose release would harm that party's interest independent of the proceeding. Such a challenge must be filed with the Chief Administrative Judge within 5 days of the notification by the NRC staff of its grant of access.

If challenges to the NRC staff determinations are filed, these procedures give way to the normal process for litigating disputes concerning access to information. The availability of interlocutory review by the Commission of orders ruling on such NRC staff determinations (whether granting or denying access) is governed by 10 CFR 2.311.[3]

I. The Commission expects that the NRC staff and presiding officers (and any other reviewing officers) will consider and resolve requests for access to SUNSI, and motions for protective orders, in a timely fashion in order to minimize any unnecessary delays in identifying those petitioners who have standing and who have propounded contentions meeting the specificity and basis requirements in 10 CFR Part 2. Attachment 1 to this Order summarizes the general target schedule for processing and resolving requests under these procedures.

It is so ordered.

Dated at Rockville, Maryland, this 14th day of January, 2010.

For the Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING

Day	Event/activity
0	Publication of FEDERAL REGISTER notice of hearing and opportunity to petition for leave to intervene, including order with instructions for access requests.
10	Deadline for submitting requests for access to Sensitive Unclassified Non-Safeguards Information (SUNSI) with information: supporting the standing of a potential party identified by name and address; describing the need for the information in order for the potential party to participate meaningfully in an adjudicatory proceeding.
60	Deadline for submitting petition for intervention containing: (i) Demonstration of standing; (ii) all contentions whose formulation does not require access to SUNSI (+25 Answers to petition for intervention; +7 petitioner/requestor reply).
20	Nuclear Regulatory Commission (NRC) staff informs the requester of the staff's determination whether the request for access provides a reasonable basis to believe standing can be established and shows need for SUNSI. (NRC staff also informs any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information.) If NRC staff makes the finding of need for SUNSI and likelihood of standing, NRC staff begins document processing (preparation of redactions or review of redacted documents).
25	If NRC staff finds no "need" or no likelihood of standing, the deadline for petitioner/requester to file a motion seeking a ruling to reverse the NRC staff's denial of access; NRC staff files copy of access determination with the presiding officer (or Chief Administrative Judge or other designated officer, as appropriate). If NRC staff finds "need" for SUNSI, the deadline for any party to the proceeding whose interest independent of the proceeding would be harmed by the release of the information to file a motion seeking a ruling to reverse the NRC staff's grant of access.

[2] Any motion for Protective Order or draft Non-Disclosure Affidavit or Agreement for SUNSI must be filed with the presiding officer or the Chief Administrative Judge if the presiding officer has not yet been designated, within 30 days of the deadline for the receipt of the written access request.

[3] Requesters should note that the filing requirements of the NRC's E-Filing Rule (72 FR 49139; August 28, 2007) apply to appeals of NRC staff determinations (because they must be served on a presiding officer or the Commission, as applicable), but not to the initial SUNSI request submitted to the NRC staff under these procedures.

ATTACHMENT 1—GENERAL TARGET SCHEDULE FOR PROCESSING AND RESOLVING REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION IN THIS PROCEEDING—Continued

Day	Event/activity
30	Deadline for NRC staff reply to motions to reverse NRC staff determination(s).
40	(Receipt +30) If NRC staff finds standing and need for SUNSI, deadline for NRC staff to complete information processing and file motion for Protective Order and draft Non-Disclosure Affidavit. Deadline for applicant/licensee to file Non-Disclosure Agreement for SUNSI.
A	If access granted: Issuance of presiding officer or other designated officer decision on motion for protective order for access to sensitive information (including schedule for providing access and submission of contentions) or decision reversing a final adverse determination by the NRC staff.
A + 3	Deadline for filing executed Non-Disclosure Affidavits. Access provided to SUNSI consistent with decision issuing the protective order.
A + 28	Deadline for submission of contentions whose development depends upon access to SUNSI. However, if more than 25 days remain between the petitioner's receipt of (or access to) the information and the deadline for filing all other contentions (as established in the notice of hearing or opportunity for hearing), the petitioner may file its SUNSI contentions by that later deadline.
A + 53	(Contention receipt +25) Answers to contentions whose development depends upon access to SUNSI.
A + 60	(Answer receipt +7) Petitioner/Intervenor reply to answers.
>A + 60	Decision on contention admission.

[FR Doc. 2010–1077 Filed 1–20–10; 8:45 am]
BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards

In accordance with the purposes of Sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold a meeting on February 4–6, 2010, 11545 Rockville Pike, Rockville, Maryland. The date of this meeting was previously published in the **Federal Register** on Monday, October 14, 2009 (74 FR 52829–52830).

Thursday, February 4, 2010, Conference Room T2–B1, Two White Flint North, Rockville, Maryland

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10 a.m.: Draft Final Revision 1 to Regulatory Guide (RG) 1.141, "*Containment Isolation Provisions for Fluid Systems*" (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding draft final Revision 1 to RG 1.141, "Containment Isolation Provisions for Fluid Systems," NRC staff's resolution of public comments, and related matters.

10:15 a.m.–12:15 p.m.: Draft Final Regulatory Guide 1.217, "*Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts*" (Open/Closed)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding draft final RG 1.217, "Guidance for the Assessment of Beyond-Design-Basis Aircraft Impacts," NRC staff's resolution of stakeholder comments, and related matters. [**Note:** A portion of this session may be closed to protect unclassified safeguards information pursuant to 5 U.S.C. 552b(c)(3).]

1:15 p.m.–2:45 p.m.: Draft Final Revision 1 to Regulatory Guide 1.62, "*Manual Initiation of Protective Actions*" (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding draft final Revision 1 to RG 1.62, "Manual Initiation of Protective Actions," NRC staff's resolution of public comments, and related matters.

3 p.m.–4:30 p.m.: Proposed Revisions to NUREG–1520, "*Standard Review Plan for Review of a License Application for a Fuel Cycle Facility*" (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding proposed revisions to NUREG 1520, "Standard Review Plan for Review of a License Application for a Fuel Cycle Facility," and related matters.

4:45 p.m.–7 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will discuss proposed ACRS reports on matters discussed during this meeting. [**Note:** A portion of this session may be closed to protect unclassified safeguards information pursuant to 5 U.S.C. 552b(c)(3).]

Friday, February 5, 2010, Conference Room T2–B1, Two White Flint North, Rockville, Maryland

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10 a.m.: Status of Rulemaking for Disposal of Depleted Uranium and Other Unique Waste Streams (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding the status of rulemaking efforts addressing disposal of depleted uranium and other unique waste streams, and related matters.

10:15 a.m.–11:45 a.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee (Open/Closed)—The Committee will discuss the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings, including anticipated workload and member assignments, and related matters. [**Note:** A portion of this session may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.]

11:45 a.m.–12 p.m.: Reconciliation of ACRS Comments and Recommendations (Open)—The Committee will discuss the responses from the NRC Executive Director for Operations to comments and recommendations included in recent ACRS reports and letters.

1 p.m.–3 p.m.: Draft ACRS Report on the NRC Safety Research Program (Open)—The Committee will discuss the draft ACRS report on the NRC Safety Research Program.

3:15 p.m.–7 p.m.: Preparation of ACRS Reports (Open/Closed)—The Committee will discuss the proposed ACRS reports on matters discussed during this meeting. [**Note:** A portion of this session may be closed to protect

unclassified safeguards information pursuant to 5 U.S.C. 552b(c)(3).]

Saturday, February 6, 2010, Conference Room T2–B1, Two White Flint North, Rockville, Maryland

8:30 a.m.–12:30 p.m.: Preparation of ACRS Reports (Open)—The Committee will continue its discussion of proposed ACRS reports.

12:30 p.m.–1 p.m.: Miscellaneous (Open)—The Committee will continue its discussion related to the conduct of Committee activities and specific issues that were not completed during previous meetings.

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 14, 2009 (74 FR 52829–52830). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Mr. Derek Widmayer, Cognizant ACRS Staff (Telephone: 301–415–7366, e-mail: *Derek.Widmayer@nrc.gov*), between 7:30 a.m. and 5:15 p.m. (ET) five days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the Cognizant ACRS Staff if such rescheduling would result in major inconvenience.

Thirty-five hard copies of each presentation or handout should be provided 30 minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the Cognizant ACRS Staff one day before meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the Cognizant ACRS Staff with a CD containing each presentation at least 30 minutes before the meeting.

In accordance with Subsection 10(d) Public Law 92–463, and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agenda, meeting transcripts, and letter reports are available through the NRC Public Document Room at *pdr.resource@nrc.gov*, or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/ACRS/*.

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service for observing ACRS meetings should contact Mr. Theron Brown, ACRS Audio Visual Technician (301–415–8066), between 7:30 a.m. and 3:45 p.m. (ET), at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Dated: January 14, 2010.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 2010–1059 Filed 1–20–10; 8:45 am]

BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before March 22, 2010.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Shelia Thomas, Office of Business Development, Small Business Administration, 409 3rd Street, 8th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Shelia Thomas, *mail to:* Office of Business Development, 202–205–5852, *shelia.thomas@sba.gov.*, Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov*.

SUPPLEMENTARY INFORMATION: This Form will be an Addendum to the 8(a) Annual Update Form (SBA Form 1450). The section 8(a) Business Development (BD) Program was designed by Congress to provide socially and economically disadvantaged businesses with management and technical assistance to enhance their ability to compete in the American marketplace. The 8(a) Program utilizes various forms of assistance (*e.g.* procurement, financial, and management and technical assistance through 7(j) designated funds) to foster the business growth and development of 8(a) Program participants.

Title: "8(a) Annual Update Addendum."

Description of Respondents: Annually.

Form Numbers: N/A.

Annual Responses: 7,644.

Annual Burden: 15,288.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 2010–1075 Filed 1–20–10; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[License No. 04/04–0296]

KLH Capital, L.P.; Notice Seeking Exemption Under 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that KLH Capital, L.P., 101 East Kennedy Boulevard, Suite 3925, Tampa, Florida 33602, a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration ("SBA") rules and regulations (13 CFR 107.730 (2006)). KLH Capital, L.P. proposes to provide financing to Bell'O International Corporation, 500 N. Westshore Blvd., Suite 450, Tampa, FL 33609. The financing is contemplated for expansion, product development, and working capital.

The financing is brought within the purview of Sec. 107.730 (a)(1) of the Regulations because Mr. P. Jeffrey Lech, a Manager and General Partner of KLH Capital, L.P., currently owns greater than 10 percent of Bell'O International Corporation, and therefore, Bell'O International Corporation, is considered an Associate of KLH Capital, L.P. as

defined in Sec. 105.50 of the regulations.

Notice is hereby given that any interested person may submit written comments on the transaction, within 15 days, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Sean J. Greene,

Associate Administrator For Investment.

[FR Doc. 2010–999 Filed 1–20–10; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Rule 17g–4; SEC File No. 270–566; OMB Control No. 3235–0627]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comments on the existing collection of information provided for in Rule 17g–4 (17 CFR 240.17g–4) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act").

The Rating Agency Act added a new Section 15E, "Registration of Nationally Recognized Statistical Rating Organizations," [1] to the Exchange Act. Rule 17g–4 requires that a Nationally Recognized Statistical Rating Organization ("NRSRO") has written policies and procedures to prevent the misuse of material nonpublic information including: procedures designed to prevent the inappropriate dissemination of material nonpublic information obtained in connection with the performance of credit rating services; procedures designed to prevent a person associated with the rating organization from trading on material nonpublic information; and procedures designed to prevent the inappropriate dissemination of a pending credit rating.[2]

It is anticipated that 30 credit rating agencies will register with the Commission as NRSROs under Section 15E of the Exchange Act. The Commission estimates that it will take approximately 50 hours for an NRSRO to establish procedures in conformance with Rule 17g-4 for a total one-time burden for the 30 credit rating agencies the Commission estimates will register as NRSROs of 1,500 hours.[3]

Written comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: January 13, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1021 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15c3–1f; SEC File No. 270–440; OMB Control No. 3235–0496.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") is soliciting comment on the existing collection of information provided for in the following rule: Appendix F to Rule 15c3–1 ("Appendix F") (17 CFR 240.15c3–1f) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) ("Exchange Act").

Appendix F requires a broker-dealer choosing to register, upon Commission approval, as an OTC derivatives dealer to develop and maintain an internal risk management system based on Value-at-Risk ("VAR") models. Appendix F also requires the OTC derivatives dealer to notify Commission staff of the system and of certain other periodic information including when the VAR model deviates from the actual performance of the OTC derivatives dealer's portfolio. It is anticipated that a total of five (5) broker-dealers will spend 1,000 hours per year complying with Appendix F. The total burden is estimated to be approximately 5,000 hours.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Charles Boucher, Director/Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov.*

Dated: January 13, 2010.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1022 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61342; File No. SR–BX–2009–088]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Fee Schedule of the Boston Options Exchange Facility

January 13, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

[1] 15 U.S.C. 78o–7.

[2] *See* Rule 17g–4. Release No. 34–55231 (Feb. 2, 2007), 72 FR 6378 (Feb. 9, 2007); and Release No. 34–55857 (June 5, 2007), 72 FR 33564 (June 18, 2007).

[3] 50 hours × 30 NRSROs = 1,500 hours.

("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 31, 2009, NASDAQ OMX BX, Inc. (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Fee Schedule of the Boston Options Exchange Group, LLC ("BOX"). The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room, on the Exchange's Internet Web site at *http://nasdaqomxbx.cchwallstreet.com/NASDAQOMXBX/Filings/*, and on the Commission's Web site at *http://www.sec.gov*.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The BOX Fee Schedule currently lists certain execution fees as "standard" trading fees, meaning that these execution fees are not dependent upon whether the transaction added or removed liquidity on BOX.[5] These standard fees, specifically within Sections 2 and 3 of the BOX Fee Schedule, are applicable for Broker Dealer proprietary accounts and Market Maker accounts, respectively, and are currently set at $0.20 per contract executed.[6] The Exchange proposes to make the following adjustments to standard trading fees:

Broker Dealer Trading Fees

Section 2 of the BOX Fee Schedule describes the current standard transaction fee applicable to Broker Dealer transactions which is currently set at $0.20. The Exchange proposes that the standard fee for Broker Dealer transactions in all options classes, excluding transactions in Standard & Poor's Depositary Receipts® ("SPY"), Powershares® QQQ Trust Series 1 ("QQQQ") and iShares Russell 2000® Index Fund ("IWM") and transactions in the Price Improvement Period ("PIP"), be set at $0.25 per contract.

Market Maker Trading Fees:

The Exchange proposes to amend Section 3 of the BOX Fee Schedule relating to transaction fees applicable to BOX Market Makers.[7] Specifically, the Exchange proposes to adopt a per contract transaction fee that is based on the number of contracts a BOX Market Maker executes in a month, excluding transactions in SPY, QQQQ and IWM and transactions within the PIP, as follows: [8]

Average daily volume (ADV) for Market Maker	Per contract
ADV of 150,001 contracts and greater	$0.13
ADV of 100,001 contracts to 150,000 contracts	0.16
ADV of 50,001 contracts to 100,000 contracts	0.18
ADV of 10,001 contracts to 50,000 contracts	0.20
ADV of 0 contracts to 10,000 contracts	0.25

This proposed tiered fee schedule is designed to incent BOX Market Makers to increase their quoting and trading activity on BOX. As a Market Maker's monthly trading volume increases the per-contract fee that a Market Maker is charged for such executions is decreased. The Exchange proposes that the new tiered fees apply to all BOX Market Makers for transactions in all classes traded on BOX (excluding executions which occur in the PIP auction and executions in SPY, QQQQ, & IWM). The BOX Market Maker's ADV will be calculated at the end of each trading month. All executions for that month will be charged the same per-contract fee rate according to the respective ADV achieved by the Market Maker.

Section 3(b) of the BOX Fee Schedule currently sets forth a volume discount that is applicable to the execution fees of BOX Market Makers. The volume discount currently is $0.03 and $0.05 per contract upon the Market Maker achieving an ADV of 25,000 and 50,000 contracts per month, respectively. The tiered fee schedule, as outlined above, will effectively apply the same goal as the Market Maker volume discount, which is to incent more quoting activity and trading volume by Market Makers on BOX. The Exchange therefore proposes to eliminate, in its entirety, the Market Maker volume discount of Section 3(b) of the BOX Fee Schedule.

Reduction of Fees and Credits in Section 7

The Exchange proposes to reduce the existing credits and fees within Section 7 for both Non-Penny Pilot Classes and Penny Pilot Classes, from $0.75 to $0.55 and from $0.20 to $0.15, respectively and for transactions in the PIP, from $0.20 to $0.15.[9] These credits and fees apply equally to all account types, whether Public Customer, Firm or Market Maker and are in addition to any applicable trading fees, as described in Sections 1 through 3 of the BOX Fee Schedule.

For example, a Public Customer Order in a Non-Penny Pilot Class is entered

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Section 7 of the BOX Fee Schedule which sets forth any applicable "liquidity fees and credits."

[6] According to Section 1 of the BOX Fee Schedule a Public Customer is charged $0.15 per executed contract of an Improvement Order on its behalf in the PIP where that order is not submitted as a Customer PIP Order ("CPO") whereby it is labeled as a "non-CPO." There are no other trading fees for any other Public Customer Orders which may be executed on BOX, including CPOs and Public Customer orders on the Book, except for the charges and credits described in Section 7 of the BOX Fee Schedule.

[7] The fees proposed herein for Market Makers vary from the fees proposed for Broker Dealers as the obligations for the two are different. For example, Market Makers must maintain active two-sided markets in options classes to which they are assigned and also have certain restrictions regarding trading activity in classes outside of their assignment, both of which do not apply to Broker Dealers on BOX.

[8] The current standard Market Maker fee is $0.20 per contact.

[9] The Exchange notes that prior to this proposal the fees and credits of Section 7 did not apply to transactions in SPY, QQQQ and IWM. Similarly, the reduction in fees discussed in this section ("Reduction of Fees and Credits in Section 7") do not apply to transactions in SPY, QQQQ and IWM.

into the BOX Trading Host and executes against a Broker Dealer's order resting on the BOX Book. The Public Customer is the remover of liquidity and the Broker Dealer is the adder of liquidity. The Public Customer will receive a $0.55 ''removal'' credit and the Broker Dealer will be charged a $0.55 ''add'' fee. The Public Customer will receive a $0.55 total credit (zero charge from Section 1 plus the $0.55 ''removal'' credit) and the Broker Dealer will be charged $0.80 total (the $0.55 fee for adding liquidity in addition to the standard $0.25 transaction fee).[10]

Fees and Charges to SPY, QQQQ, and IWM

The Exchange Traded Fund Shares ("ETFs") SPY, QQQQ and IWM are among the most actively traded multiply listed options classes across all of the options exchanges. The Exchange believes that the characteristics that these ETFs share among themselves make it appropriate that pricing for transactions in these classes be set on par with each other. Furthermore, the Exchange believes that the volume and liquidity exhibited in these classes is such that the pricing applicable to these classes be set apart from the pricing applicable to all other options classes listed and traded on BOX.

Therefore, the Exchange proposes that the standard fee for transactions in SPY, QQQQ and IWM be set at $0.10 per contract for Broker Dealers and at $0.05 per contract for BOX Market Makers.[11] The proposed different rate as between Broker Dealers and BOX Market Makers is based upon the obligations that Market Makers undertake on BOX, such as posting continuous two-sided quotes, which Broker Dealers are not subject to.

The credits and fees of Section 7 of the BOX Fee Schedule currently do not apply to executions in the classes SPY, QQQQ or IWM. The Exchange proposes to apply Section 7's credits and fees to transactions in these three classes as is currently applied to transactions in all other classes on BOX. The Exchange proposes that the fees and credits apply equally for these three classes at $0.05 for both the fees and credits.

Transactions in the PIP

The BOX PIP is a mechanism by which BOX Participants can obtain executions and price improvement of their customers' orders. Because executions in the PIP are separate and distinct from non-PIP executions the Exchange believes that pricing for executions that take place within the PIP also be separate and distinct from non-PIP execution rates.[12] Therefore, the Exchange proposes that the standard fee for transactions within the PIP, including transactions in SPY, QQQQ and IWM, be set at $0.20 per contract, both for Broker Dealers and for BOX Market Makers.[13]

Non-Substantive Changes

The Exchange is also proposing various non-substantive changes to the BOX Fee Schedule. These changes are necessary for reasons such as the elimination of certain Fee Schedule text (*e.g.* the proposed elimination of the Market Maker Volume Discount of Section 3(b)) or the renumbering of certain sections of the Fee Schedule (*e.g.* Section 2(b) renumbered to Section 2(c)). Further non-substantive changes have been proposed either to add greater clarity or remove language from the Fee Schedule which is now considered confusing in light of the substantive changes that are being proposed herein.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[14] in general, and Section 6(b)(5) of the Act,[15] in particular, as well as Section 6(b) of the Act,[16] in general, and Section 6(b)(4) of the Act,[17] in particular in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. In particular, the proposed change will allow the fees charged on BOX to remain competitive with other exchanges as well as apply such fees in a manner which is equitable based upon the particular account type, e.g. Market Maker or Broker Dealer, for which such transactions are executed. The obligations of Market Makers on BOX and Brokers Dealers that execute transactions on BOX are different. For example, BOX Market Makers must maintain active two-sided markets in options classes to which they are assigned and also have certain restrictions regarding trading activity in classes outside of their assignment, both of which do not apply to Broker Dealers on BOX.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act[18] and Rule 19b–4(f)(2)[19] thereunder, because it establishes or changes a due, fee, or other charge applicable only to a member.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–BX–2009–088 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[10] This example presupposes that the proposed increase in Broker Dealer fees, from $0.20 to $0.25, is in effect.

[11] Currently the standard fees charged for transactions in SPY, QQQQ and IWM are $0.20 for both Market Maker and Broker Dealer transactions. As is currently the case, most executions on BOX on behalf of Public Customers will be free.

[12] BOX Options Participants are able to compete within the PIP auction for a portion of the order on the opposite side of the Public Customer PIP Order that must be filled by submitting Improvement Orders.

[13] Transactions within the PIP are presently subject to a $0.20 fee. This proposal merely breaks fees for PIP transactions into their own distinct line item in the Fee Schedule. *See* Ex. 5. Transactions within the PIP will also be subject to the fees and credits of Section 7 of the BOX Fee Schedule, as proposed and discussed above.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4).

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

[19] 17 CFR 240.19b–4(f)(2).

Securities and Exchange Commission, 100 F Street, NE., Washington DC 20549–1090.

All submissions should refer to File Number SR–BX–2009–088. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BX–2009–088 and should be submitted on or before February 11, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1015 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61343; File No. SR–NYSEAmex–2009–94]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Amending Commentary .01 to Rule 903G

January 13, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 23, 2009, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .01 to Rule 903G in order to extend until August 31, 2010, the current pilot period regarding the minimum value size for opening a FLEX Equity Option transaction ("Pilot Program"). The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Pilot Program provides for an initial series opening transaction size to be 150 contracts (or $1 million in underlying value, whichever is less).[4] The Exchange believes that the proposed reduction of the minimum value size for opening a series provides FLEX participating members and their customers with greater flexibility in structuring the terms of FLEX Equity Options to better suit the FLEX traders' particular needs. Prior to the initiation of the Pilot Program, the minimum opening transaction value size in the case of FLEX Equity Options series was the lesser of (i) 250 contracts or (ii) the number of contracts overlying $1 million in the underlying series.[5] The Pilot Program modifies the minimum opening size formula by reducing the "250 contracts" component to "150 contracts" (the $1 million underlying value component continues to apply unchanged).[6]

The Pilot Program expired on December 19, 2009. The purpose of this proposed rule change is to extend the pilot period that applies to the minimum value size for an opening Flex Equity Options transaction until August 31, 2010. This is merely an extension. The Exchange is not seeking any other changes to the Pilot Program.[7]

In support of the proposed rule change, the Exchange is submitting to the commission [sic] a Pilot Program report (the "Report") detailing the Exchange's experience with the Pilot Program. Specifically, the Report contains (i) data and analysis on the open interest and trading volume in FLEX Equity Options for which series were opened with a minimum opening size of 150 to 249 contracts with less than $1 million in underlying value; and (ii) analysis on the types of investors that initiated opening FLEX Equity Options transactions (*i.e.,* institutional, high net worth or retail, if any). The Exchange is submitting the Report under separate cover and seeking confidential treatment under the Freedom of Information Act.

The Exchange believes that maintaining the minimum opening transaction value size broadens the base of institutional investors that use FLEX Equity Options to manage their trading

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 58037 (June 26, 2008), 73 FR 38008 (July 2, 2008).

[5] Under this formula, an opening transaction in a FLEX Equity series in a stock priced at $40 or more would reach the $1 million limit before it would reach the contract size limit, *i.e.,* 250 contracts times the multiplier (100) times the stock price ($40) equals $1 million in underlying value. For a FLEX Equity series in a stock priced at less than $40, the 250 contract size limit applies.

[6] Under this proposed formula, an opening transaction in a FLEX Equity series in a stock priced at approximately $66.67 or more would reach the $1 million limit before it would reach the contract size limit, *i.e.,* 150 contracts times the multiplier (100) times the stock price ($66.67) equals just over $1 million in underlying value. For a FLEX Equity series in a stock priced at less than $66.67, the 150 contract size limit would apply.

[7] The Commission notes that the Exchange has stated that it will provide the Commission with an updated report 45 days before any request to extend or make permanent the current pilot program regarding the minimum value size for opening a FLEX Equity Option transaction. *See* E-mail from Andrew Stevens, Chief Counsel, U.S. Equities and Derivatives, NYSE Amex, to Jennifer Colihan, Special Counsel, Division of Trading and Markets, Commission, dated January 13, 2010.

and investment risk, including investors that currently trade in the over-the-counter market for customized options which can take on contract characteristics similar to FLEX Options but for which similar opening size restriction do not apply. The Exchange believes that market participants benefit from being able to trade these customized options in an exchange environment in several ways, including, but not limited to, enhanced efficiency in initiating and closing out positions; increased market transparency; and heightened contra-party creditworthiness due to the role of The Options Clearing Corporation as issuer and guarantor of FLEX Equity Options.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act [8] in general, and furthers the objectives of Section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system. Specifically, the Exchange believes that reducing the minimum value sizes for certain opening transactions in FLEX Equity Options series thereby providing FLEX participating members and their customers greater flexibility to trade FLEX Equity Options will benefit the marketplace and market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6)(iii) thereunder.[10]

A proposed rule change filed under Rule 19b-4(f)(6) [11] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[12] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that the original pilot program was published for notice and comment and no comments were received.[13] In addition, extending the pilot through August 31, 2010 does not raise any new or novel regulatory issues that were not previously considered in approving the original pilot. Based on the above, the Commission designates the proposal as operative upon filing.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2009–94 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEAmex–2009–94. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549–1090 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *http://www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2009–94 and should be submitted on or before February 11, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1017 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] *See supra* note 4.

[14] For purposes only of waiving the operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61348: File No. SR–ISE–2010–01]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposal To Codify Certain Provisions of the Options Listing Procedures Plan Into ISE's Rules

January 14, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 4, 2010, the International Securities Exchange, LLC (the "Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Rule 504 and adopt Rule 504A to apply uniform objective standards to the range of options series exercise (or strike) prices available for trading on the Exchange. The text of the proposed rule change is available on the Exchange's Web site *http://www.ise.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to implement in ISE rules changes that were recently made to the Plan for the Purpose of Developing and Implementing Procedures Designated to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934, also known as the Options Listing Procedures Plan ("OLPP"), in Amendment No. 3 thereto.[5] Proposed new ISE Rule 504A incorporates uniform objective standards to the range of options series exercise (or strike) prices available for trading on the Exchange, as a quote mitigation strategy intended to reduce the overall number of option series available for trading, which will in turn lessen the rate of increase in quote traffic ("range limitations" or "range limitation strategy").

Rule 504 currently indicates what series of option contracts may be open for trading after a particular class of options has been approved for trading on the Exchange. Proposed new Rule 504A applies certain "range limitations" to the addition of new series for options classes overlying equity securities, Exchange Traded Fund Shares ("ETFs"), or Trust Issued Receipts ("TIRs").

As proposed in Rule 504A, if the price of the underlying security is less than or equal to $20, the Exchange would not list new option series with an exercise price more than 100 percent above or below the price of the underlying security.[6] If the price of the underlying security is greater than $20, the Exchange would not list new options series with an exercise price more than 50 percent above or below the price of the underlying security. The proposal provides for an objective basis upon which the underlying prices for the price range limitations described above shall be determined, specifically in regard to intra-day add-on series and next-day series additions, new expiration months and for options series to be added as a result of pre-market trading.

This proposed rule change also allows the Exchange to designate up to five underlying securities to which, instead of the aforementioned 50 percent restriction, a 100 percent restriction would apply. These designations would be made on an annual basis and cannot be removed during the calendar year unless the options class is delisted by the Exchange, in which case the Exchange may designate another class to replace the delisted class. If a designated class is delisted by the Exchange but continues to trade on at least one other exchange, any additional series for the class which are added from that point forward would again be subject to the proposed exercise price range limitations, unless the class is subsequently designated by another exchange. The proposal also provides a procedure for the Exchange to request, if conditions warrant, additional case-by-case exceptions even when it has already so designated five underlying securities.

In addition, the Exchange may request, on a case-by-case basis, an exemption when it desires to list a series from the 100 percent range limitation. This procedure would enable the Exchange to list options series with strike prices that are more than 100 percent above or below the price of an underlying security, if unanimously agreed upon by all exchanges that list options overlying the security.[7]

The Exchange notes that the proposal would not restrict its ability to list options series in two situations. First, the Exchange would not be restricted from listing options series that have been properly listed by another exchange. And second, the proposal expressly eliminates the applicability of range limitations with regard to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 60531 (August 19, 2009), 74 FR 43173 (August 26, 2009) (Order approving Amendment No. 3 to the OLPP, which would apply uniform objective standards to the range of options series exercise or strike prices available for trading on exchanges that are sponsors of OLPP). The sponsors of OLPP include ISE, Chicago Board Options Exchange, Inc.; NASDAQ OMX PHLX, Inc.; NASDAQ OMX BX, Inc.; The NASDAQ Stock Market LLC; NYSE Amex, LLC; and NYSE Arca, Inc. (together known as the "Plan Sponsor Exchanges"). The OLPP is a national market system plan that, among other things, sets forth procedures governing the listing of new options series and replaces and supersedes the Joint-Exchange Options Plan ("JEOP"). *See* Securities Exchange Act Release No. 44521 (July 6, 2009) [sic], 66 FR 36809 (July 13, 2001) (Order approving OLPP). *See also* Securities Exchange Act Release No. 29698 (September 17, 1991), 56 FR 48954 [sic] (September 25, 1991) (Order approving JEOP).

[6] This restriction would not prohibit the listing of at least three options series per expiration month in an options class.

[7] Application of any of the aforementioned exceptions and/or exemptions to the strike price range limitations for an underlying security would be available to all exchanges listing options on such security.

listing of $1 strike prices in option classes participating in the $1 Strike Program, and the listing of series of FLEX options.

The Exchange believes that the proposed rule change implementing range limitation strategies for equity, ETF, and TIR options should be beneficial in reducing quote traffic on the Exchange and in the options industry.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(5) of the Act's [9] requirements that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest. In particular, the Exchange believes that codifying certain range limitation provisions of the OLPP, as amended, serves to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6)(iii) thereunder.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–ISE–2010–01 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–01 and should be submitted on or before February 11, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1019 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A)(iii).

[11] 17 CFR 240.19b–4(f)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61363; File No. PCAOB–2009–02]

Public Company Accounting Oversight Board; Order Approving Proposed Rules on Auditing Standard No. 7, Engagement Quality Review, and Conforming Amendment

January 15, 2010.

I. Introduction

On August 4, 2009, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") a notice (the "Notice") of proposed rules (File No. PCAOB–2009–02) on Auditing Standard No. 7, *Engagement Quality Review,* and Conforming Amendment to the Board's Interim Quality Control Standards, pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"). Notice of the proposed rules was published in the **Federal Register** on November 5, 2009.[1] The Commission received nine comment letters relating to the proposed rules. For the reasons discussed below, the Commission is granting approval of the proposed rules. As specified by the Board, the rules are

[1] See SEC Release No. 34–60903 (October 29, 2009); 74 FR 57357 (November 5, 2009).

effective for the engagement quality review ("EQR") of audits and interim reviews for fiscal years beginning on or after December 15, 2009.

II. Description

Section 103 of the Act directs the Board, among other things, to set standards for public company audits, including a requirement for each registered public accounting firm to "provide a concurring or second partner review and approval of [each] audit report (and other related information), and concurring approval in its issuance * * *." According to the Board, the proposed rules would strengthen and expand the Board's existing requirements for concurring reviews.

According to the Board, a well-performed EQR can serve as an important safeguard against erroneous or insufficiently supported audit opinions and, accordingly, can contribute to audit quality. As described in the Notice, the engagement quality review will serve as a meaningful check on the work performed by the engagement team, and the Board believes this should increase the likelihood that a registered public accounting firm will identify any significant engagement deficiencies before it issues its audit report.

Auditing Standard No. 7 requires the engagement quality reviewer (or the "reviewer") to evaluate the significant judgments made and related conclusions reached by the engagement team in forming the overall conclusion on the engagement and in preparing the engagement report. Auditing Standard No. 7 also requires the engagement quality reviewer to perform certain procedures designed to focus the reviewer on those judgments and conclusions. As discussed in the Notice, the procedures required of an engagement quality reviewer are different in nature from the procedures required of the engagement team. Unlike the engagement team, a reviewer does not perform substantive procedures or obtain sufficient evidence to support an opinion on the financial statements or internal control over financial reporting. If more audit work is necessary before the reviewer may provide concurring approval of issuance, the engagement team—not the reviewer—is responsible under PCAOB standards for performing the work. In contrast, the reviewer fulfills the obligation to perform an EQR by holding discussions with the engagement team, reviewing documentation, and determining whether to provide concurring approval of issuance.

The proposed rules also amend the Board's interim quality control standards by replacing the third sentence of paragraph 18 of QC section 20, "System of Quality Control for a CPA Firm's Accounting and Auditing Practice" with a statement that a firm's quality control policies and procedures also should address engagement quality reviews pursuant to PCAOB Auditing Standard No. 7.

III. Discussion

The Commission received nine comment letters on the proposed rules. Seven letters were received from registered public accounting firms, and two letters were received from professional organizations.[2] The commenters generally agreed with the requirements of Auditing Standard No. 7 and also expressed agreement with the changes made by the PCAOB in response to its comment process.[3]

PCAOB Use and Purpose of Release Text

Many of the comments indicated that there is a lack of clarity resulting from perceived inconsistencies between Auditing Standard No. 7 and text in the Board's adopting release.[4] One commenter expressed a concern whether the release text has the "same weight" as the standard itself.[5] One commenter expressed a concern that the release text issued with an adopted standard is not subject to the PCAOB's comment process.[6]

The release text summarizes issues that the Board considered significant in reaching the conclusions set forth in the standard, including responses to comments and the rationale for accepting certain approaches and rejecting others. The Commission publishes notice of and approves the "Rules of the Board" as defined in Section 2(a)(13) of the Act, including the auditing standards adopted by the Board. The release text accompanying the Board's issuance of an auditing standard is not part of the "Rules of the Board" that are approved by the Commission; rather, it is a statement made by the PCAOB to provide insight into the Board's decisionmaking process.

Documentation of the EQR

Commenters generally expressed agreement with the documentation requirement as set forth in Auditing Standard No. 7.[7] Many of the same commenters, however, expressed concerns regarding an example in the PCAOB's adopting release that describes the documentation requirement for significant engagement deficiencies identified by the engagement quality reviewer. The release states that "the EQR documentation should contain sufficient information to enable an experienced auditor, having no previous connection with the engagement, to understand, e.g., the significant deficiency identified, how the reviewer communicated the deficiency to the engagement team, why such matter was important, and how the reviewer evaluated the engagement team's response."

Commenters were concerned that the example in the release could be read to be inconsistent with the requirement in the standard and could result in unintended consequences in terms of performance. The primary concern was that the engagement quality reviewer may be compelled to document every interaction with the engagement team, not knowing whether a matter will ultimately be identified as a significant engagement deficiency. Commenters viewed this as a documentation requirement for an EQR that is incremental to the requirements of PCAOB Auditing Standard No. 3, *Audit Documentation.* Auditing Standard No. 3 does not require the auditor to document each discussion and preliminary conclusion.

In addition, one commenter was concerned that the example provided in the PCAOB's adopting release may disrupt the communication between the engagement team and the engagement quality reviewer.[8] The commenter expressed a view that, if unable to

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[2] See comments of Deloitte & Touche LLP ("Deloitte"), Ernst & Young LLP ("EY"), Grant Thornton LLP ("Grant"), KPMG LLP ("KPMG"), McGladrey & Pullen LLP ("McGladrey"), Piercy Bowler Taylor & Kern ("PBTK"), PricewaterhouseCoopers LLP ("PWC"), Center for Audit Quality ("CAQ"), and Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce ("CCMC").

[3] One commenter (CCMC) provided comments related to the PCAOB's standard-setting process in general, including due process and convergence with international auditing standards. These comments were similar to comments received by the PCAOB during its standard-setting process for Auditing Standard No. 7. In response, the PCAOB stated in its adopting release for Auditing Standard No. 7 that it continuously endeavors to improve its processes, including the standard-setting process, and is considering comments it receives. The Commission encourages the Board to continue to consider comments to improve the Board's standard-setting process. The Commission will continue to provide oversight as the Board endeavors to improve all of its processes.

[4] See comments of CAQ, CCMC, Deloitte, EY, Grant, KPMG, McGladrey, and PWC.

[5] See comments of PBTK.

[6] See comments of CCMC.

[7] See comments of CAQ, Deloitte, EY, Grant, KPMG, McGladrey, and PWC.

[8] See comments of KPMG.

determine which matters may be significant, the engagement quality reviewer would need to document every issue and therefore would not perform any review procedures until the engagement team completed all audit work and finalized all of its conclusions.

The Commission does not believe that there is any inconsistency between the example in the adopting release and the requirements of Auditing Standard No. 7. The PCAOB specified in its adopting release that the example applies "if a reviewer identified a significant engagement deficiency to be addressed by the engagement team." We believe that documentation suggested in the example from the adopting release is appropriate after the engagement quality reviewer has concluded that he or she has identified a significant engagement deficiency. However, since several comments were related to this point, we encourage the PCAOB to provide further implementation guidance on the documentation requirement.[9]

Standard of Care

Commenters generally expressed agreement with the revisions that the PCAOB made to the description of due professional care in the standard in response to comments, including establishing the expected standard of performance by referring to AU Section 230, *Due Professional Care in the Performance of Work* ("AU 230").[10] However, many of the same commenters expressed concern with language in the adopting release about the concept of due professional care. Particularly, many commenters pointed to language in the adopting release that a qualified reviewer who has performed the required review with due professional care "will, necessarily, have discovered any significant engagement deficiencies that could reasonably have been discovered under the circumstances." Certain commenters expressed a view that the language in the release could be read as requiring absolute assurance or a "flawless" review.[11]

The Commission believes that the PCAOB adequately responded to comments in this area during its reproposal process. We do not find any inconsistency between the PCAOB's adopting release and the requirement to conduct the EQR with due professional care as described in paragraphs 12 and 17 of Auditing Standard No. 7. Paragraph 12 of Auditing Standard No. 7 references AU 230, which is the source of guidance regarding due professional care in the PCAOB's interim auditing standards. Moreover, the PCAOB specified in its adopting release that "the Board is not redefining due professional care in the context of the EQR standard."

Definition of Partner

One commenter suggested that the PCAOB revise the description of the qualifications of the engagement quality reviewer in Auditing Standard No. 7 to specify that equity ownership in the firm is not a requirement for a reviewer.[12] The commenter believed Board language in its adopting release on the distinction between "partner" and "non-partner" could be considered "muddying and potentially biasing (and perhaps unintended) restrictive language."

The discussion of requiring a partner or an individual in an equivalent position to perform the EQR is consistent with the Commission's independence rules.[13] We do not believe that equity ownership is necessarily inherent in the analysis; rather the analysis of whether an individual is a partner or in an equivalent position is based on the organization of the individual firm and other related facts and circumstances.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed PCAOB Rules on Auditing Standard No. 7, *Engagement Quality Review*, and Conforming Amendment (File No. PCAOB–2009–02) are consistent with the requirements of the Act and the securities laws and are necessary or appropriate in the public interest or for the protection of investors.

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that the proposed PCAOB Rules on Auditing Standard No. 7, *Engagement Quality Review*, and Conforming Amendment (File No. PCAOB–2009–02) be and hereby are approved.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–1028 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

[9] We note clarifications have been provided in other contexts. For example, see PCAOB Staff Q&A at *http://www.pcaobus.org/Standards/Staff_Questions_and_Answers/2009/09-02_FASB_Codification.pdf*.

[10] See comments of CAQ, Deloitte, EY, Grant, KPMG, and PWC.

[11] See comments of Deloitte, Grant, and KPMG.

[12] See comments of PBTK.

[13] 17 CFR 210.2–01(f)(7)(ii).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61349; File No. SR–CBOE–2010–004]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify Trading Hours for CBSX

January 14, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 12, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by CBOE. CBOE has submitted the proposed rule change under Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify trading hours for the CBOE Stock Exchange ("CBSX"). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CBSX proposes to designate the time period from 8:30 a.m. CT until 3 p.m. CT as "CBSX Regular Trading Hours" for stock, IPR and IPS transactions and to make certain corresponding changes. CBSX also proposes to designate the time periods from 8 a.m. CT until 8:30 a.m. CT and 3 p.m. CT until 3:30 p.m. CT as "CBSX Extended Trading Hours" and to make certain corresponding changes. The proposed change would be effective as of February 1, 2010. CBOE also proposes to make changes corresponding to SR–CBOE–2009–083, which changed the time at which CBSX opens from 8:15 a.m. CT to 8 a.m. CT.[5] All changes have been requested by CBSX users. Other US-based exchanges permit trading after 3 p.m. CT, including the Nasdaq Stock Market.[6]

These changes do not change the effective "normal trading hours," on CBSX, which is and will remain from 8:30 a.m. CT to 3 p.m. CT. The periods from 8 a.m. CT until 8:30 a.m. CT and 3 p.m. CT until 3:30 p.m. CT will not qualify as "normal trading hours." Therefore, trading rules, policies and Designated Primary Market-Maker ("DPM") obligations during these periods may differ from those during normal trading hours, [sic] Some of these differences already exist in CBSX rules.

Specifically, the "Unusual Market Conditions" rule pertaining to trading halts for trading of IPRs and IPSs imposes different procedures during normal trading hours than it does during the 8 a.m. CT to 8:30 a.m. CT and 3:15 p.m. to 3:30 p.m. periods.[7] This difference already existed in CBSX rules; the proposed rule change would adjust the time periods listed in Rule 52.3(c)(1).

CBSX rules also already included differences between normal trading hours and the non-normal trading periods in the numerical guidelines used to determine whether or not a trade qualifies as "clearly erroneous." The proposed rule change would also adjust the time periods listed in Rule 52.4(c)(1).

Because the periods from 8 a.m. CT to 8:30 a.m. CT and 3 p.m. CT to 3:30 p.m. CT are not "normal trading hours," CBSX DPMs will not be required to provide continuous quotes during these periods. The proposed rule change would amend Rule 53.56 to reflect this.

The Exchange represents that the later closing time will have no implications for CBSX systems. The Exchange represents that CBSX traders will have been notified of the time change via circular prior to the rule change taking effect.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Securities Exchange Act of 1934 ("Act")[8] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[9] Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5)[10] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Permitting trading until later in the day will permit investors greater opportunity to participate in the market, thereby removing an impediment to trading.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

CBOE has designated the proposed rule change as one that: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

CBOE has requested that the Commission waive a portion of the 30-day operative delay to permit the proposed rule change to become operative on February 1, 2010. CBOE believes that such waiver will facilitate CBSX providing its members with extended trading opportunities that are already available on other exchanges.[13] The Commission grants CBOE's request.[14] The Commission believes that such action is consistent with the protection of investors and the public interest because other U.S. exchanges currently provide extended trading hours subject to similar rules relating to investor protection.[15] Accordingly, CBOE's proposal does not appear to present any novel regulatory issues.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR–CBOE–2010–004 on the subject line.

[5] See SR–CBOE–2009–083, 74 FR 57718 (November 9, 2009).

[6] See Nasdaq Stock Market Rules 4617 and 4120(b)(4), NYSEArca Rule 7.34(a), and BATS Rule 11.1(a).

[7] See CBOE Rule 52.3(c)(1).

[8] 15 U.S.C. 78s(b)(1).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). Rule 19b–4(f)(6)(iii) also requires an exchange to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change or such shorter time as the Commission may designate. The Exchange satisfied this requirement.

[13] *See* note 6, *supra.*

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] *See* CBOE Rule 31.5P.(2)(a); CBOE Rule 51.2, Interpretation and Policy .01 (providing required disclosures for CBSX extended trading hours); and CBOE Rule 51.8(a) (prohibiting the entry of market orders during CBSX extended trading hours). *See also* BATS Rules 3.21 and 11.9(a)(2); Nasdaq Rules 4631 and 5740(a)(2); and NYSEArca Rule 7.34(e).

Paper Comments:

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–004. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–CBOE–2010–004 and should be submitted on or before February 11, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1020 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61347; File No. SR–NASDAQ–2010–003]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the NASDAQ Stock Market LLC To Amend the $1 Strike Program To Allow the Listing of $1 LEAPS

January 13, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 11, 2010, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposal for the NASDAQ Options Market ("NOM" or "Exchange") to amend its Chapter IV Supplementary Material .02 to Section 6 (Series of Options Contracts Open for Trading) to expand the Exchange's $1 Strike Price Program ("Program" or "$1 Strike Program") [3] to allow listing long-term option series ("LEAPS") [4] in $1 strike price intervals up to $5 in up to 200 option classes in individual stocks.

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b–4(f)(6)(iii).[5]

The text of the proposed rule change is available from Nasdaq's Web site at *http://nasdaq.cchwallstreet.com/Filings/*, at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This proposed rule change is based on a filing previously submitted by Chicago Board Options Exchange, Incorporated ("CBOE") that was recently approved by the Commission.[6]

The purpose of the proposal is to expand the $1 Strike Program in a limited fashion to allow NASDAQ to list new series in $1 strike price intervals up to $5 in LEAPS in up to 200 option classes on individual stocks.

Currently, under the $1 Strike Program, the Exchange may not list option series having greater than nine months until expiration (LEAPS) at $1 strike price intervals for any class selected for the Program. The Exchange also is restricted from listing any series that would result in strike prices being $0.50 apart, unless the series are part of the $.50 Strike Program.[7]

NASDAQ believes that its proposal to allow limited listing of option series having greater than nine months until expiration (LEAPS) in the Program is appropriate and will allow investors to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The $1 Strike Price Program was initially approved as a pilot on March 12, 2008. *See* Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) (order approving). The program was subsequently made permanent and expanded. *See* Securities Exchange Act Release Nos. 58093 (July 3, 2008), 73 FR 39756 (July 10, 2008)(SR–NASDAQ–2008–057) (notice of filing and immediate effectiveness); and 59588 (March 17, 2009), 74 FR 12410 (March 24, 2009)(SR–NASDAQ–2009–025) (notice of filing and immediate effectiveness).

[4] Long-Term Equity Anticipation Securities (LEAPS) are long term options that expire from twelve to thirty-nine months from the time they are listed. Chapter IV Section 8. Long-term index options are considered separately in Chapter XIV Section 11. For purposes of the Program, long-term options (LEAPS) are considered to be option series having greater than nine months until expiration. Chapter IV Supplementary Material .02 to Section 6.

[5] 17 CFR 240.19b–4(f)(6)(iii).

[6] *See* Securities Exchange Act Release No. 60978 (November 10, 2009), 74 FR 59296 (November 17, 2009) (SR–CBOE–2009–068) (order approving proposed rule change to allow listing LEAPS in $1 Strike Program).

[7] Regarding the $0.50 Strike Program, *see* Chapter IV Supplementary Material .05 to Section 6 and Securities Exchange Act Release No. 60952 (November 6, 2009), 74 FR 59277 (November 17, 2009) (SR–NASDAQ–2009–099) (notice of filing and order approving). The $0.50 Strike Program establishes strike price intervals of $0.50 for options on stocks trading at or below $3.00.

establish option positions that are better tailored to meet their investment objectives, vis-à-vis credit risk, using deep out-of-the-money, long-term put options. These types of options are viewed as a viable, liquid alternative to over the counter-traded ("OTC") credit default swaps ("CDS"), because such options do not possess the negative characteristics associated with CDS, namely, lack of transparency, insufficient collateral requirements, and inefficient trade processing.

The Exchange notes that its proposal is limited in scope, as $1 strikes in LEAPS may only be listed up to $5 and in only up to 200 option classes. As is currently the case in the $1 Strike Program, the Exchange would not list series with $1.00 intervals within $0.50 of an existing $2.50 strike price in the same series.[8] As a result, the Exchange does not believe that this proposal will cause a significant increase in quote traffic.

Moreover, as the Commission is aware, the Exchange has adopted various quote mitigation strategies in an effort to lessen the growth rate of quotations. When it expanded the $1 Strike Price Program several months ago the Exchange included a delisting policy that would be applicable with regard to this proposed expansion; the Exchange has likewise established a number of other delisting policies.[9] The Exchange and other options exchanges amended the Options Listing Procedures Plan ("OLPP") in 2008 to impose a minimum volume threshold of 1,000 contracts national average daily volume ("ADV") per underlying class to qualify for an additional year of LEAP series.[10] Most recently, the Exchange, along with the other options exchanges, amended the OLPP to adopt objective, exercise price range limitations applicable to equity option classes, options on Exchange Traded Funds ("ETFs") and options on trust issued receipts ("TIRs")(the "range limitation strategy").[11] The Exchange has filed a rule change proposal to codify the range limitation strategy in its own rules.[12] The Exchange believes that these price range limitations, in conjunction with the delisting policies in place at the Exchange,[13] will have a meaningful quote mitigation impact.

The margin requirements set forth in Chapter XIII Sections 1 through 5 and the position and exercise requirements set forth in Chapter III Sections 7 and 9, respectively, will continue to apply to these new series, and no changes are being proposed to those requirements by this rule change.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority ("OPRA") have the necessary systems capacity to handle the additional traffic that may be associated with the listing and trading of LEAPS in the $1 Strike Program as proposed by this filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[14] in general, and furthers the objectives of Section 6(b)(5) of the Act[15] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the ability to list and trade LEAPS at $1 strike price intervals will benefit investors by giving them more flexibility to more closely tailor their investment and hedging decisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[16] and Rule 19b-4(f)(6) thereunder.[17]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission hereby grants that request.[18] The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it recently approved a proposal from CBOE which is nearly identical to the current proposal and on which no comments were received.[19] Therefore, the proposal is operative upon filing.

[8] However, strike prices of $2 and $3 are permitted within $0.50 of a $2.50 strike price for classes also selected for the $0.50 Strike Program. *See* proposed Chapter IV Supplementary Material .02(c) to Section 6, which is similar in this respect to the current Chapter IV Supplementary Material .02(b) to Section 6.

[9] For the $1 Strike Program delisting policy, *see* Securities Exchange Act Release No. 59588 (March 17, 2009), 74 FR 12410 (March 24, 2009) (SR–NASDAQ–2009–025) (notice of filing and immediate effectiveness). The $1 Strike Program delisting policy includes a provision stating that the Exchange may grant member requests and add strikes and/or maintain strikes in series of options classes traded pursuant to the Program that are eligible for delisting. For other delisting policies proposed and implemented by the Exchange, *see* Securities Exchange Act Release No. 60248 (July 6, 2009), 74 FR 33504 (July 13, 2009) (SR–NASDAQ–2009–063) (notice of filing and immediate effectiveness regarding Quarterly Options Series program); and Chapter IV Section 4(l) (low ADV delisting policy) and Securities Exchange Act Release No. 59923 (May 14, 2009), 74 FR 23902 (May 21, 2009) (SR–NASDAQ–2009–046) (notice of filing and immediate effectiveness regarding, among other things, delisting securities underlying low ADV options).

[10] *See* Securities Exchange Act Release No. 58630 (September 24, 2008), 73 FR 57166 (October 1, 2008) (File No. 4–443) (order approving Amendment No. 2 to OLPP).

[11] *See* Securities Exchange Act Release No. 60531 (August 19, 2009), 74 FR 43173 (August 26, 2009) (File No 4–443) (order approving Amendment No. 3 to OLPP). NASDAQ's proposal to list $1 strikes in LEAPs to $5 would not be subject to the exercise price range limitations contained in new paragraph (3)(g)(ii) of the OLPP.

[12] *See* Securities Exchange Act Release No. 61203 (December 18, 2009), 74 FR 68653 (December 28, 2009) (SR–NSDAQ–2009–108).

[13] *See, for example,* Securities Exchange Act Release No. 60248 (July 6, 2009), 74 FR 33504 (July 13, 2009) (SR–NASDAQ–2009–063) (notice of filing and immediate effectiveness regarding Quarterly Options Series program); and Chapter IV Section 4(l) (low ADV delisting policy) and Securities Exchange Act Release No. 59923 (May 14, 2009), 74 FR 23902 (May 21, 2009) (SR–NASDAQ–2009–046) (notice of filing and immediate effectiveness regarding, among other things, delisting securities underlying low ADV options).

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] *See* Securities Exchange Act Release No. 60978 (November 10, 2009), 74 FR 59296 (November 17, 2009) (approving SR–CBOE–2009–68).

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NASDAQ–2010–003 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NASDAQ–2010–003. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–NASDAQ–2010–003 and should be submitted on or before February 11, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1018 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61346; File No. SR–OC–2009–04]

Self-Regulatory Organizations; One Chicago, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change, as Modified by Amendment No. 1, Changing Its Listing Standards in Conformance With the November 19, 2009 Joint Order Modifying the Listing Standards Requirements Under Section 6(h) of the Securities Exchange Act of 1934 and the Criteria Under Section 2(a)(1) of the Commodity Exchange Act

January 13, 2010.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–7 under the Act,[2] notice is hereby given that on December 23, 2009, OneChicago, LLC ("OneChicago") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by OneChicago. OneChicago filed Amendment No. 1 to the proposal on January 11, 2010.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons. OneChicago also filed the proposed rule change with the Commodity Futures Trading Commission ("CFTC") under Section 5c(c) of the Commodity Exchange Act[4] on December 23, 2009.

I. Self-Regulatory Organization's Description of the Proposed Rule Change

OneChicago is proposing to amend Rule 906(b)(1) to conform its maintenance standards to those approved by both the SEC and the CFTC (together the "Commissions") in their Joint Order dated November 19, 2009 ("JO–2009").[5] OneChicago amended Rule 906(a)1 and 4 effective December 3, 2009.[6] The text of the proposed rule change is available on OneChicago's Web site at *http://www.onechicago.com,* on the Commission's Web site at *http://www.sec.gov*, at the principal office of OneChicago, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

OneChicago has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to permit security futures to maintain comparability with the options markets and to provide competitive financial tools that offer a variety of investing and hedging products for the public as set forth in the Commissions JO–2009. This proposed change is simply to conform to JO–2009.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(5) of the Act[7] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to protect investors and the public interest, and to remove impediments to and perfect the mechanism for a free and open market and a national market system. In particular, the proposed rule change will maintain comparability with the listed options markets. Additionally, the changes are consistent with those set forth in JO–2009.

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(7).

[2] 17 CFR 240.19b–7.

[3] Amendment No. 1 corrects typographical errors and provides the correct filing and effective date for the proposal. Specifically, Amendment No. 1 states that the proposal was filed, and became effective, on December 23, 2009, rather than December 2, 2009.

[4] 7 U.S.C. 7a–2(c).

[5] Securities and Exchange Commission Release No. 34–61027 (November 19, 2009). Joint Order Modifying the Listing Standards Requirements under Section 6(h) of the Securities Exchange Act of 1934 and the Criteria under Section 2(a)(1) of the Commodity Exchange Act.

[6] *See* OCX Rule filing 2009–03, December 2, 2009.

[7] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

OneChicago does not believe that the proposed rule change will have an impact on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments on the OneChicago proposed rule change have not been solicited and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change will become effective on December 23, 2009. Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.[8]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–OC–2009–04 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–OC–2009–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–OC–2009–04 and should be submitted on or before February 11, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–1016 Filed 1–20–10; 8:45 am]

BILLING CODE 8011–01–P

[8] 15 U.S.C. 78s(b)(1).

[9] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 6877]

Invitation for Recommendations for U.S. Authors and Reviewers to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)

ACTION: Invitation for recommendations for U.S. authors and reviewers to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC).

SUMMARY: The U.S. Department of State invites recommendations for qualified U.S. experts to serve as authors or reviewers of the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), which will be developed and finalized over the coming four years.

DATES: Qualified U.S. experts wishing to be considered for nomination should submit an electronic application and supporting material conforming to the information specified at *http://www.globalchange.gov* by February 15th, 2010.

SUPPLEMENTARY INFORMATION: The IPCC is an intergovernmental body that oversees the development of assessments on the state of knowledge on climate change by scientific and technical experts. In order to fulfill this role, the IPCC produces comprehensive assessment reports at regular intervals on major aspects of climate change and responses to it. These reports have been widely used as key references for the state of knowledge on climate change, including in international climate discussions under the *United Nations Framework Convention on Climate Change (UNFCCC)*. The United States has played a leading role in the IPCC since its inception, through official contributions and key leadership positions in IPCC report development, as well as through the contributions of many U.S. scientist and experts to the reports themselves. The *Fourth Assessment Report* was completed in November 2007.

Over 100 governments and organizations participate in the IPCC process that oversees the development of the comprehensive assessments. Governments develop and approve plans for reports, and nominate experts as lead authors and reviewers. Draft reports go through reviews by experts and governments, and IPCC member governments accept each final report, and approve their executive summaries (known as a "summary for policy makers") in a formal session of the IPCC. Three volumes are prepared under the auspices of three working groups. Working Group I assesses the scientific aspects of the climate system and climate change; Working Group II assesses the vulnerability of socio-economic and natural systems to climate change, negative and positive consequences of climate change, and options for adapting to it; and Working Group III assesses options for limiting greenhouse gas emissions and otherwise mitigating climate change. A fourth, shorter volume synthesizes the material found in the three working group volumes. IPCC reports are prepared by author teams consisting of scientists and technical experts according to agreed principles and procedures, which specify the responsibilities of authors and reviewers in the development of IPCC reports. Copies of completed reports, as well as the IPCC's principles and procedures and related information, can be found at *http://www.ipcc.ch*.

At the 31st session of the IPCC (Bali—26–29 October, 2009), delegates accepted the overall outline and the work program for the Fifth Assessment Report. Volumes of the report will be finalized in 2013 and 2014. The IPCC has formally requested that governments and participating organizations

nominate experts to serve as lead authors and reviewers of the various chapters of the report. To respond to this request, the U.S. Government is soliciting recommendations from any interested Federal, academic, non-governmental, or private sector entity. The U.S. government will review proposed nominations and develop a slate of nominees for forwarding to IPCC. Given the large number of individuals that are typically nominated by different member countries of the IPCC, selection as a U.S. nomination does not guarantee selection as an IPCC author.

Further information, including the IPCC request for nominations, the approved outlines of the three IPCC working groups for the AR5, a description of the roles and responsibilities associated with them, and a nomination form that must be completed for each nominee, may be found at either the IPCC Secretariat Web site (*http://www.ipcc.ch*) or USGCRP Web site (*http://www.globalchange.gov/*)

Dated: January 15, 2010.

Trigg Talley,

Director, Office of Global Change, Department of State.

[FR Doc. 2010–1098 Filed 1–20–10; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Funding Availability for the Small Business Transportation Resource Center Program

AGENCY: Office of the Secretary of Transportation (OST), Office of Small and Disadvantaged Business Utilization (OSDBU), Department of Transportation (DOT).

ACTION: Notice of Funding Availability.

SUMMARY: The Department of Transportation (DOT), Office of the Secretary (OST), Office of Small and Disadvantaged Business Utilization (OSDBU) announces the opportunity for; (1) Business centered community-based organizations; (2) transportation-related trade associations; (3) colleges and universities; (4) community colleges or; (5) chambers of commerce, registered with the Internal Revenue Service as 501C(6) or 501C(3) tax-exempt organizations, to compete for participation in OSDBU's Small Business Transportation Resource Center (SBTRC) program in the Southwest Region, the South Atlantic Region, and the Mid-South Atlantic Region. The Central, Great Lakes, Gulf, Mid Atlantic, Northeast, Northwest, and Southeast Regions will be competed at a later date as their cooperative agreements expire. A new West Central Region will also be competed at that time.

OSDBU will enter into Cooperative Agreements with these organizations to outreach to the small business community in their designated region and provide financial and technical assistance, business training programs, such as, business assessment, management training, counseling, technical assistance, marketing and outreach, and the dissemination of information, to encourage and assist small businesses to become better prepared to compete for, obtain, and manage DOT funded transportation-related contracts and subcontracts at the federal, state and local levels. Throughout this notice, the term "small business" will refer to: 8(a), Disadvantaged business enterprises (DBE), women owned small business (WOB), HubZone, service disabled veteran owned business (SDVOB), and veteran owned small business (VOSB). Throughout this notice, "transportation-related" is defined as the maintenance, rehabilitation, restructuring, improvement, or revitalization of any of the nation's modes of transportation.

Catalog of Federal Domestic Assistance (CFDA) Number: 20.910 Assistance to small and disadvantaged businesses.

Type of Award: Cooperative Agreement Grant.

Award Ceiling: $138,000.

Award Floor: $128,000.

Program Authority: DOT is authorized under 49 U.S.C. 332(b)(4), (5) & (7) to design and carry out programs to assist small disadvantaged businesses in getting transportation-related contracts and subcontracts; develop support mechanisms, including management and technical services, that will enable small disadvantaged businesses to take advantage of those business opportunities; and to make arrangements to carry out the above purposes.

DATES: Complete Proposals must be electronically submitted to OSDBU via email on or before February 16, 2010, 5 p.m. Eastern Standard Time. Proposals received after the deadline will be considered non-responsive and will not be reviewed. The applicant is advised to turn on request delivery receipt notification for email submissions. DOT plans to give notice of awards for the competed regions on or before the following dates:

Southwest Region February 28, 2010
South Atlantic Region March 31, 2010
Mid-South Atlantic Region March 31, 2010

ADDRESSES: Applications must be electronically submitted to OSDBU via e-mail at *SBTRC@dot.gov.*

FOR FURTHER INFORMATION: For further information concerning this notice, contact Mr. Arthur D. Jackson, U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization, 1200 New Jersey Avenue, SE., W56–462, Washington, DC 20590. Telephone: 1–800–532–1169. E-mail: *art.jackson@dot.gov.*

SUPPLEMENTARY INFORMATION:

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Full Text of Announcement

1. Introduction

1.1 Background

The United States Department of Transportation (DOT) established the Office of Small and Disadvantaged Business Utilization (OSDBU) in accordance with Public Law 95–507, an amendment to the Small Business Act and the Small Business Investment Act of 1958.

The mission of OSDBU at DOT is to ensure that the small and disadvantaged business policies and goals of the Secretary of Transportation are developed and implemented in a fair, efficient and effective manner to serve small and disadvantaged businesses throughout the country. The OSDBU also administers the provisions of Title 49, Section 332, the Minority Resource Center (MRC) which includes the duties of advocacy, outreach and financial services on behalf of small and disadvantaged business and those certified under CFR 49 parts 23 and or

26 as Disadvantaged Business Enterprises (DBE) and the development of programs to encourage, stimulate, promote and assist small businesses to become better prepared to compete for, obtain and manage transportation-related contracts, and subcontracts.

The Regional Partnerships Division of OSDBU, through the SBTRC program allows OSDBU to partner with local organizations to offer a comprehensive delivery system of business training, technical assistance and dissemination of information, targeted towards small business transportation enterprises in their regions.

1.2 Program Description and Goals

The national SBTRC program utilizes Cooperative Agreements with chambers of commerce, trade associations, educational institutions and business-centered community based organizations to establish SBTRCs to provide business training, technical assistance and information to DOT grantees and recipients, prime contractors and subcontractors. In order to be effective and serve their target audience, the SBTRCs must be active in the local transportation community in order to identify and communicate opportunities and provide the required technical assistance. SBTRCs must already have, or demonstrate the ability to establish working relationships with the state and local transportation agencies and technical assistance agencies (i.e., The U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Small Business Development Centers (SBDCs), Procurement Technical Assistance Centers (PTACs), SCORE and State DOT highway supportive services contractors in their region. Utilizing these relationships and their own expertise, the SBTRCs are involved in activities such as information dissemination, small business counseling, and technical assistance with small businesses currently doing business with public and private entities in the transportation industry.

Effective outreach is critical to the success of the SBTRC program. In order for their outreach efforts to be effective, SBTRCs must be familiar with DOT's Operating Administrations, its funding sources, and how funding is awarded to DOT grantees, recipients, contractors, subcontractors, and its financial assistance programs. SBTRCs must outreach to the regional small business transportation community to disseminate information and distribute DOT-published marketing materials, such as STLP Program Information, Bonding Assistance information, SBTRC brochures and literature, Procurement Forecasts; Contracting with DOT booklets, and any other materials or resources that DOT or OSDBU may develop for this purpose. To maximize outreach, the SBTRC may be called upon to participate in regional and national conferences and seminars. Quantities of DOT publications for on-hand inventory and dissemination at conferences and seminars will be available upon request from the OSDBU office.

1.3 Description of Competition

The purpose of this RFP is to solicit proposals from transportation-related trade associations, chambers of commerce, community based entities, colleges and universities, community colleges, and any other qualifying transportation-related non-profit organizations with the desire and ability to partner with OSDBU to establish and maintain an SBTRC.

It is OSDBU's intent to award Cooperative Agreement to one organization in each of the designated geographical area(s), from herein referred to as "region(s)", competed in this solicitation. However, if warranted, OSDBU reserves the option to make multiple awards to selected partners. Proposals submitted for a region must contain a plan to service the entire region, not just the SBTRC state or local geographical area. The region's SBTRC headquarters must be established in the designated state set forth below. Submitted proposals must also contain justification for the establishment of the SBTRC headquarters in a particular city within the designated state.

SBTRC Region(s) Competed in This Solicitation

South Atlantic Region:
North Carolina, Headquarters
Virginia
Kentucky
West Virginia
Southwest Region:
California, Headquarters
Arizona
Nevada
Hawaii
Mid-South Atlantic Region:
Georgia, Headquarters
Tennessee
South Carolina

Program requirements and selection criteria, set forth in Sections 2 and 4 respectively, indicate, the OSDBU intends for the SBTRC to be multidimensional; that is, the selected organizations must have the capacity to effectively access and provide supportive services to the broad range of small businesses within the respective geographical region. To this end, the SBTRC must be able to demonstrate that they currently have established relationships within the geographic region with whom they may coordinate and establish effective networks with DOT grant recipients and local/regional technical assistance agencies to maximize resources.

Cooperative agreement awards will be distributed to the region(s) as follows:

South Atlantic Region: Up to $138,000 per year

Southwest Region: Up to $136,000 per year

Mid-South Atlantic Region: Up to $128,000 per year

Cooperative agreement awards by region are based upon an analysis of DBEs, Certified Small Businesses, and US DOT transportation dollars in each region.

It is OSDBU's intent to maximize the benefits received by the small business transportation community through the SBTRC. Funding may be utilized to reimburse an on-site Project Director up to 100% of salary plus fringe benefits, an on-site Executive Director up to 50% of salary plus fringe benefits, the cost of designated SBTRC space, other direct costs, and all other general and administrative expenses. Selected SBTRC partners will be expected to provide in-kind administrative support. Submitted proposals must contain an alternative funding source with which the SBTRC will fund administrative support costs. Preference will be given to proposals containing in-kind contributions for the Project Director, the Executive Director, cost of designated SBTRC space, other direct costs, and all other general and administrative expenses.

1.4 Duration of Agreements

Cooperative agreements will be awarded for a period of 12 months (one year) with options for two (2) additional one year periods. OSDBU will notify the SBTRC of our intention to exercise an option year or not to exercise an option year 30 days in advance of expiration of the current year.

1.5 Authority

DOT is authorized under 49 U.S.C. 332(b)(4), (5) & (7) to design and carry out programs to assist small disadvantaged businesses in getting transportation-related contracts and subcontracts; develop support mechanisms, including management and technical services, that will enable small disadvantaged businesses to take advantage of those business opportunities; and to make

arrangements to carry out the above purposes.

1.6 Eligibility Requirements

To be eligible, an organization must be an established, nonprofit, community-based organization, transportation-related trade association, chamber of commerce, college or university, community college, and any other qualifying transportation-related non-profit organization which has the documented experience and capacity necessary to successfully operate and administer a coordinated delivery system that provides access for small businesses to prepare and compete for transportation-related contracts.

In addition, to be eligible, the applicant organization must:

(A) Be an established 501 C(3) or 501 C(6) tax-exempt organization and provide documentation as verification. No application will be accepted without proof of tax-exempt status;

(B) Have at least one year of documented and continuous experience prior to the date of application in providing advocacy, outreach, and technical assistance to small businesses within the region in which proposed services will be provided. Prior performance providing services to the transportation community is preferable, but not required; and

(C) Have an office physically located within the proposed city in the designated headquarters state in the region for which they are submitting the proposal that is readily accessible to the public.

2. Program Requirements

2.1 Recipient Responsibilities

(A) Assessments, Business Analyses

1. Conduct an assessment of small businesses in the SBTRC region to determine their training and technical assistance needs, and use information that is available at no cost to structure programs and services that will enable small business enterprises to become better prepared to compete for and receive transportation-related contract awards.

2. Contact other federal, state and local governmental agencies, such as the U.S. Small Business Administration, (SBA), state and local highway departments, state and local airport authorities, and transit authorities to identify relevant and current information that may support the assessment of the regional small business transportation community needs.

(B) General Management & Technical Training and Assistance

1. Utilize OSDBU's Intake Form to document each small business assisted by the SBTRC and type of service(s) provided. The completed form must be transmitted electronically to the SBTRC Program Manager on a monthly basis, accompanied by a narrative report on the activities and performance results for that period. The data gathered must be supportive by the narrative and must relate to the numerical data on the monthly reports.

2. Ensure that an array of information is made available for distribution to the small business transportation community that is designed to inform and educate the community on DOT/OSDBU services and opportunities.

3. Coordinate efforts with OSDBU's National Information Clearinghouse in order to maintain an on-hand inventory of DOT/OSDBU informational materials for general dissemination and for distribution at transportation-related conferences and other events.

(C) Business Counseling

1. Collaborate with agencies, such as the SBA, U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Service Corps of Retired Executives (SCORE), Procurement Technical Assistance Centers (PTACs), and Small Business Development Centers (SBDCs), to offer a broad range of counseling services to transportation-related small business enterprises.

2. Create a technical assistance plan that will provide each counseled participant with the knowledge and skills necessary to improve the management of their own small business to expand their transportation-related contracts and subcontracts portfolio.

3. Provide a minimum of 20 hours of individual or group counseling sessions to small businesses per month.

(D) Planning Committee

1. Establish a Regional Planning Committee consisting of at least 7 members that includes representatives from the regional community and federal, state, and local agencies. The highway, airport, and transit authorities for the SBTRC's headquarters state must have representation on the planning committee. This committee shall be established no later than 60 days after the execution of the Cooperative agreement between the OSDBU and the selected SBRTC.

2. Provide a forum for the federal, state, and local agencies to disseminate information about upcoming procurements.

3. Hold either monthly or quarterly meetings at a time and place agreed upon by SBTRC and planning committee members.

4. Use the initial session (teleconference call) by the SBTRC explain the mission of the committee and identify roles of the staff and the members of the group.

5. Responsibility for the agenda and direction of the Planning Committee should be handled by the SBTRC Executive Director or his/her designee.

(E) Outreach Services/Conference Participation

1. Utilize the services of the Central Contractor Registration (CCR) and other sources to construct a database of regional small businesses that currently or may participate in DOT direct and DOT funded transportation related contracts, and make this database available to OSDBU, upon request.

2. Utilize the database of regional transportation-related small businesses to match opportunities identified through the planning committee forum, FedBiz Opps, a web-based system for posting solicitations and other Federal procurement-related documents on the Internet, and other sources to eligible small businesses and contact the eligible small businesses about those opportunities.

3. Develop a "targeted" database of firms (100–150) that have the capacity and capabilities, and are ready, willing and able to participate in DOT contracts and subcontracts immediately. This control group will receive ample resources from the SBTRC, *i.e.,* access to working capital, bonding assistance, business counseling, management assistance and direct referrals to DOT agencies at the state and local levels, and to prime contractors as effective subcontractor firms.

4. Identify regional, state and local conferences where a significant number of small businesses, with transportation related capabilities, are expected to be in attendance. Maintain and submit a list of those events to the SBTRC Program Manager for review and for posting on the OSDBU Web site on a monthly basis. Include recommendations for OSDBU and/or SBTRC participation with the list.

5. Conduct outreach and disseminate information to small businesses at regional transportation-related conferences, seminars, and workshops. In the event that the SBTRC is requested to participate in an event, prior approval must be granted by the OSDBU prior to participation. Upon OSDBU approval,

the SBTRC will send DOT materials, the OSDBU banner and other information that is deemed necessary for the event.

6. Submit a conference summary report to OSDBU no later than 5 business days after participation in the event or conference. The conference summary report must summarize activities, contacts, outreach results, and recommendations for continued or discontinued participation in future similar events sponsored by that organization.

7. Upon approval by OSDBU, coordinate efforts with DOT's grantees and recipients at the state and/or local levels to sponsor or cosponsor an OSDBU transportation related conference in the region.

(F) Loan and Bond Assistance

1. Work with STLP participating banks and if not available, other lending institutions, to deliver a minimum of five (5) seminars/workshops per year on the STLP financial assistance program to the transportation-related small business community. The seminar/workshop must cover the entire STLP process, from completion of STLP loan applications and preparation of the loan package to graduation from the STLP.

2. Provide direct support, technical support, and advocacy services to potential STLP applicants to increase the probability of STLP loan approval and generate a minimum of 5 approved STLP applications per year.

3. Work with local bond producers/agents in your region to deliver a minimum of five (5) seminars/workshops to DBEs on the DOT ARRA BAP and how the Reimbursable Fee Program works. A minimum of 10 DBE firms per workshop should participate.

4. Provide direct support, technical support, and advocacy services to potential Disadvantaged Business Enterprise American Reinvestment and Recovery Act of 2009 Bonding Assistance Reimbursable Fee Program (DBE ARRA BAP) applicants to increase the probability of reimbursement approval and generate a minimum of 5 approved DBE ARRA BAP applications until September 8, 2010 or until notice of cessation in the event the program is extended.

5. Provide direct support, technical support, and advocacy services to potential Provide direct support, technical support, and advocacy services to potential Bonding Assistance Program (BAP) applicants to increase the probability of guaranteed bond approval and generate a minimum of 5 approved BAP applications per year from inception of the BAP program.

(G) Furnish all labor, facilities and equipment to perform the services described in this announcement

2.2 Office of Small and Disadvantaged Business Utilization (OSDBU) Responsibilities

(A) Provide consultation and technical assistance in planning, implementing and evaluating activities under this announcement.

(B) Provide orientation and training to the applicant organization.

(C) Monitor SBTRC activities, cooperative agreement compliance, and overall SBTRC performance.

(D) Assist SBTRC to develop or strengthen its relationships with federal, state, and local transportation authorities, other technical assistance organizations, and DOT grantees.

(E) Facilitate the exchange and transfer of successful program activities and information among all SBTRC regions.

(F) Provide the SBTRC with DOT/OSDBU materials and other relevant transportation-related information for dissemination.

(G) Maintain effective communication with the SBTRC and inform them of transportation news and contracting opportunities to share with small businesses in their region.

(H) Provide all required forms to be used by the SBTRC for reporting purposes under the program.

(I) Perform an annual performance evaluation of the SBTRC. Satisfactory performance is a condition of continued participation of the organization as an SBTRC and execution of all option years.

3. Submission of Proposals

3.1 Format for Proposals

Each proposal must be submitted to DOT's OSDBU in the format set forth in the application form attached as Appendix A to this announcement.

3.2 Address; Number of Copies; Deadlines for Submission

Any eligible organization, as defined in Section 1.6 of this announcement, will submit only one proposal per region for consideration by OSDBU. Eligible organizations may submit proposals for multiple regions.

Applications must be double spaced, and printed in a font size not smaller than 12 points. Applications will not exceed 35 single-sided pages, not including any requested attachments.

All pages should be numbered at the top of each page. All documentation, attachments, or other information pertinent to the application must be included in a single submission.

Grant application packages must be submitted electronically to OSDBU at *SBTRC@dot.gov.* The applicant is advised to turn on request delivery receipt notification for email submissions.

Proposals must be received by DOT/OSDBU no later than February 16, 2010 5 p.m., EST.

4. Selection Criteria

4.1 General Criteria

OSDBU will award the cooperative agreement on a best value basis, using the following criteria to rate and rank applications:

Applications will be evaluated using a point system (maximum number of points = 100);

- Approach and strategy (25 points)
- Linkages (25 points)
- Organizational Capability (25 points)
- Staff Capabilities and Experience (15 points)
- Cost Proposal (10 points)

(A) Approach and Strategy (25 Points)

The applicant must describe their strategy to achieve the overall mission of the SBTRC as described in this solicitation and service the small business community in their entire geographic regional area. The applicant must also describe how the specific activities outlined in Section 2.1 will be implemented and executed in the organization's regional area. OSDBU will consider the extent to which the proposed objectives are specific, measurable, time-specific, and consistent with OSDBU goals and the applicant organization's overall mission. OSDBU will give priority consideration to applicants that demonstrate innovation and creativity in their approach to assist small businesses to become successful transportation contractors and increase their ability to access DOT contracting opportunities and financial assistance programs. Applicants must also submit the estimated direct costs, other than labor, to execute their proposed strategy. OSDBU will consider the quality of the applicant's plan for conducting program activities and the likelihood that the proposed methods will be successful in achieving proposed objectives at the proposed cost.

(B) Linkages (25 Points)

The applicant must describe their established relationships within their geographic region and demonstrate their ability to coordinate and establish effective networks with DOT grant recipients and local/regional technical

assistance agencies to maximize resources. OSDBU will consider innovative aspects of the applicant's approach and strategy to build upon their existing relationships and established networks with existing resources in their geographical area. The applicant should describe their strategy to obtain support and collaboration on SBTRC activities from DOT grantees and recipients, transportation prime contractors and subcontractors, the SBA, U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Service Corps of Retired Executives (SCORE), Procurement Technical Assistance Centers (PTACs), Small Business Development Centers (SBDCs), State DOTs, and State highway supportive services contractors. In rating this factor, OSDBU will consider the extent to which the applicant demonstrates ability to be multidimensional. The applicant must demonstrate that they have the ability to access a broad range of supportive services to effectively serve a broad range of transportation-related small businesses within their respective geographical region. Emphasis will also be placed on the extent to which the applicant identifies a clear outreach strategy related to identified needs that can be successfully carried out within the period of this agreement and a plan for involving the Planning Committee in the execution of that strategy.

(C) Organizational Capability (25 Points)

The applicant must demonstrate that they have the organizational capability to meet the program requirements set forth in Section 2. The applicant organization must have sufficient resources and past performance experience to successfully outreach to the small business transportation resources in their geographical area and carry out the mission of the SBTRC. In rating this factor, OSDBU will consider the extent to which the applicant's organization has recent, relevant and successful experience in advocating for and addressing the needs of small businesses. Applicants will be given points for demonstrated past transportation-related performance. The applicant must also describe technical and administrative resources it plans to use in achieving proposed objectives. In their description, the applicant must describe their facilities, computer and technical facilities, ability to tap into volunteer staff time, and a plan for sufficient matching alternative financial resources to fund the general and administrative costs of the SBTRC. The applicant must also describe their administrative and financial management staff. OSDBU will place an emphasis on capabilities of the applicant's financial management staff.

(D) Staff Capability and Experience (15 Points)

The applicant organization must provide a list of proposed personnel for the project, with salaries, fringe benefit burden factors, educational levels and previous experience clearly delineated. The applicant's project team must be well-qualified, knowledgeable, and able to effectively serve the diverse and broad range of small businesses in their geographical region. The Executive Director and the Project Director shall be deemed key personnel. Detailed resumes must be submitted for all proposed key personnel and outside consultants and subcontractors. Proposed key personnel must have detailed demonstrated experience providing services similar in scope and nature to the proposed effort. The proposed Project Director will serve as the responsible individual for the program. 100% of the Project Director's time must be dedicated to the SBTRC. Both the Executive Director and the Project Director must be located on-site. In this element, OSDBU will consider the extent to which the applicant's proposed Staffing Plan; (a) clearly meets the education and experience requirements to accomplish the objectives of the cooperative agreement; (b) delineates staff responsibilities and accountability for all work required and; (c) presents a clear and feasible ability to execute the applicant's proposed approach and strategy.

(E) Cost Proposal (10 Points)

Applicants must submit the total proposed cost of establishing and administering the SBTRC in the applicant's geographical region for a 12 month period, inclusive of costs funded through alternative matching resources. The applicant's budget must be adequate to support the proposed strategy and costs must be reasonable in relation to project objectives. The portion of the submitted budget funded by OSDBU can not exceed the ceiling outlined in Section 1.3 Description of Competition per fiscal year. Applicants are encouraged to provide in-kind costs and other innovative cost approaches.

4.2 Scoring of Applications

A review panel will score each application based upon the evaluation criteria listed above. Points will be given for each evaluation criteria category, not to exceed the maximum number of points allowed for each category. Proposals which are deemed non-responsive, do not meet the established criteria, or incomplete at the time of submission will be disqualified.

OSDBU will perform a responsibility determination of the prospective winning recipient in each region, which may include a site visit, before awarding the cooperative agreement.

4.3 Conflicts of Interest

Applicants must submit a certified statement by key personnel and all organization principals indicating that they, or members of their immediate families, do not have a personal, business or financial interest in any DOT-funded transportation projects, nor any relationships with local or state transportation agencies that may have the appearance of a conflict of interest.

Appendix A—Format for Proposals for the Department of Transportation Office of Small and Disadvantaged Business Utilization's Small Business Transportation Resource Center (SBTRC) Program

Submitted proposals for the DOT, Office of Small and Disadvantaged Business Utilization's Small Business Transportation Resource Center Program must contain the following 12 sections and be organized in the following order:

1. *Table of Contents:*

Identify all parts, sections and attachments of the application.

2. *Application Summary:*

Provide a *summary overview* of the following:

- The applicant's proposed SBTRC region and city and key elements of the plan of action/strategy to achieve the SBTRC objectives.
- The applicant's relevant organizational experience and capabilities.

3. *Understanding of the Work:*

Provide a narrative which contains specific project information as follows:

- The applicant will describe its understanding of the OSDBU's SBTRC program mission and the role of the applicant's proposed SBTRC in advancing the program goals.
- The applicant will describe specific outreach needs of transportation-related small businesses in the applicant's region and how the SBTRC will address the identified needs.

4. *Approach and Strategy:*

- Describe the applicant's plan of action/strategy for conducting the program in terms of the tasks to be performed.
- Describe the specific services or activities to be performed and how these services/activities will be implemented.
- Describe innovative and creative approaches to assist small businesses to become successful transportation contractors and increase their ability to access DOT contracting opportunities and financial assistance programs.
- Estimated direct costs, other than labor, to execute the proposed strategy.

5. *Linkages:*

• Describe established relationships within the geographic region and demonstrate the ability to coordinate and establish effective networks with DOT grant recipients and local/regional technical assistance agencies.

• Describe the strategy to obtain support and collaboration on SBTRC activities from DOT grantees and recipients, transportation prime contractors and subcontractors, the SBA, U.S. Department of Commerce's Minority Business Development Centers (MBDCs), Service Corps of Retired Executives (SCORE), Procurement Technical Assistance Centers (PTACs), Small Business Development Centers (SBDCs), State DOTs, and State highway supportive services contractors.

• Describe the outreach strategy related to the identified needs that can be successfully carried out within the period of this agreement and a plan for involving the Planning Committee in the execution of that strategy.

6. *Organizational Capability:*

• Describe recent and relevant past successful performance in addressing the needs of small businesses, particularly with respect to transportation-related small businesses.

• Describe internal technical, financial management, and administrative resources.

• Propose a plan for sufficient matching alternative financial resources to fund the general and administrative costs of the SBTRC.

7. *Staff Capability and Experience:*

• List proposed key personnel, their salaries and proposed fringe benefit factors.

• Describe the education, qualifications and relevant experience of key personnel. Attach detailed résumés.

• Proposed staffing plan. Describe how personnel are to be organized for the program and how they will be used to accomplish program objectives. Outline staff responsibilities, accountability and a schedule for conducting program tasks.

8. *Cost Proposal:*

• Outline the total proposed cost of establishing and administering the SBTRC in the applicant's geographical region for a 12-month period, inclusive of costs funded through alternative matching resources. Clearly identify the portion of the costs funded by OSDBU.

• Provide a brief narrative linking the cost proposal to the proposed strategy.

9. *Proof of Tax Exempt Status:*

10. *Assurances Signature Form:*

Complete the attached form identified as Attachment 1.

11. *Certification Signature Form:*

Complete the attached form identified as Attachment 2.

12. *Standard Form 424:*

Complete the attached Standard Form 424 identified as Attachment 3.

Please be sure that all forms have been signed by an authorized official who can legally represent the organization.

Issued in Washington, DC on January 13, 2010.

Brandon Neal,

Director, Office of Small and Disadvantaged Business Utilization, Office of the Secretary, U.S. Department of Transportation.

[FR Doc. 2010–1062 Filed 1–20–10; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 USC 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed interchange project on U.S. Route 101 at the Monterey/San Benito County line (Monterey County postmiles 100.0/101.3 and San Benito County postmiles 0.0/1.6) in the State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before July 20, 2010. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: G. William "Trais" Norris III, Senior Environmental Planner, California Department of Transportation (Caltrans), 2015 East Shields Avenue, Suite 100, Fresno, CA 93726; weekdays 8 a.m. to 5 p.m. (Pacific time); telephone (559) 243–8178; (please note office closed 1st through 3rd Fridays due to State furloughs), e-mail: *trais_norris@dot.ca.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: The San Juan Interchange Project on U.S. Route 101 in Monterey and San Benito Counties of California. The purpose of the project is to make safety and operational improvements by constructing an interchange with frontage roads on U.S. Route 101 and a median barrier to close existing gaps. The project limits are 0.4 mile south of Dunbarton Road in Monterey County (post mile 100.0) to 1 mile north of Cole Road in San Benito County (post mile 1.6).

The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Environmental Assessment (EA)/Finding of No Significant Impact (FONSI) for the project, approved on December 7, 2009. The EA/FONSI and other documents are available by contacting Caltrans at the address provided above. The EA/FONSI, and other documents also can be viewed and downloaded from the project Web site at: *http://www.dot.ca.gov/dist05/projects/mon_sanjuan/index.htm.*

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; and Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Landscape and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wetlands and Water Resources:* Safe Drinking Water Act [42 U.S.C. 300(f) -300(j)(6)]; and Wetlands Mitigation [23 U.S.C. 103(b)(6)(m) and 133(b)(11)].

5. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; and Migratory Bird Treaty Act [16 U.S.C. 703–712].

6. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469c]; Archaeological Resources Protection Act of 1979 [16 U.S.C. 470aa et seq]; and Native American Graves Protection and Repatriation Act [25 U.S.C. 3001–3013].

7. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; Farmland Protection Policy Act [7 U.S.C. 4201–4209]; and The Uniform Relocation Assistance and Real

Property Acquisition Act of 1970, as amended.

8. *Hazardous Materials:* Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601–9675]; Superfund Amendments and Reauthorization Act of 1986; and Resource Conservation and Recovery Act [42 U.S.C. 6901–6992(k)].

9. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O.12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of the Cultural Environment; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; and E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1)

Issued on: January 14, 2010.

Cindy Vigue,

Director, State Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2010–1047 Filed 1–20–10; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35342]

Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company

Pursuant to a written trackage rights agreement dated December 22, 2009, BNSF Railway Company (BNSF) has agreed to grant temporary nonexclusive overhead trackage rights to Union Pacific Railroad Company (UP) over BNSF lines extending between BNSF milepost 10.2 at Tukwila, WA, and BNSF milepost 38.4 at Reservation, WA, a distance of approximately 28.2 miles.

The transaction is scheduled to be consummated on February 7, 2010. The temporary trackage rights are scheduled to expire on or about March 7, 2010. The purpose of the temporary trackage rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980), and any employees affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Stay petitions must be filed by January 28, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35342, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on John J. Brennan, Senior Commerce Counsel, Union Pacific Railroad Company, 1400 Douglas Street, STOP 1580, Omaha, NE 68179.

Board decisions and notices are available on our Web site at: *http://www.stb.dot.gov.*

Decided: January 13, 2010.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–926 Filed 1–20–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designation of Entities and Individuals Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of 19 newly-designated individuals and 16 newly-designated entities whose property and interests in property are blocked pursuant to Executive Order 12978 of October 21, 1995, "Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers" (the "Order"). In addition, OFAC is also publishing the name of one individual who has been re-designated and whose property and interests in property continue to be blocked pursuant to the Order.

DATES: The designation by the Director of OFAC of the 19 individuals and 16 entities, as well as the re-designation of one individual, identified in this notice pursuant to Executive Order 12978 is effective on January 14, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), issued the Order. In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and the Secretary of State, to play a significant role in international narcotics trafficking centered in Colombia, or materially to assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On January 14, 2010, the Director of OFAC, in consultation with the Departments of Justice, State, and Homeland Security, designated 19 individuals and 16 entities, and re-designated one individual, whose property and interests in property are blocked pursuant to the Order.

The list of designees is as follows:

Re-Designated Individual

1. QUINTERO SANCLEMENTE, Ramon Alberto (a.k.a. "Lucas"; a.k.a. "El Ingeniero"; a.k.a. "Don Tomas"); Carrera 16 No. 3–15, Buga, Valle, Colombia; DOB 30 Nov 1960; Alt. DOB 28 Nov 1958; Alt. DOB 30 Nov 1961; POB Cali, Colombia; Alt. POB Buga, Valle, Colombia; Citizen Colombia; Cedula No. 14881147 (Colombia); Passport AE048871 (Colombia); (INDIVIDUAL) [SDNT].

Individuals

1. CIFUENTES VARGAS, Carmen Viviana, c/o INVERSIONES EN GANADERIA JESSICA, Cali, Colombia; DOB 19 Jun 1964; POB Buga, Valle, Colombia; Cedula No. 38863513 (Colombia); Passport PO67538 (Colombia); (INDIVIDUAL) [SDNT].

2. CIFUENTES VARGAS, Orlando (a.k.a. "El Chute"); c/o RESTAURANTE BAR PUNTA DEL ESTE, Cali, Colombia; c/o SERVIAGRICOLA CIFUENTES E.U., Cali, Colombia; DOB 10 Jun 1965; Cedula No. 14890941 (Colombia); (INDIVIDUAL) [SDNT].

3. CIFUENTES VARGAS, Yanet (a.k.a. "La Pecosa"); Carrera 2 Oeste No. 51–51, Cali, Colombia; DOB 01 Aug 1963; POB Buga, Valle, Colombia; Cedula No. 38864607 (Colombia); Passport AI988963 (Colombia); (INDIVIDUAL) [SDNT].

4. DOMINGUEZ VELEZ, Jorge Enrique (a.k.a. "El Onli"); c/o ERA DE LUZ LTDA. LIBRERIA CAFE, Cali, Colombia; DOB 09 Aug 1968; Cedula No. 16767305 (Colombia); (INDIVIDUAL) [SDNT].

5. GIRALDO HERNANDEZ, Adriana Maria, c/o UNIVISA S.A., Cali, Colombia; c/o V.I.P. PRODUCCIONES E.U., Cali, Colombia; DOB 08 Mar 1961; Cedula No. 31857952 (Colombia); Passport AF234411 (Colombia); (INDIVIDUAL) [SDNT].

6. GONZALEZ BOHORQUEZ, Guillermo, c/o UNIVISA S.A., Cali, Colombia; DOB 20 Dec 1944; POB Buga, Valle, Colombia; Cedula No. 6185654 (Colombia); Passport AJ772175 (Colombia); (INDIVIDUAL) [SDNT].

7. GONZALEZ SANCLEMENTE, Alejandro, c/o IMERCO LTDA., San Pedro, Valle, Colombia; DOB 26 Feb 1960; POB Buga, Valle, Colombia; Cedula No. 14882775 (Colombia); (INDIVIDUAL) [SDNT].

8. GONZALEZ SANCLEMENTE, Fernando, Colombia; DOB 16 Jul 1963; Cedula No. 14884862 (Colombia); (INDIVIDUAL) [SDNT].

9. GONZALEZ SANCLEMENTE, Jose Alberto, c/o AGROINDUSTRIAS JORDANES S.A., Cali, Colombia; c/o FEGO CANA E.U., Cali, Colombia; c/o IMERCO LTDA., San Pedro, Valle, Colombia; DOB 10 Sep 1971; Alt. DOB 09 Oct 1971; POB Buga, Valle, Colombia; Cedula No. 14894820 (Colombia); (INDIVIDUAL) [SDNT].

10. GUTIERREZ AGUIRRE, Duffay (a.k.a. "El Gordo Duffay"); Bogota, Colombia; DOB 16 Sep 1968; POB Buga, Valle, Colombia; Cedula No. 14892384 (Colombia); Matricula Mercantil No 01302280 (Colombia); (INDIVIDUAL) [SDNT].

11. LOPEZ RODRIGUEZ, Walter, c/o CARMILE INVERSIONES LOPEZ Y CIA. S.C.A., Cali, Colombia; c/o CONSTRUCTORA SANTA TERESITA S.A., Cali, Colombia; c/o INVERSIONES MEDICAS Y QUIRUGICAS ESPECIALIZADAS LTDA., Cali, Colombia; c/o PRODUCTOS ALIMENTICIOS GLACIARES LTDA., Cali, Colombia; c/o UNIVISA S.A., Cali, Colombia; DOB 12 Jul 1954; POB Buga, Valle, Colombia; Cedula No. 19253056 (Colombia); Passport PO66566 (Colombia); (INDIVIDUAL) [SDNT].

12. NUNEZ BEJARANO, Carlos Eduardo, Carrera 24B Oeste No. 2–04, Cali, Colombia; DOB 07 Sep 1938; POB Buga, Valle, Colombia; Cedula No. 2729563 (Colombia); (INDIVIDUAL) [SDNT].

13. ROLDAN SALCEDO, Fabio, c/o CONSTRUCTORA SANTA TERESITA S.A., Cali, Colombia; DOB 08 Aug 1954; POB Buga, Valle, Colombia; Cedula No. 14875349 (Colombia); (INDIVIDUAL) [SDNT].

14. ROLDAN SALCEDO, Milena, c/o CARMILE INVERSIONES LOPEZ Y CIA. S.C.A., Cali, Colombia; c/o INVERSIONES MEDICAS Y QUIRUGICAS ESPECIALIZADAS LTDA., Cali, Colombia; c/o UNIVISA S.A., Cali, Colombia; DOB 09 Feb 1960; Cedula No. 38858586 (Colombia); Passport PO66565 (Colombia); (INDIVIDUAL) [SDNT].

15. SAAVEDRA ARCE, Rodrigo Eugenio, c/o CONSTRUCTORA SANTA TERESITA S.A., Cali, Colombia; c/o BOSQUE DE SANTA TERESITA LTDA., Cali, Colombia; c/o SAAVEDRA Y CIA. S. EN C., Cali, Colombia; DOB 30 Oct 1942; Cedula No. 16236683 (Colombia); Passport AF637666 (Colombia); (INDIVIDUAL) [SDNT].

16. SANCHEZ CONDE, Martha Cecilia, c/o ALIMENTOS CARNICOS DE TRADICION ESPANOLA LTDA., Cali, Colombia; c/o UNIVISA S.A., Cali, Colombia; DOB 30 Dec 1967; POB Cali, Colombia; Cedula No. 31981102 (Colombia); Passport AJ368943 (Colombia); (INDIVIDUAL) [SDNT].

17. SATIZABAL RENGIFO, Mario German (a.k.a. "Pelo de Cobre"); Colombia; DOB 04 Mar 1970; POB Buga, Valle, Colombia; Cedula No. 14892890 (Colombia); (INDIVIDUAL) [SDNT].

18. TASCON ROJAS, Servio Tulio, c/o UNIVISA S.A., Cali, Colombia; DOB 02 Nov 1938; Alt. DOB 11 Feb 1938; Cedula No. 2729445 (Colombia); (INDIVIDUAL) [SDNT].

19. YORDAN CARDENAS, Augusto Guillermo, c/o PRODUCTOS ALIMENTICIOS GLACIARES LTDA., Cali, Colombia; c/o UNIVISA S.A., Cali, Colombia; DOB 01 Jan 1965; POB Cali, Colombia; Cedula No. 14886699 (Colombia); (INDIVIDUAL) [SDNT].

Entities

1. AGROINDUSTRIAS JORDANES S.A. (a.k.a. JORDANES PARRILLA ARGENTINA); Calle 8 No. 25–46, Cali, Colombia; Calle 9A Norte No. 4N–23, Oficina 101E, Cali, Colombia; Calle 18N No. 9–07, Cali, Colombia; Carrera 98 No. 16–200, Local R6, Cali, Colombia; Carrera 105 Calle 15D, Loc. 5 y 6, Cali, Colombia; NIT # 900092924–9 (Colombia); (ENTITY) [SDNT].

2. ALIMENTOS CARNICOS DE TRADICION ESPANOLA LTDA. (a.k.a. "ALICANTE"); Calle 12 No. 12–58, Cali, Colombia; NIT # 900229820–2 (Colombia); (ENTITY) [SDNT].

3. BOSQUE DE SANTA TERESITA LTDA., Avenida 6N No. 17–92, Of. 411–412, Cali, Colombia; NIT # 800117606–9 (Colombia); (ENTITY) [SDNT].

4. CARMILE INVERSIONES LOPEZ Y CIA. S.C.A. (a.k.a. ESTACION DE SERVICIO EL OASIS DE PASOANCHO; a.k.a. FOOD MART OASIS; f.k.a. COMERCIALIZADORA CARMILE Y CIA. S.C.A.); Calle 13 No. 31–42, Cali, Colombia; NIT # 890329543–0 (Colombia); (ENTITY) [SDNT].

5. CONSTRUCTORA SANTA TERESITA S.A., Avenida 6 Norte No. 17–92 Of. 411, Cali, Colombia; NIT # 805028212–7 (Colombia); (ENTITY) [SDNT].

6. ERA DE LUZ LTDA. LIBRERIA CAFE, Calle 16 No. 100–98, Cali, Colombia; NIT # 805015908–8 (Colombia); (ENTITY) [SDNT].

7. FEGO CANA E.U., Calle 11A No. 116–40 Casa 3, Cali, Colombia; NIT # 830500953–0 (Colombia); Matricula Mercantil No 680975–15 (Colombia); (ENTITY) [SDNT].

8. IMERCO LTDA., Calle Ruta Buga—Tulua 4 Kilometros despues de San Pedro, San Pedro, Valle, Colombia; NIT # 810004154–2 (Colombia); (ENTITY) [SDNT].

9. INVERSIONES EN GANADERIA JESSICA, Carrera 10 Este No. 7–11, Cali, Colombia; Matricula Mercantil No 281899–1 (Colombia); (ENTITY) [SDNT].

10. INVERSIONES MEDICAS Y QUIRUGICAS ESPECIALIZADAS LTDA., Calle 13 No. 31–42, Cali, Colombia; NIT # 800171266–7 (Colombia); (ENTITY) [SDNT].

11. PRODUCTOS ALIMENTICIOS GLACIARES LTDA. (f.k.a. FRONTERA REPRESENTACIONES LTDA.); Carrera 84 No. 15–26, Cali, Colombia; NIT # 805027303–4 (Colombia); (ENTITY) [SDNT].

12. RESTAURANTE BAR PUNTA DEL ESTE, Calle 17N No. 9N–05, Cali, Colombia; Matricula Mercantil No 387183–1 (Colombia); (ENTITY) [SDNT].

13. SAAVEDRA Y CIA. S. EN C., Avenida 6N No. 17–92 Of. 411–412, Cali, Colombia; NIT # 890332983–9 (Colombia); (ENTITY) [SDNT].

14. SERVIAGRICOLA CIFUENTES E.U., Calle 4 No. 35A–20 Of. 402, Cali, Colombia; NIT # 805025920–1 (Colombia); (ENTITY) [SDNT].

15. UNIVISA S.A., Calle 9 No. 4–50 Of. 301, Cali, Colombia; NIT # 805011494–2 (Colombia); (ENTITY) [SDNT].

16. V.I.P. PRODUCCIONES E.U., Calle 1A No. 55B–115, Cali, Colombia; NIT # 805031027–1 (Colombia); (ENTITY) [SDNT].

Dated: January 14, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–1002 Filed 1–20–10; 8:45 am]

BILLING CODE 4811–45–P

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of proposed amendments to sentencing guidelines, policy statements, and commentary. Request for public comment, including public comment regarding retroactive application of any of the proposed amendments. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, the United States Sentencing Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment. This notice also sets forth a number of issues for comment, some of which are set forth together with the proposed amendments; some of which are set forth independent of any proposed amendment; and one of which (regarding retroactive application of proposed amendments) is set forth in the Supplementary Information portion of this notice.

The proposed amendments and issues for comment in this notice are as follows: (1) A proposed amendment on alternatives to incarceration, including a proposed new guideline that would provide authority under the guidelines to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria, and proposed changes to the Sentencing Table in Chapter Five that would expand Zones B and C by one level in each criminal history category, and related issues for comment on alternatives to incarceration; (2) issues for comment on the extent to which specific offender characteristics should be considered at sentencing generally and in the *Guidelines Manual* in particular, including issues for comment on age; mental and emotional condition; physical condition; military service, public service, and good works; and lack of guidance as a youth, and issues for comment on when, if at all, a downward departure may be appropriate based on the collateral consequences of a defendant's status as a non-citizen, or based on cultural assimilation; (3) a proposed amendment to § 1B1.1 (Application Instructions) in light of *United States* v. *Booker,* 543 U.S. 220 (2005); (4) a proposed amendment on the computation of criminal history points under subsection (e) of § 4A1.1 (Criminal History Category), known as the "recency" provision, including proposed changes to § 4A1.1 to reduce the cumulative impact of "recency", and issues for comment on whether the Commission should instead address the cumulative impact of "recency" only for one or more specific Chapter Two offense guidelines; (5) a proposed amendment in response to the Matthew Shephard and James Byrd, Jr. Hate Crime Prevention Act, division E of Public Law 111–84, including proposed changes to § 3A1.1 (Hate Crime Motivation or Vulnerable Victim); (6) a proposed amendment to Chapter Eight of the *Guidelines Manual* regarding the sentencing of organizations, including proposed changes to § 8B2.1 (Effective Compliance and Ethics Program) and § 8D1.4 (Recommended Conditions of Probation—Organizations), and a related issue for comment; (7) a proposed amendment in response to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues, including proposed changes to the guidelines' treatment of offenses involving commodities fraud, paleontological resources, unauthorized disclosures of personal information regarding health insurance eligibility, and iodine; and (8) a proposed amendment in response to certain technical issues that have arisen in the guidelines.

DATES: (1) Written Public Comment.—Written public comment regarding the proposed amendments and issues for comment set forth in this notice, including public comment regarding retroactive application of any of the proposed amendments, should be received by the Commission not later than March 22, 2010.

(2) Public Hearing.—The Commission plans to hold a public hearing regarding the proposed amendments and issues for comment set forth in this notice. Further information regarding the public hearing, including requirements for testifying and providing written testimony, as well as the location, time, and scope of the hearing, will be provided by the Commission on its Web site at *http://www.ussc.gov.*

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4597.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

The proposed amendments in this notice are presented in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the

Commission's part in comment and suggestions regarding alternative policy choices; for example, a proposed enhancement of [2][4][6] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions on how the Commission should respond to those issues.

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed amendments published in this notice. The Commission requests comment regarding which, if any, of the proposed amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

Additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's Web site at *http://www.ussc.gov.*

Authority: 28 U.S.C. 994(a), (o), (p), (x); USSC Rules of Practice and Procedure, Rule 4.4.

William K. Sessions III,

Chair.

1. Alternatives to Incarceration

Synopsis of Proposed Amendment: In September 2009, the Commission indicated that one of its policy priorities would be continued study of alternatives to incarceration, including consideration of any potential changes to the zones incorporated in the Sentencing Table in Chapter Five and/or other changes to the guidelines that might be appropriate in light of the information obtained from that study. *See* 74 FR 46478, 46479 (September 9, 2009). The Commission is publishing this proposed amendment to inform the Commission's consideration of alternatives to incarceration.

The proposed amendment contains two parts (A and B). The Commission is considering whether to promulgate either or both of these parts, as they are not necessarily mutually exclusive.

Part A expands the authority of the court to impose an alternative to incarceration for drug offenders who need treatment for drug addiction and who meet certain criteria. This part does so by creating a new guideline, § 5C1.3, that provides the court with authority under the guidelines to impose a sentence of probation (with a requirement that the offender participate in a [residential] treatment program) rather than a sentence of imprisonment, without regard to the applicable Zone of the Sentencing Table. To use this authority, the court must find that the drug offender has demonstrated a willingness to participate in a substance abuse treatment program and [will likely benefit from such a program][that participation in such a program will likely address the defendant's need for substance abuse treatment], and the court must impose a condition of probation that requires the defendant to participate in a [residential] substance abuse treatment program. To be eligible for this alternative to incarceration, a drug offender must have committed the offense while addicted to a controlled substance[, and the controlled substance addiction must have contributed substantially to the commission of the offense]. Also, the drug offender's total offense level must be not greater than [11]–[16]. Finally, the drug offender must meet the "safety valve" criteria set forth in § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

Part A also makes conforming changes to § 5B1.1 (Imposition of a Term of Probation) and § 5C1.1 (Imposition of a Term of Imprisonment).

Part B expands Zones B and C in the Sentencing Table in Chapter Five. Specifically, it expands Zone B by one level in each of Criminal History Categories I through VI (taking this area from Zone C), and expands Zone C by one level in each of Criminal History Categories I through VI (taking this area from Zone D). Part B also provides guidance on the effectiveness of residential treatment programs. Finally, Part B makes conforming changes to §§ 5B1.1 and 5C1.1.

Issues for comment are also included.

Proposed Amendment

Part A:

Chapter Five, Part C is amended by adding at the end the following new guideline:

"§ 5C1.3. Substance Abuse Treatment Program as Alternative to Incarceration for Certain Drug Offenders

(a) Subject to subsection (b), in the case of an offense under 21 U.S.C. 841, 844, 846, 960, or 963, the court may sentence the defendant to a term of probation without regard to the applicable Zone of the Sentencing Table, if the court finds that the defendant meets the criteria set forth below:

(1) The defendant committed the offense while addicted to a controlled substance[, and the controlled substance addiction contributed substantially to the commission of the offense];

(2) The defendant has demonstrated a willingness to participate in a substance abuse treatment program, and [will likely benefit from such a program][participation in such a program will likely address the defendant's need for substance abuse treatment];

(3) The total offense level for purposes of the Sentencing Table in Chapter Five, Part A, is not greater than [11]–[16];

(4) Each of the criteria set forth in § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

(b) If the court imposes probation under subsection (a), the court must include a condition that requires the defendant to participate in a [residential] substance abuse treatment program.".

Section 5B1.1(a) is amended in paragraph (2) by striking the period at the end and inserting "; or"; and by adding at the end the following:

"(3) § 5C1.3 applies.".

The Commentary to § 5B1.1 captioned "Application Notes" is amended in Note 1 by adding at the end the following:

"(c) *Where § 5C1.3 applies. See* § 5C1.3.";

And in Note 2 by inserting ", except as provided in § 5C1.3" after "probation".

Section 5C1.1 is amended by adding at the end the following:

"(g) Notwithstanding subsections (a)–(f), a sentence of imprisonment is not required if § 5C1.3 applies.".

The Commentary to § 5C1.1 captioned "Application Notes" is amended by adding at the end the following:

"9. Subsection (g) provides that, notwithstanding subsections (a) through (f), a sentence of imprisonment is not required if § 5C1.3 applies.".

Part B:

The Sentencing Table in Chapter Five, Part A, is amended—

(1) By increasing Zone B by one level in each of Criminal History Categories I through VI (so that Zone B contains offense levels 9–11 in Criminal History Category I; 6–10 in Criminal History Category II; 5–9 in Criminal History Category III; 4–7 in Criminal History Category IV; 3–6 in Criminal History

Category V; and 2–5 in Criminal History Category VI), and, correspondingly, by removing each such offense level from Zone C; and

(2) By increasing Zone C by one level in each of Criminal History Categories I through VI (so that Zone C contains offense levels 12–13 in Criminal History Category I; 11–12 in Criminal History Category II; 10–11 in Criminal History Category III; 8–9 in Criminal History Category IV; 7 in Criminal History Category V; and 6 in Criminal History Category VI).

For an illustration of the proposed amendment to the Sentencing Table, as executed, see table. The existing boundaries of Zones B and C are marked with straight lines; the new proposed lower boundary of Zone B is shaded; and the new proposed lower boundary of Zone C is marked with a wavy line.

BILLING CODE 2210–40–P

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

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The Commentary to § 5B1.1 captioned "Application Notes" is amended in Note 1(b) by striking "six" and inserting

"nine"; and in Note 2 by striking "eight" and inserting "ten".

The Commentary to § 5C1.1 captioned "Application Notes" is amended in Note 3 by striking "six" after "not more than" and inserting "nine"; and in Note 4 by striking "eight, nine, or ten months" and inserting "ten or twelve months"; by striking "8–14" both places it appears and inserting "10–16"; by striking "sentence of four" both places it appears and inserting "sentence of five"; and by striking "five" after "and a sentence of" and inserting "ten"; and by redesignating Notes 6, 7, and 8 as Notes 7, 8, and 9, respectively; and by inserting after Note 5 the following:

"6. There may be cases in which community confinement in a residential treatment program is warranted to accomplish a specific treatment purpose. In such a case, the court should consider the effectiveness of the residential treatment program.

An effective program should possess, at a minimum, the following features:

(A) The program is licensed, certified, accredited, or otherwise approved by the relevant state regulatory agency.

(B) The program is operated by professionals who are well trained, qualified, and experienced in the evaluation and treatment of participants and who follow established ethical and professional standards.

(C) The evaluation and treatment of participants is based on "the best available scientific knowledge."; and in Note 9 (as so redesignated) by striking "twelve" and inserting "15".

Issues for Comment

1. The Commission requests comment on how Part A of the proposed amendment should interact with other provisions in the *Guidelines Manual.* In particular, if the Commission were to promulgate Part A, what other amendments to Chapter Five of the *Guidelines Manual* would be appropriate?

For example, § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) currently provides, among other things, that physical condition "is not ordinarily relevant in determining whether a departure is warranted" and that "drug or alcohol dependence or abuse is not a reason for a downward departure". If the Commission were to promulgate Part A, what changes, if any, should the Commission make to § 5H1.4?

2. The Commission requests comment on whether defendants with a condition other than drug addiction, such as a mental or emotional condition, should be eligible for treatment programs as an alternative to incarceration.

3. The Commission requests comment on whether the proposed amendment should include standards for effective treatment programs. The Commission has provided standards for other types of programs; for example, § 8B2.1 (Effective Compliance and Ethics Program)) provides minimum requirements for corporate compliance and ethics programs. Should the Commission similarly provide standards for effective treatment programs? If so, what standards should the Commission provide?

4. The Commission requests comment on whether the Zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The Zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (*e.g.,* to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?

5. The Commission requests comment on what revisions to Chapter Five, Part B (Probation), and Chapter Five, Part F (Sentencing Options), may be appropriate to provide more guidance on the use of alternatives to incarceration.

As explained in the Introductory Commentary to Chapter Five, Part B, "probation is a sentence in and of itself", and may be used as an alternative to incarceration, "provided that the terms and conditions of probation can be fashioned so as to meet fully the statutory purposes of sentencing, including respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant".

Are there changes the Commission should make to the guidelines to guide courts in fashioning sentences that meet the statutory purposes of sentencing, *see* 18 U.S.C. 3553(a)(2), and to better implement the requirements of 28 U.S.C. 994(j) (requiring the Commission to ensure that "the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense")?

In particular, should the Commission make changes to Chapter Five, Parts B and F, to more broadly encourage the use of alternatives to incarceration, such as community confinement, home detention, and intermittent confinement (*see* §§ 5F1.1 (Community Confinement), 5F1.2 (Home Detention), and 5F1.8 (Intermittent Confinement))? If so, what changes should the Commission make?

Should the Commission make changes to Chapter Five, Parts B and F, to provide more guidance to the court in deciding whether to impose an alternative to incarceration in a particular case and, if so, in deciding what specific alternative to incarceration should be imposed? For example, what guidance should the Commission provide with regard to how the court should decide among sentencing a particular defendant to imprisonment, intermittent confinement, community confinement, or home detention?

2. Specific Offender Characteristics

Issues for Comment

1. In September 2009, the Commission indicated that one of its policy priorities would be a "review of departures within the guidelines, including (A) a review of the extent to which pertinent statutory provisions prohibit, discourage, or encourage certain factors as forming the basis for departure from the guideline sentence; and (B) possible revisions to the departure provisions in the *Guidelines Manual.*" *See* 74 FR 46478, 46479 (September 9, 2009).

The Sentencing Reform Act (the "Act") contained several provisions regarding the relevance of specific offender characteristics to sentencing:

First, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. *See* 28 U.S.C. 994(d).

Second, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics—education; vocational

skills; employment record; family ties and responsibilities; and community ties. *See* 28 U.S.C. 994(e).

Third, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five other characteristics—race, sex, national origin, creed, and socioeconomic status. *See* 28 U.S.C. 994(d).

Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, "the history and characteristics of the defendant". *See* 18 U.S.C. 3553(a)(1).

As part of its review of departures, the Commission is reviewing the relevance of specific offender characteristics to sentencing. The Commission contemplates that work on this priority will continue beyond the amendment cycle ending May 1, 2010. During the amendment cycle ending May 1, 2010, the Commission is focusing on specific offender characteristics addressed in Chapter Five, Part H, of the *Guidelines Manual* that are not listed in 28 U.S.C. 994(e).

The Commission requests comment on the extent to which specific offender characteristics should be considered at sentencing generally and in the *Guidelines Manual* in particular. The Commission has received some public comment suggesting that, in light of *United States* v. *Booker,* 543 U.S. 220 (2005), the Commission amend the *Guidelines Manual* to eliminate provisions regarding specific offender characteristics, which are addressed in the *Guidelines Manual* primarily through the policy statements in Chapter Five, Part H. Eliminating Chapter Five, Part H, however, would contravene the mandates to the Commission in the Act.

Are specific offender characteristics already adequately addressed in the *Guidelines Manual?* If not, how should the Commission amend the *Guidelines Manual* to more adequately address specific offender characteristics?

2. The Commission requests comment regarding five specific offender characteristics in particular. Those characteristics, and the statutes and policy statements currently addressing those characteristics, are as follows:

(1) Age (28 U.S.C. 994(d)(1)), *see* § 5H1.1 (Age).

(2) Mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant (28 U.S.C. 994(d)(4)), *see* § 5H1.3 (Mental and Emotional Conditions).

(3) Physical condition, including drug dependence (28 U.S.C. 994(d)(5)), *see* § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

(4) Military, civic, charitable, or public service, employment-related contributions, record of prior good works, *see* § 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works).

(5) Lack of guidance as a youth, *see* § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances).

A. In General

Are the guidelines adequate as they apply to these five specific offender characteristics? If not, what amendments to the guidelines should be made to address these specific offender characteristics?

B. Relevance to Decisions Regarding Prison and Probation

For each of these five specific offender characteristics, the Commission requests comment regarding whether, and to what extent, the characteristic is relevant to decisions regarding prison and probation. In particular:

(1) Is the characteristic relevant in making the "in/out" decision, *i.e.,* the decision whether to sentence the defendant to prison or probation?

(2) Assuming the defendant is to be sentenced to prison, is the characteristic relevant in deciding the length of imprisonment?

(3) Assuming the defendant is to be sentenced to probation, is the characteristic relevant in deciding the length of probation, or the conditions of probation?

For each of the decisions identified in (1), (2), and (3) above, if the characteristic is relevant in making the decision, when is it relevant, why is it relevant, what effect should it have, and how much effect should it have? Are there categories of offenses, or categories of offenders, for which the characteristic should be more relevant, or less relevant? What criteria should be used to establish such categories?

C. Use as Proxy for Forbidden Factors

As stated above, the Act specified that the guidelines and policy statements must be "entirely neutral" as to race, sex, national origin, creed, and socioeconomic status; these characteristics are known as the "forbidden" factors. *See* 28 U.S.C. 994(d).

For each of these five specific offender characteristics, could the characteristic be used as a proxy for one or more of the "forbidden" factors? If so, how should the Commission address that possibility, while at the same time providing for consideration of the characteristic when relevant?

3. The Commission also has separate requests for comment for each of these five specific offender characteristics. The separate requests are as follows:

A. Age

Section 5H1.1 (Age) generally provides that age (including youth) is not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should an offender's youth be a reason to decrease the sentence to reflect a view that younger offenders are less accountable for their actions, or a reason to increase the sentence to reflect a view that younger offenders are more likely to recidivate? Should an offender's advanced age be a reason to increase the sentence to reflect a view that older offenders should be more mature and responsible, or a reason to decrease the sentence to reflect a view that older offenders are less likely to recidivate?

B. Mental and Emotional Conditions

Section 5H1.3 (Mental and Emotional Conditions) generally provides that mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should a mental or emotional condition be a reason to increase the sentence (*e.g.,* if the mental or emotional condition, such as an antisocial personality disorder, makes the defendant a particular danger to the community)? On the other hand, should a mental or emotional condition be a reason to decrease the sentence (*e.g.,* if the mental or emotional condition could more effectively be treated outside of prison)?

In a case in which the defendant's mental or emotional condition was a factor in the commission of the offense, how should mental or emotional condition interact with the policy statements regarding diminished capacity, *see* § 5K2.13 (Diminished Capacity), and coercion and duress, *see* § 5K2.12 (Coercion and Duress)? In particular, in a case in which the defendant's mental or emotional condition was a factor in the commission of the offense, but does not meet the requirements of § 5K2.13 and § 5K2.12, when, if at all, should the

mental or emotional condition be a reason for a departure?

The Commission has heard testimony that service members have been returning from combat with traumatic brain injuries that cause them to act out violently toward family members and others, or have been returning with other mental or emotional conditions (such as post-traumatic stress disorder). If such a service member commits a crime, when, and to what extent, would a departure be warranted?

C. Physical Condition (Including Drug or Alcohol Dependence or Abuse; Gambling Addiction)

Section 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) generally provides that physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. Should the Commission revise this policy statement? If so, how?

For example, should a physical condition or addiction be a reason to decrease the sentence (*e.g.,* if the physical condition or addiction could more effectively be treated outside of prison or if the physical condition renders the offender so infirm that home confinement may be sufficient)? Conversely, should a physical condition or addiction be a reason to increase the sentence (*e.g.,* if the addiction increases the risk of recidivism)?

D. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works

Section 5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works) provides that military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should military service be a reason to decrease the sentence (*e.g.,* to reflect a view that an exemplary military record reflects courage, loyalty, and personal sacrifice that a sentencing court should take into account)? Conversely, should military service be a reason to increase the sentence (*e.g.,* to reflect a view that the offender is a role model who "should have known better")?

Similarly, should civic or charitable contributions be a reason to decrease the sentence to reflect the view that credit should be given for past good deeds or that past good deeds predict that the defendant will continue to add value to the community when not in prison? If so, what level of contributions should be demonstrated before a decrease in sentence is warranted?

E. Lack of Guidance as a Youth and Similar Circumstances

Section 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances) provides that lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant grounds in determining whether a departure is warranted. Should the Commission revise this policy statement? If so, how?

For example, should lack of guidance as a youth not be a reason to decrease the sentence (*e.g.,* to reflect a view that many or most offenders may be able to demonstrate some lack of guidance or disadvantaged upbringing)? Should physical abuse, emotional abuse, or sexual abuse suffered as a child be a reason to decrease the sentence under this policy statement or elsewhere in Chapter Five, Part H?

3. The Commission requests comment regarding what, if any, conforming changes should be made to Chapter Five, Part K, of the *Guidelines Manual,* or elsewhere in the *Guidelines Manual,* if the Commission were to amend the policy statements applicable to the five specific offender characteristics discussed above.

4. The Commission requests comment on when, if at all, the collateral consequences of a defendant's status as a non-citizen may warrant a downward departure. There are differences among the circuits on this issue. *Compare, e.g., United States* v. *Restrepo,* 999 F.2d 640, 644 (2d Cir. 1993) (holding that none of the following collateral consequences are a basis for departure: (1) The fact that an alien is not eligible to be imprisoned in a lower-security facility or to participate in certain prison programs; (2) the fact that an alien will face deportation upon release from prison; and (3) the fact that an alien, upon release from prison, will be civilly detained until deportation), *with United States* v. *Smith,* 27 F.3d 649, 655 (D.C. Cir. 1994) ("[A] downward departure may be appropriate where the defendant's status as a deportable alien is likely to cause a fortuitous increase in the severity of his sentence.").

The circuits appear to be in agreement, however, that the defendant's status as a non-citizen is never a proper basis for departure when the defendant is sentenced under the illegal reentry guideline, § 2L1.2 (Unlawfully Entering or Remaining in the United States). *See, e.g., United States* v. *Martinez-Carillo,* 250 F.3d 1101, 1107 (7th Cir. 2001); *United States* v. *Garay,* 235 F.3d 230, 234 (5th Cir. 2000).

Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted on the basis of such collateral consequences? If so, how?

5. The Commission requests comment on when, if at all, a downward departure may be appropriate in an illegal reentry case sentenced under § 2L1.2 on the basis of "cultural assimilation", that is, the defendant's cultural ties to the United States. Several circuits have held that such a departure may be warranted. *See, e.g., United States* v. *Lipman,* 133 F.3d 726, 730 (9th Cir. 1998); *United States* v. *Rodriguez-Montelongo,* 263 F.3d 429, 433 (5th Cir. 2001); *United States* v. *Sanchez-Valencia,* 148 F.3d 1273, 1274 (11th Cir. 1998). Other circuits, such as the First and Tenth Circuits, have declined to rule on whether such a departure may be warranted. *See, e.g., United States* v. *Melendez-Torres,* 420 F.3d 45, 51 (1st Cir. 2005); *United States* v. *Galarza-Payan,* 441 F.3d 885, 889 (10th Cir. 2006).

Should the Commission amend the guidelines to address when, if at all, a downward departure may be warranted in an illegal reentry case on the basis of "cultural assimilation"? If so, how?

3. Application Instructions

Synopsis of Proposed Amendment: This proposed amendment amends § 1B1.1 (Application Instructions) in light of *United States* v. *Booker,* 543 U.S. 220 (2005).

As explained more fully in Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines) of the *Guidelines Manual,* a district court is required to properly calculate and consider the guidelines when sentencing. *See* 18 U.S.C. 3553(a)(4); *Booker,* 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must * * * take them into account when sentencing."); *Rita* v. *United States,* 551 U.S. 338, 351 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall* v. *United States,* 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

After determining the guideline range, the district court should refer to the *Guidelines Manual* and consider whether the case warrants a departure.

" 'Departure' is a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines." *See Irizarry* v. *United States,* 128 S.Ct. 2198, 2202 (2008). A "variance"—*i.e.,* a sentence outside the guideline range other than as provided for in the *Guidelines Manual*—is considered only after departures have been considered.

As the Fifth Circuit has explained: "*Post-Booker* case law recognizes three types of sentences under the new advisory sentencing regime: (1) A sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence." *United States* v. *Tzep-Mejia,* 462 F.3d 522 (5th Cir. 2006) (internal footnote and citation omitted). On this point most other circuits agree. *See, e.g., United States* v. *Dixon,* 449 F.3d 194, 203–4 (1st Cir. 2006) (court must consider "any applicable departures"); *United States* v. *Selioutsky,* 409 F.3d 114 (2d Cir. 2005) (court must consider "available departure authority"); *United States* v. *Jackson,* 467 F.3d 834, 838 (3d Cir. 2006) (same); *United States* v. *Morehead,* 437 F.3d 424, 433 (4th Cir. 2006) (departures "remain an important part of sentencing even after *Booker*"); *United States* v. *McBride,* 434 F.3d 470 (6th Cir. 2006) (same); *United States* v. *Hawk Wing,* 433 F.3d 622, 631 (8th Cir. 2006) ("the district court must decide if a traditional departure is appropriate", and after that must consider a variance); *United States* v. *Robertson,* 568 F.3d 1203, 1210 (10th Cir. 2009) (district courts must continue to apply departures); *United States* v. *Jordi,* 418 F.3d 1212 (11th Cir. 2005) (stating that "the application of the guidelines is not complete until the departures, if any, that are warranted are appropriately considered"). *But see United States* v. *Johnson,* 427 F.3d 423 (7th Cir. 2006) (departures "obsolete").

In short, the district court, in determining the appropriate sentence in a particular case, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. 3553(a). *See Rita,* 551 U.S. at 351. This has been described as a "3-step process":

> First, because the *Booker* decision requires that courts consult the sentencing guidelines, a sentencing court must calculate the applicable guideline range in the customary fashion. Second, the court should determine whether a departure from the guideline range is consistent with the guidelines' policy statements and commentary. Third, the court should evaluate whether a variance, *i.e.,* a sentence outside the advisory guideline range is warranted under the authority of 18 U.S.C. 3553(a).

See United States Sentencing Commission, "Final Report on the Impact of *United States* v. *Booker* on Federal Sentencing" (2006) at 42.

The proposed amendment follows the approach adopted by a majority of circuits and structures § 1B1.1 to reflect the three-step process. As amended, subsection (a) addresses how to apply the provisions in this manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted. Subsection (c) addresses the need to consider the applicable factors under 18 U.S.C. 3553(a) in determining the appropriate sentence. In addition, the proposed amendment amends the Commentary to § 1B1.1 to define the term "variance".

Proposed Amendment

Section 1B1.1 is amended by striking "Except as specifically directed, the provisions of this manual are to be applied in the following order:" and inserting the following:

"(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:"; by redesignating subdivisions (a) through (h) as (1) through (8), respectively; in subdivision (4) (as so redesignated) by striking "(a)" and inserting "(1)", and by striking "(c)" and inserting "(3)";

By redesignating subdivision (i) as subsection (b) and, in that subsection, by striking "Refer to" and inserting "The court shall then consider", and by adding at the end "*See* 18 U.S.C. 3553(a)(5).."; and

By adding at the end the following:

"(c) The court shall then determine the sentence (*i.e.,* a sentence within the guideline range, a departure, or a variance), considering the applicable factors in 18 U.S.C. 3553(a) taken as a whole.".

The Commentary to § 1B1.1 captioned "Application Notes" is amended in Note 1, in subparagraph (E)(i), by inserting "as provided for in Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, or any other policy statements or commentary in the guidelines" after "guideline sentence"; and by adding at the end the following:

"(M) 'Variance' means imposition of a sentence other than as provided in the guidelines, policy statements, and commentary of the *Guidelines Manual*.".

4. Recency

Synopsis of Proposed Amendment: In September 2009, the Commission indicated that one of its policy priorities would be consideration of miscellaneous guideline application issues, including "examination of, and possible guideline amendments relating to, the computation of criminal history points under § 4A1.1(e)". *See* 74 FR 46478, 46479 (September 9, 2009). Subsection (e) of § 4A1.1 (Criminal History Category) is known as the "recency" provision. The Commission is examining how the "recency" provision interacts with the "status" provision in subsection (d) of § 4A1.1 and also how the "recency" provision interacts with other provisions regarding criminal history in various Chapter Two offense guidelines.

Section 4A1.1 currently provides that if the instant offense was committed while under another criminal justice sentence, 2 criminal history points are added under subsection (d) for "status"; if the instant offense was committed less than two years after release from imprisonment, or while in imprisonment or escape status, 2 points are added under subsection (e) for "recency". If 2 points are added for "status" under (d), however, only 1 point is added for "recency" under (e). See § 4A1.1 comment. (backg'd.) ("Because of the potential overlap of (d) and (e), their combined impact is limited to three points.").

Under § 4A1.1, a sentence for a single prior conviction may count up to three times in the calculation of the Criminal History Category (*e.g.,* such a sentence could count under §§ 4A1.1(a) or (b), 4A1.1(d), and 4A1.1(e)). Additionally, the prior conviction can increase the offense level determined under certain Chapter Two guidelines (*e.g.,* § 2L1.2 (Unlawfully Entering or Remaining in the United States)). Therefore, in a case in which the prior conviction increases the Chapter Two offense level, the single prior conviction may be counted four times in the determination of the applicable guideline range.

The proposed amendment presents two options for amending § 4A1.1 that would reduce the cumulative impact of "recency". Under Option 1, "recency" points are eliminated for all offenders in all cases; conforming changes to § 4A1.2 (Definitions and Instructions for Computing Criminal History) are also

made. Under Option 2, "recency" points are retained but are not cumulative with "status" points; thus, in the case of an offender eligible for both "status" points and "recency" points, the combined impact is limited to 2 points rather than 3.

The proposed amendment also makes stylistic changes to § 4A1.1 so that its subdivisions are referred to as "subsections" rather than as "items".

Issues for comment are also provided that, in part, request comment on whether the Commission should instead address the cumulative impact of "recency" more narrowly, *i.e.,* only for cases sentenced under Chapter Two offense guidelines that increase the offense level based on criminal history.

Proposed Amendment

[Option 1:

Section 4A1.1 is amended by striking "items (a) through (f)" and inserting "subsections (a) through (e); in subsection (c) by striking "item" and inserting "subsection"; by striking subsection (e) and redesignating subsection (f) as (e); and in subsection (e) (as so redesignated) by striking "item" and inserting "subsection".

The Commentary to § 4A1.1 captioned "Application Notes" is amended by striking "item" each place it appears and inserting "subsection"; by striking Note 5 and redesignating Note 6 as Note 5; and in Note 5 (as so redesignated) by striking "(f)" and inserting "(e)" each place it appears.

The Commentary to § 4A1.1 captioned "Background" is amended by striking "Subdivisions" and inserting "Subsections"; by striking "implements one measure of recency by adding" and inserting "adds"; and by striking the paragraph that begins "Section 4A1.1(e)".

Section 4A1.2 is amended in subsection (a)(2) by striking "(f)" and inserting "(e)"; in subsection (k) by striking subparagraph (A) and by striking "(B)"; in subsection (l) by striking "(f)" and inserting "(e)", and by striking "; § 4A1.1(e) shall not apply"; in subsection (n) by striking "and (e)"; and in subsection (p) by striking "(f)" and inserting "(e)".

The Commentary to § 4A1.2 captioned "Application Notes" is amended in Note 12(A) by striking "subdivision" and inserting "subsection".]

[Option 2:

Section 4A1.1(e) is amended by striking "If 2 points are added for item (d), add only 1 point for this item" and inserting "If subsection (d) applies, do not apply this subsection".

The Commentary to § 4A1.1 captioned "Application Notes" is amended in Note 5 by striking "if two points are added under § 4A1.1(d), only one point is added under § 4A1.1(e)" and inserting "if § 4A1.1(d) applies, do not apply § 4A1.1(e)".

The Commentary to § 4A1.1 captioned "Background" is amended in the paragraph that begins "Section 4A1.1(e)" by striking "three" and inserting "two"; and by striking the sentence that begins "However,".]

Issues for Comment

1. The Commission seeks comment on whether the Commission should reduce the cumulative impact of "recency" points in § 4A1.1(e), when they apply in combination with "status" points in § 4A1.1(d) or in combination with provisions regarding criminal history in Chapter Two.

An example of such a provision is the specific offense characteristic in subsection (b)(1) of § 2L1.2 (Unlawfully Entering or Remaining in the United States), which provides an enhancement of 4 to 16 levels if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for a certain type of offense. Other examples can be found in the alternative base offense levels in §§ 2K2.1(a) and 2D1.1(a), which provide a heightened base offense level if the defendant had one or more prior convictions for certain types of offenses; the "pattern of activity" enhancement in § 2S1.3(b)(2), which provides an enhancement based on a pattern of criminal activity; and the enhancements in §§ 2N2.1(b)(1) and 2K2.6(b)(1), which provide an enhancement based on a past conviction.

If the Commission were to retain "recency" in subsection (e) of § 4A1.1, should the Commission amend the guidelines to specify that, in a case in which a conviction is used to increase the Chapter Two offense level, "recency" points shall not apply?

A. Should the Commission Reduce the Impact in Cases Sentenced Under § 2L1.2 Only?

With regard to the specific offense characteristic in § 2L1.2(b)(1), should the Commission insert an application note in the commentary to § 4A1.1 and a corresponding, parallel application note in the commentary to § 2L1.2? One approach for such an application note, which would apply only if the Chapter Two provision and the "recency" provision were both derived from the same conviction, would be the following:

"*Interaction with § 2L1.2(b)(1).*—If a conviction is used as a basis for an enhancement under § 2L1.2(b)(1), do not use the sentence resulting from that conviction as a basis for adding points for 'recency' under subsection (e)."

Another approach for such an application note, which would apply even if the Chapter Two provision and the "recency" provision were derived from different convictions, would be the following:

"*Interaction with § 2L1.2(b)(1).*—If § 2L1.2(b)(1) applies, do not apply subsection (e)."

Should the Commission follow one of these approaches? Is there a different approach the Commission should follow?

B. Should the Commission Reduce the Impact in Cases Under Other Specific Guidelines?

Should such an application note also be provided for a case in which (1) a conviction is used as a basis for an alternative base offense level, such as in §§ 2K2.1(a) and 2D1.1(a); or (2) a conviction is used as a basis for a pattern of activity enhancement, such as in § 2S1.3(b)(2); or (3) a conviction is otherwise used as a basis for an enhancement, such as in §§ 2N2.1(b)(1) and 2K2.6(b)(1)? Are there other provisions in Chapter Two for which such an application note should be provided?

5. Hate Crimes

Synopsis of Proposed Amendment: This proposed amendment responds to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (division E of Pub. L. 111–84) (the "Act"). With regard to hate crimes, the Act created a new offense and amended a 1994 congressional directive to the Commission. The Act also created a second new offense, relating to attacking a United States serviceman on account of his or her service.

The new hate crimes offense, 18 U.S.C. 249 (Hate crime acts), makes it unlawful, whether or not acting under color of law, to willfully cause bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt to cause bodily injury to any person, because of the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person. A person who violates section 249 is subject to imprisonment for not more than 10 years (or, if the offense includes kidnapping, aggravated sexual abuse, or an attempt to kill, or if death results from the offense, for any term of

years or for life). The proposed amendment amends Appendix A (Statutory Index) to reference the new offense to § 2H1.1 (Offenses Involving Individual Rights).

The Act also amended section 280003 of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103–322; 28 U.S.C. 994 note), which contains a congressional directive to the Commission regarding hate crimes that the Commission implemented in subsection (a) of § 3A1.1 (Hate Crime Motivation or Vulnerable Victim). The Act expanded the definition of "hate crime" in section 280003(a) to include crimes motivated by actual or perceived "gender identity", which has the effect of expanding the scope of the congressional directive in section 280003(b) to require the Commission to provide an enhancement for crimes motivated by actual or perceived "gender identity". To reflect that congressional action, the proposed amendment amends § 3A1.1(a) to include crimes motivated by actual or perceived "gender identity", and makes conforming changes to §§ 2H1.1 and 3A1.1.

In addition, the proposed amendment contains a bracketed proposal to strike the special instruction in § 3A1.1(c), which states that the 3-level enhancement in § 3A1.1(a) shall not apply if the 6-level enhancement in § 2H1.1(b) applies. Currently, the 3-level enhancement in § 3A1.1(a) applies if the offense was a hate crime, *i.e.,* was motivated by the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person; the 6-level enhancement in § 2H1.1(b) applies if (A) the defendant was a public official at the time of the offense, or (B) the offense was committed under color of law. By striking the special instruction in § 3A1.1(c), the proposed amendment would allow both enhancements to operate, if applicable in a particular case. Conforming changes to §§ 2H1.1 and 3A1.1 are also bracketed.

The second new offense, 18 U.S.C. 1389 (Prohibition on attacks on United States servicemen on account of service), makes it unlawful to knowingly assault or batter a United States serviceman or an immediate family member of a United States serviceman, or to knowingly destroy or injure the property of such serviceman or immediate family member, on the account of the military service of that serviceman or status of that individual as a United States serviceman. A person who violates section 1389 is subject to imprisonment for not more than 2 years (in the case of a simple assault, or damage of not more than $500), for not more than 5 years (in the case of damage of more than $500), or for not less than 6 months nor more than 10 years (in the case of a battery, or an assault resulting in bodily injury). The proposed amendment amends Appendix A (Statutory Index) to reference the new offense to §§ 2A2.2 (Aggravated Assault), 2A2.3 (Minor Assault) and 2B1.1 (Theft, Property Destruction, and Fraud). The Commission anticipates that the official victim adjustment in § 3A1.2 (Official Victim) would apply in such a case.

Proposed Amendment

The Commentary to § 2H1.1 captioned "Statutory Provisions" is amended by inserting "249," after "248,".

The Commentary to § 2H1.1 captioned "Application Notes" is amended in Note 4 by inserting "gender identity," after "gender,".

[The Commentary to § 2H1.1 captioned "Application Notes" is amended in Note 4 by striking the sentence that begins "An adjustment" and all that follows through "*See* § 3A1.1(c).".]

Section 3A1.1 is amended in subsection (a) by inserting "gender identity," after "gender,".

[Section 3A1.1 is amended by striking subsection (c).]

[The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 1 by striking the sentence that begins "Moreover,".]

The Commentary to § 3A1.1 captioned "Application Notes" is amended in Note 3 by inserting "gender identity," after "gender,"; and by adding after Note 4 the following:

"5. For purposes of this guideline, 'gender identity' means actual or perceived gender-related characteristics. *See* 18 U.S.C. § 249(c)(4).".

The Commentary to § 3A1.1 captioned "Background" is amended in the first paragraph by adding at the end the following: "In section 4703(a) of Public Law 111–84, Congress broadened the scope of that directive to include gender identity; to reflect that congressional action, the Commission has broadened the scope of this enhancement to include gender identity.".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 247 the following:

"18 U.S.C. § 249 2H1.1";

and by inserting after the line referenced to 18 U.S.C. 1369 the following:

"18 U.S.C. § 1389 2A2.2, 2A2.3, 2B1.1".

6. Organizational Guidelines

Synopsis of Proposed Amendment: This proposed amendment makes several changes to Chapter Eight of the *Guidelines Manual* regarding the sentencing of organizations.

First, the proposed amendment amends the Commentary to § 8B2.1 (Effective Compliance and Ethics Program) to clarify the remediation efforts required to satisfy subsection (b)(7) (the seventh requirement for an effective compliance and ethics program). The proposed amendment adds a new application note that describes the reasonable steps to respond appropriately after criminal conduct is detected, including remedying the harm caused to identifiable victims and payment of restitution. Notably, restitution is already a significant remediation step considered under current Department of Justice guidelines in determining whether to prosecute business organizations. *See* U.S. Attorney's Manual, Chapter 9–28.300(A)(6) and Chapter 9–28.900(A) & (B).

Second, the proposed amendment amends § 8D1.4 (Recommended Conditions of Probation—Organizations) (Policy Statement) to augment and simplify the recommended conditions of probation for organizations. The policy statement currently distinguishes between conditions of probation imposed solely to enforce a monetary penalty (addressed in subsection (b)) and conditions of probation imposed for any other reason (addressed in subsection (c)). Under the proposed amendment, subsections (b) and (c) are consolidated; accordingly, when a court determines there is a need for organizational probation, all conditional probation terms are available for consideration by the court. The proposed amendment also inserts specific language regarding the engagement of an independent, properly qualified, corporate monitor. This language reflects current governmental policy and best practices with regard to the appointment of such independent corporate monitors. Finally, the proposed amendment inserts specific language requiring the organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision.

In addition, the proposed amendment contains, in brackets, two proposed additions to the Commentary of § 8B2.1. The first bracketed addition amends Application Note 3 to include a new paragraph which clarifies what is expected of high-level personnel and

substantial authority personnel. Such personnel "should be aware of the organization's document retention policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law".

The second bracketed addition amends Application Note 6 to clarify that when an organization periodically assesses the risk that criminal conduct will occur, the "nature and operations of the organization with regard to particular ethics and compliance functions" should be included among the other matters assessed. This bracketed addition also states, as an example, that "all employees should be aware of the organization's document retention policy or policies and conform any document retention policy to meet the goals of an effective compliance program under the guidelines and to avoid any liability under the law".

Finally, the proposed amendment makes technical and conforming changes.

An issue for comment is also included on whether to encourage direct reporting to the board by responsible compliance personnel by allowing an organization with such a structure to benefit from a three level mitigation of the culpability score, even if high-level personnel are involved in the criminal conduct.

Proposed Amendment

[The Commentary to § 8B2.1 captioned "Application Notes" is amended in Note 3 by adding at the end the following:

"Both high-level personnel and substantial authority personnel should be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law (*e.g.* 18 U.S.C. § 1519; 18 U.S.C. § 1512(c))."; and in Note 6(A) by adding at the end the following:

"(iv) The nature and operations of the organization with regard to particular ethics and compliance functions. For example, all employees should be aware of the organization's document retention policies and conform any such policy to meet the goals of an effective compliance program under the guidelines and to reduce the risk of liability under the law (*e.g.* 18 U.S.C. § 1519; 18 U.S.C. § 1512(c)).]

The Commentary to § 8B2.1 captioned "Application Notes" is amended by redesignating Note 6 as Note 7, and by inserting after Note 5 the following:

"6. *Application of Subsection (b)(7).*—The seventh minimal requirement for an effective compliance and ethics program provides guidance on the reasonable steps that an organization should take after detection of criminal conduct. First, the organization should respond appropriately to the criminal conduct. In the event the criminal conduct has an identifiable victim or victims the organization should take reasonable steps to provide restitution and otherwise remedy the harm resulting from the criminal conduct. Other appropriate responses may include self-reporting, cooperation with authorities, and other forms of remediation. Second, to prevent further similar criminal conduct, the organization should assess the compliance and ethics program and make modifications necessary to ensure the program is more effective. The organization may take the additional step of retaining an independent monitor to ensure adequate assessment and implementation of the modifications.".

Section 8D1.4 is amended by striking subsections (b) and (c) and inserting the following:

"(b) If probation is imposed under § 8D1.1, the following conditions may be appropriate:

(1) The organization shall develop and submit to the court an effective compliance and ethics program consistent with § 8B2.1 (Effective Compliance and Ethics Program). The organization shall include in its submission a schedule for implementation of the compliance and ethics program.

(2) Upon approval by the court of a program referred to in subdivision (1), the organization shall notify its employees and shareholders of its criminal behavior and its program referred to in subdivision (1). Such notice shall be in a form prescribed by the court.

(3) The organization shall be required to retain an independent corporate monitor agreed on by the parties or, in the absence of such an agreement, selected by the court. The independent corporate monitor must have appropriate qualifications and no conflict of interest in the case. The scope of the independent corporate monitor's role shall be approved by the court. Compensation to and costs of any independent corporate monitor shall be paid by the organization.

(4) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, (A) reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received, and (B) reporting on the organization's progress in implementing the program referred to in subdivision (1). Among other things, such reports shall disclose any criminal prosecution, civil litigation, or administrative proceeding commenced against the organization, or any investigation or formal inquiry by governmental authorities of which the organization learned since its last report.

(5) The organization shall be required to notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(6) The organization shall submit to: (A) A reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer, experts engaged by the court, or independent corporate monitor; (B) a reasonable number of regular or unannounced examinations of facilities subject to probation supervision; and (C) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court or independent corporate monitors shall be paid by the organization.

(7) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (A) Restitution; (B) fine; and (C) any other monetary sanction.".

The Commentary to § 8D1.4 captioned "Application Note" is amended in Note 1 by striking "(a)(3) through (6)"; by inserting "or require retention of an independent corporate monitor" after "experts"; and by striking "(c)(3)" and inserting "(b)(4)".

Issue for Comment

1. Should the Commission amend § 8C2.5(f)(3) (Culpability Score) to allow an organization to receive the three level mitigation for an effective compliance program even when high-level personnel are involved in the offense if (A) the individual(s) with operational responsibility for compliance in the organization have direct reporting authority to the board level (e.g. an audit committee of the board); (B) the compliance program was successful in detecting the offense prior to discovery or reasonable likelihood of discovery outside of the organization; and (C) the organization promptly reported the violation to the appropriate authorities?

7. Miscellaneous

Synopsis of Proposed Amendment: This proposed multi-part amendment responds to miscellaneous issues arising from legislation recently enacted and other miscellaneous guideline application issues.

Part A of the proposed amendment responds to the Fraud Enforcement and Recovery Act of 2009 (Pub. L. 111–21), which expanded the securities fraud statute, 18 U.S.C. 1348, so that it also covers commodities fraud. Section 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States)

contains an enhancement at subsection (b)(17)(B) that applies when a violation of commodities law is committed by certain specified persons who have fiduciary duties. The proposed amendment adds 18 U.S.C. 1348 to the list of offenses that qualify as "commodities law" for purposes of this enhancement.

Part B of the proposed amendment responds to the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11), which established a new offense at 16 U.S.C. 470aaa–5. The new offense makes it unlawful to excavate, remove, damage, or otherwise alter or deface any paleontological resource on federal land; to traffic in a paleontological resource taken from federal land; or to make or submit a false record relating to a paleontological resource taken from federal land. The proposed amendment adds 16 U.S.C. 470aaa–5 to Appendix A (Statutory Index) and references it to §§ 2B1.1 and 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources). Technical and conforming changes to §§ 2B1.1 and 2B1.5 are also made.

Part C of the proposed amendment responds to the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111–3), which amends the Social Security Act to establish a new offense at 42 U.S.C. 1396w–2. This provision provides limited authority for private entities to disclose certain personal information related to eligibility determinations to appropriate State agencies, and also creates a new Class A misdemeanor for those who abuse this limited authority and communicate protected information to parties not entitled to view it. The proposed amendment adds 42 U.S.C. 1396w–2 to Appendix A (Statutory Index) and references it to § 2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Certain Private or Protected Information).

Part D of the proposed amendment responds to a regulatory change in the status of iodine as a listed chemical. Under that regulatory change, iodine was upgraded from a List II chemical to a List I chemical. The proposed amendment changes the Chemical Quantity Table in § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to reflect the upgrade. Because the maximum base offense level is higher for List I chemicals (level 30) than for List II chemicals (level 28), the proposed amendment also extends iodine's maximum base offense level to level 30 and specifies the amount of iodine that would be needed (1.3 kilograms) for a base offense level of 30 to apply.

Proposed Amendment

(A) Fraud Enforcement and Recovery Act of 2009

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 14(A) by inserting "and 18 U.S.C. § 1348" after "7 U.S.C. § 1 *et seq.*)".

(B) Omnibus Public Land Management Act of 2009

Section 2B1.1(c)(4) is amended by inserting "or a paleontological resource" after "resource"; and by inserting "or Paleontological Resources" after "Heritage Resources" each place it appears.

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 1 by inserting after the paragraph that begins "'National cemetery' means" the following:

"'Paleontological resource' has the meaning given that term in Application Note 1 of the Commentary to § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources)."

Section 2B1.5 is amended in the heading by inserting "*or Paleontological Resources*" after "*Heritage Resources*" each place it appears.

Section 2B1.5(b) is amended by inserting "or paleontological resource" after "heritage resource" each place it appears; and in paragraph (5) by inserting "or paleontological resources" after "heritage resources".

The Commentary to § 2B1.5 captioned "Statutory Provisions" is amended by inserting "470aaa–5," after "16 U.S.C. §§ ".

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 1 by redesignating (A) through (G) as (i) through (vii), respectively; by striking" '*Cultural Heritage Resource' Defined.*—For purposes of this guideline, 'cultural heritage resource' means any of the following:" and inserting:

"*Definitions.*—For purposes of this guideline:

(A) 'Cultural heritage resource' means any of the following:";

By striking "(A)" before "has the meaning" and inserting "(I)"; by striking "(B)" before "includes" and inserting "(II)"; and by adding at the end the following:

"(B) 'Paleontological resource' has the meaning given such term in 16 U.S.C. § 470aaa.".

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 2 by striking "*Cultural Heritage*" both places it appears; and by striking "cultural heritage" each place it appears.

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 5(B) by striking "cultural heritage"; in Note 6(A) by inserting "or paleontological resources" after "resources", and by striking "cultural heritage" after "involving a" each place it appears; in Note 8 by striking "cultural heritage" each place it appears; and in Note 9 by inserting "or paleontological resources" after "resources" the first two places it appears; and by striking "cultural heritage" after "or other".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 16 U.S.C. § 413 the following:

"16 U.S.C. § 470aaa–5 2B1.1, 2B1.5".

(C) Children's Health Insurance Program Reauthorization Act of 2009

Appendix A (Statutory Index) is amended by inserting after the line referenced to 42 U.S.C. 1396h(b)(2) the following:

"42 U.S.C. § 1396w–2 2H3.1".

(D) Iodine

Section 2D1.11(e) is amended in subdivisions (1)–(10) by inserting the following list I chemicals in the appropriate place in alphabetical order by subdivision as follows:

(1) "1.3 KG or more of Iodine;",

(2) "At least 376.2 G but less than 1.3 KG of Iodine;",

(3) "At least 125.4 G but less than 376.2 G of Iodine;",

(4) "At least 87.8 G but less than 125.4 G of Iodine;",

(5) "At least 50.2 G but less than 87.8 G of Iodine;",

(6) "At least 12.5 G but less than 50.2 G of Iodine;",

(7) "At least 10 G but less than 12.5 G of Iodine;",

(8) "At least 7.5 G but less than 10 G of Iodine;",

(9) "At least 5 G but less than 7.5 G of Iodine;",

(10) "Less than 5 G of Iodine;"; and

in subdivisions (2)–(10), in list II chemicals, by striking the lines referenced to "Iodine", and in the lines referenced to "Toluene" by striking the semicolon and inserting a period.

8. Technical

Synopsis of Proposed Amendment: This two-part proposed amendment makes various technical and conforming changes to the guidelines.

Part A of the proposed amendment makes changes to the Guidelines Manual to promote accuracy and completeness. For example, it corrects typographical errors, and it addresses cases in which the Guidelines Manual provides information (such as a reference to a guideline, statute, or regulation) that has become incorrect or obsolete. Specifically, it amends:

(1) § 1B1.3 (Relevant Conduct), Application Note 6, to ensure that two quotations contained in that note are accurate;

(2) § 1B1.8 (Use of Certain Information), Application Note 2, to revise a reference to the "Probation Service";

(3) § 1B1.9 (Class B or C Misdemeanors and Infractions), Application Note 1, to reflect that some infractions do not have any authorized term of imprisonment;

(4) § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), Application Note 2, to correct a typographical error;

(5) § 2A1.1 (First Degree Murder), Application Note 1, to provide specific citations for the examples given;

(6) § 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts)), Application Note 5, to correct typographical errors;

(7) § 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), Application Note 1, to correct a typographical error;

(8) § 2A3.5 (Failure to Register as a Sex Offender), Application Note 1, to ensure that the statutory definitions referred to in that note are accurately cited;

(9) § 2B1.4 (Insider Trading), Application Note 1, to correct a typographical error;

(10) § 2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources), Application Note 1, to provide updated citations to statutes and regulations;

(11) § 2B3.1 (Robbery), Application Note 2, to correct a typographical error;

(12) § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), Background, to provide an updated description and reference to the statute criminalizing bribery in connection with Medicare and Medicaid referrals;

(13) § 2B6.1 (Altering or Removing Motor Vehicle Identification Numbers), Background, to update the statutory maximum term of imprisonment for violations of 18 U.S.C. § 553(a)(2);

(14) § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe), Application Note 3, to ensure that the subsection relating to "loss" is accurately cited;

(15) § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), Application Note 4, to correct a typographical error;

(16) § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking), in the Notes to the Drug Quantity Table, to provide updated citations to regulations;

(17) Both § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical), Application Note 6, and § 2D1.12 (Unlawful Possession, Manufacture, Distribution, Transportation, Exportation, or Importation of Prohibited Flask, Equipment, Chemical, Product, or Material) to provide a more accurate statutory citation and description;

(18) § 2D1.14 (Narco-Terrorism), subsection (a)(1), to provide an updated guideline reference;

(19) § 2D2.1 (Unlawful Possession), Commentary, to provide updated statutory references;

(20) § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter), Application Note 1, to make the definition of "distribution" in that guideline more consistent with the definition of "distribution" in the child pornography guidelines;

(21) § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), Application Note 2, to ensure that a quotation contained in that note is accurate;

(22) § 2K2.5 (Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone), Application Notes 2 and 3, to provide updated statutory references;

(23) Both § 2L2.2 (Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport), Statutory Provisions, and § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use), Statutory Provisions, to provide updated statutory references;

(24) § 2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government), Application Note 1, to provide an updated reference to an executive order;

(25) § 2M3.3 (Transmitting National Defense Information), to provide an updated statutory reference;

(26) § 2M3.9 (Disclosure of Information Identifying a Covert Agent), Application Note 3, to provide an updated statutory reference;

(27) § 2M6.1 (Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction), Application Note 1, to provide updated statutory references;

(28) § 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides), Background, to provide updated guideline references;

(29) § 2Q1.6 (Hazardous or Injurious Devices on Federal Lands), subsection (a)(1), to correct a typographical error;

(30) § 2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), Application Note 3, to provide a more complete reference to regulations;

(31) Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), Introductory Commentary, to provide a more complete statutory reference;

(32) § 2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)), to strike an erroneous statutory reference;

(33) Appendix A (Statutory Index), to provide updated statutory references and strike an erroneous statutory reference.

Part B of the proposed amendment makes a series of changes to the *Guidelines Manual* to promote stylistic consistency in how subdivisions are designated. Specifically, when dividing guideline sections into subdivisions, the guidelines generally follow the structure used by Congress to divide statutory sections into subdivisions. Thus, a section is broken into subsections (starting with "(a)"), which are broken into paragraphs (starting with "(1)"), which are broken into subparagraphs (starting with "(A)"), which are broken into clauses (starting with "(i)"), which are broken into subclauses (starting with "(I)"). *See Koons Buick Pontiac GMC, Inc.,* v. *Nigh,* 543 U.S. 50, 60 (2004). For a generic term, "subdivision" is also used. When dividing application notes into subdivisions, the guidelines generally follow the same structure, except that subsections and paragraphs are not used; the first subdivisions used are subparagraphs (starting with "(A)"). Part B of the proposed amendment identifies places in the *Guidelines Manual* where these principles are not followed and brings them into conformity.

Proposed Amendment

(A) Changes To Promote Accuracy and Completeness

The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 6, in the paragraph that begins "A particular guideline", by striking "'is"

and inserting "'was"; and by striking "was committed by the means set forth in" and inserting "involved conduct described in".

The Commentary to § 1B1.8 captioned "Application Notes" is amended in Note 2 by striking "Probation Service" and inserting "probation office".

The Commentary to § 1B1.9 captioned "Application Notes" is amended in Note 1 by inserting "or for which no imprisonment is authorized. *See* 18 U.S.C. 3559" after "five days".

The Commentary to § 1B1.11 captioned "Application Notes" is amended in Note 2 by striking "Guideline" and inserting "Guidelines".

The Commentary to § 2A1.1 captioned "Application Notes" is amended in Note 1 by inserting ", *see* § 2A4.1(c)(1)" after "occurs"; and by inserting ", *see* § 2E1.3(a)(2)" after "racketeering".

The Commentary to § 2A3.2 captioned "Application Notes" is amended in Note 5 by striking "kidnaping" and inserting "kidnapping" each place it appears.

The Commentary to § 2A3.3 captioned "Application Notes" is amended in Note 1 by inserting "years" before "; (B)".

The Commentary to § 2A3.5 captioned "Application Notes" is amended in Note 1 by striking "those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively" and inserting "the terms 'tier I sex offender', 'tier II sex offender', and 'tier III sex offender', respectively, in 42 U.S.C. § 16911".

The Commentary to § 2B1.4 captioned "Application Notes" is amended in Note 1 by striking "*Subsection of*".

The Commentary to § 2B1.5 captioned "Application Notes" is amended in Note 1(C) by striking "299" and inserting "229"; and in Note 1(E) by striking "section 2(c) of Public Law 99–652 (40 U.S.C. 1002(c))" and inserting "40 U.S.C. § 8902(a)(1)".

The Commentary to § 2B3.1 captioned "Application Notes" is amended in Note 2 by striking "(d)" and inserting "(D)".

The Commentary to § 2B4.1 captioned "Background" is amended in the paragraph that begins "This guideline also applies" by striking "was recently increased from two to" and inserting "is"; and by striking the sentence that begins "Violation" and all that follows through "to the Medicaid program." and inserting "Violations of 42 U.S.C. § 1320a–7b involve the offer or acceptance of a payment to refer an individual for services or items paid for under a federal health care program (*e.g.,* the Medicare and Medicaid programs).".

The Commentary to § 2B6.1 captioned "Background" is amended by striking "§§ 511 and 553(a)(2)" and inserting "§ 511"; and by inserting "§ 553(a)(2) and" before "2321".

The Commentary to § 2C1.1 captioned "Application Notes" is amended in Note 3 by striking "(A)" after "(b)(2)".

The Commentary to § 2C1.2 captioned "Application Notes" is amended in Note 4 by striking "or" before "Trust" and inserting "of".

Section 2D1.1(c) is amended in each of Notes (H) and (I) to the Drug Quantity Table by striking "(25)" and inserting "(30)".

The Commentary to § 2D1.11 captioned "Application Notes" is amended in Note 6 by striking "or" after "1319(c),"; by striking § 5124,"; and by inserting after "9603(b)" the following: ", and 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)".

The Commentary to § 2D1.12 captioned "Application Notes" is amended in Note 3 by striking "or" after "1319(c),"; by striking § 5124,"; and by inserting after "9603(b)" the following: ", and 49 U.S.C. 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material)".

Section 2D1.14(a)(1) is amended by striking "(3)"and inserting "(5)" both places it appears.

The Commentary to § 2D2.1 captioned "Background" is amended in the paragraph that begins "Section 2D2.1(b)(1)" by striking "Section 6371 of the Anti-Drug Abuse Act of 1988" both places it appears and inserting "21 U.S.C. § 844" both places it appears.

The Commentary to § 2G3.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "'Distribution' means" by inserting "transmission," after "production,".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 2 by inserting "*That Is*" after "*Firearm*"*;* and by inserting "that is" after "'semiautomatic firearm".

The Commentary to § 2K2.5 captioned "Application Notes" is amended in Note 2 by striking "(f)" and inserting "(g)"; and in Note 3 by inserting "*See* 18 U.S.C. § 924(a)(4)." after "other offense.".

The Commentary to § 2L2.1 captioned "Statutory Provisions" is amended by striking "(b)," after "1325"; and by inserting ", (d)" after "(c)".

The Commentary to § 2L2.2 captioned "Statutory Provisions" is amended by striking "(b)," after "1325"; and by inserting ", (d)" after "(c)".

The Commentary to § 2M3.1 captioned "Application Notes" is amended in Note 1 by striking "12356" and inserting "12958 (50 U.S.C. § 435 note)".

The Commentary to § 2M3.3 captioned "Statutory Provisions" is amended by striking "(b), (c)".

The Commentary to § 2M3.9 captioned "Application Notes" is amended in Note 3 by inserting "*See* 50 U.S.C. § 421(d)." after "imprisonment.".

The Commentary to § 2M6.1 captioned "Application Notes" is amended in Note 1 in the paragraph that begins "Foreign terrorist" by striking "1219" and inserting "1189"; and in the paragraph that begins "'Restricted person" by striking "(b)" and inserting "(d)".

The Commentary to § 2Q1.2 captioned "Background" is amended by striking "last two" and inserting "fifth and sixth".

Section 2Q1.6(a)(1) is amended by striking "Substance" and inserting "Substances".

The Commentary to § 2Q2.1 captioned "Application Notes" is amended in Note 3 by inserting ", Subtitle B," after "7 CFR".

Chapter Two, Part T, Subpart 2, is amended in the Introductory Commentary by striking "section" and inserting "subpart"; and by inserting "of Chapter 51 of Subtitle E" after "Subchapter J".

The Commentary to § 2X5.2 captioned "Statutory Provisions" is amended by striking "§ 1129(a),".

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. § 13(f) by striking "(f)" and inserting "(e)";

In the line referenced to 8 U.S.C. 1325(b) by striking "(b)" and inserting "(c)";

In the line referenced to 8 U.S.C. 1325(c) by striking "(c)" and inserting "(d)";

By inserting after the line referenced to 18 U.S.C. 47 the following:

"18 U.S.C. § 248 2H1.1";

By striking the line referenced to 18 U.S.C. 1129(a);

By inserting after the line referenced to 42 U.S.C. 1320a–7b the following:

"42 U.S.C. § 1320a–8b 2X5.1, 2X5.2";

In the line referenced to 50 U.S.C. 783(b) by striking "(b)"; and

By striking the line referenced to 50 U.S.C. 783(c).

(B) Changes To Promote Stylistic Consistency

The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 2 in the second paragraph by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

The Commentary to § 1B1.13 captioned "Application Notes" is amended in Note 1 by striking

"*Subsection*" and inserting "*Subdivision*".

Section 2H4.2(b)(1) is amended by striking "(i)" and inserting "(A)"; and by striking "(ii)" and inserting "(B)".

The Commentary to § 2K1.3 captioned "Application Notes" is amended in Note 10 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; by striking "(3)" and inserting "(C)"; and by striking "(4)" and inserting "(D)".

The Commentary to § 2K2.1 captioned "Application Notes" is amended in Note 11 by striking "(1)" and inserting "(A)"; by striking "(2)" and inserting "(B)"; by striking "(3)" and inserting "(C)"; and by striking "(4)" and inserting "(D)".

The Commentary to § 3C1.1 captioned "Application Notes" is amended in Note 4 by redesignating subdivisions (a) through (k) as (A) through (K); and in Note 5 by redesignating subdivisions (a) through (e) as (A) through (E).

The Commentary to § 3E1.1 captioned "Application Notes" is amended in Note 1 by redesignating subdivisions (a) through (h) as (A) through (H).

Section 5K2.17 is amended by striking "(A)" and inserting "(1)"; and by striking "(B)" and inserting "(2)".

[FR Doc. 2010–970 Filed 1–20–10; 8:45 am]

BILLING CODE 2210–40–P

DEPARTMENT OF VETERANS AFFAIRS

National Research Advisory Council; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the National Research Advisory Council will hold a meeting on Thursday, February 4, 2010, in the second floor conference room of the Paralyzed Veterans of America Building, 801 18th Street, NW., Washington, DC. The meeting will convene at 8:30 a.m. and end at 3 p.m. The meeting is open to the public.

The purpose of the Council is to provide external advice and review for VA's research mission. The agenda will include a review of the VA research portfolio and a summary of current budget allocations. The Council will also provide feedback on the direction/focus of VA's research initiatives.

Time will be allocated for receiving public comments at 2 p.m. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Ms. Margaret Hannon, Designated Federal Officer, Department of Veterans Affairs, Office of Research and Development (12), 810 Vermont Avenue, NW., Washington, DC 20420, or electronically at *Margaret.Hannon@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Ms. Hannon at (202) 461–1696.

Dated: January 14, 2010.

By direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. 2010–991 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0571]

Agency Information Collection (NCA Customer Satisfaction Surveys (Headstone/Marker)) Activity Under OMB Review

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the National Cemetery Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 22, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0571" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0571."

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for NCA, and IG Customer Satisfaction Surveys.

OMB Control Number: 2900–0571.

Type of Review: Extension of a currently approved collection.

Abstract: Executive Order 12862, Setting Customer Service Standards, requires Federal agencies and Departments to identify and survey its customers to determine the kind and quality of services they want and their level of satisfaction with existing service. VA will use the data collected to maintain ongoing measures of performance and to determine how well customer service standards are met.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 12, 2009, at pages 58373–58374.

Affected Public: Individuals or households.

Estimated Annual Burden Hours, Burden per Respondents, and Number of Respondents

I. National Cemetery Administration Focus Groups

a. *Next of Kin* (5 groups/10/participants per group/3 hours each session) = 150 hours.

b. *Funeral Directors* (5 groups/10 participants per group/3 hours each session) = 150 hours.

c. *Veterans Service Organizations* (5 groups/10 participants per group/3 hours each session) = 150 hours.

II. National Cemetery Administration Visitor Comments Cards (Local Use)

(2,500 respondents/5 minutes per card) = 208 hours.

III. National Cemetery Administration Mail Surveys

a. *Next of Kin National Customer Satisfaction Survey* (Mail to 15,000 respondents/30 minutes per survey) = 7,500 hours.

b. *Funeral Directors National Customer Satisfaction Survey* (Mail to 4,000 respondents/30 minutes per survey) = 2,000 hours.

c. *Veterans-At-Large National Customer Satisfaction Survey* (Mail to 5,000 respondents/30 minutes per survey) = 2,500 hours.

IV. Program/Specialized Service Survey

National Cemetery Administration Headstone and Marker/PMC Survey (Mail to 6,000 surveys/15 minutes per survey) = 1,000.

Frequency of Response: Annually.

Dated: January 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–1029 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–New (HEC)]

Agency Information Collection (Health Eligibility Center (HEC) New Enrollee Survey) Activity Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 22, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–New (HEC)" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–New (HEC)."

SUPPLEMENTARY INFORMATION:

Title: Health Eligibility Center (HEC) New Enrollee Survey, VA Form 10–0479.

OMB Control Number: 2900–New (HEC).

Type of Review: New collection.

Abstract: The data collected on VA Form 10–0479 will be used to improve customer service processes for Veterans applying for health care benefits. VA will use this information to determine the quality of customer service given to the Veteran and to identify what areas within the process are in need for improvement.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 13, 2009, on pages 58683–58684.

Affected Public: Individuals or Households.

Estimated Annual Burden: 153 hours.

Estimated Average Burden per Respondent: 5.7 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 1,055.

Dated: January 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–1030 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0118]

Agency Information Collection (Transfer of Scholastic Credit (Schools)) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 22, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to "OMB Control No. 2900–0118" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0118."

SUPPLEMENTARY INFORMATION:

Title: Transfer of Scholastic Credit (Schools), VA Form Letter 22–315.

OMB Control Number: 2900–0118.

Type of Review: Extension of a currently approved collection.

Abstract: Students receiving VA education benefits and are enrolled in two training institutions, must have the primary institution at which he or she is pursuing approved program of education verify that their courses pursued at a secondary school will be accepted as full credit towards their course objective. VA sends VA Form Letter 22–315 to the student requesting that they have the certifying official of his or her primary institution list the course or courses pursued at the secondary school for which the primary institution will give full credit. Educational payment for courses pursued at a secondary school is not payable until VA receives evidence from the primary institution verifying that the student is pursuing his or her approved program while enrolled in these courses. VA Form Letter 22–315 serves as this certification of acceptance.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 12, 2009, at pages 58374–58375.

Affected Public: State, Local or Tribal Government.

Estimated Annual Burden: 1,436 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Occasion.

Estimated Number of Respondents: 8,616.

Dated: January 15, 2009.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–1031 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0406]

Agency Information Collection (Verification of VA Benefits) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 22, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0406" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0406."

SUPPLEMENTARY INFORMATION:

Title: Verification of VA Benefits, VA Form 26–8937.

OMB Control Number: 2900–0406.

Type of Review: Extension of a currently approved collection.

Abstract: Lenders authorized to make VA-guaranteed home or manufactured loans on an automatic basis are required to determine through VA whether any benefits related debts exist in the veteran-borrower's name prior to the closing of any automatic loan. Lenders cannot close any proposed automatic loan until evidence is received from VA stating that there is no debt, or if a debt exists, or the veteran has agreed on an acceptable repayment plan, or payments under a plan already in effect are current. VA Form 26–8937 is used to assist lenders and VA in the completion of debt checks in a uniform manner. The form restricts information requested to only what is needed for the debt check and to eliminate unlimited versions of lender-designed forms. The form also informs the lender whether or not the veteran is exempt from paying the funding fee, which must be collected on all VA home loans unless the veteran is receiving service-connected disability compensation.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 13, 2009, at pages 58684–58685.

Affected Public: Individuals or households.

Estimated Annual Burden: 12,500 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 150,000.

Dated: January 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–1032 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0176]

Agency Information Collection (Monthly Record of Training and Wages) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before February 22, 2010.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0176" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0176."

SUPPLEMENTARY INFORMATION:

Title: Monthly Record of Training and Wages, VA Form 28–1905c.

OMB Control Number: 2900–0176.

Type of Review: Extension of a currently approved collection.

Abstract: On-the-job trainers use VA Form 28–1905c to maintain accurate records on a trainee's progress toward their rehabilitation goals as well as recording the trainee's on-the-job training monthly wages. Trainers report these wages on the form at the beginning of the program and at any time the trainee's wage rate changes. Following a trainee's completion of a vocational rehabilitation program, the form is submitted to the trainee's case manager to monitor the trainee's training and to ensure that the trainee is progressing and learning the skills necessary to carry out the duties of his or her occupational goal.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 12, 2009, at page 58375.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,600 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 14,400.

Dated: January 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–1033 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0567]

Agency Information Collection (PMC) Activity Under OMB Review

AGENCY: National Cemetery Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the National Cemetery Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before *February 22, 2010.*

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov;* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0567" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov.* Please refer to "OMB Control No. 2900–0567."

SUPPLEMENTARY INFORMATION:

Title: President Memorial Certificate (PMC), VA Form 40–0247.

OMB Control Number: 2900–0567.

Type of Review: Extension of a currently approved collection.

Abstract: The PMC is automatically issued without a request from the next of kin as part of processing a death benefits claim. The PMC allows eligible recipients (next of kin, other relatives or friends) to request additional certificates and/or replacement or corrected certificates upon the receipt of the original PMC.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on November 13, 2009, on page 58684.

Affected Public: Individuals or households.

Estimated Annual Burden: 8,004.

Estimated Average Burden per Respondent: 2 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 240,132.

Dated: January 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–1034 Filed 1–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Rehabilitation Research and Development Service Scientific Merit Review Board; Notice of Meeting

The Department of Veterans Affairs gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Rehabilitation Research and Development Service Scientific Merit Review Board will meet on March 1–2, 2010, and March 3–4, 2010, at the Marriott Washington Wardman Park Hotel, 2660 Woodley Road, NW., Washington, DC, from 8 a.m. until 5:30 p.m. each day.

The purpose of the Board is to review rehabilitation research and development applications for scientific and technical merit and to make recommendations to the Director, Rehabilitation Research and Development Service, regarding their funding.

The sessions on March 1 and 4 will be open to the public from 8 a.m. to 9 a.m. for the discussion of administrative matters, the general status of the program and the administrative details of the review process. The sessions will be closed as follows for the Board's review of research and development applications:

March 1—from 9 a.m. to 5:30 p.m.

March 2—from 8 a.m. to 5:30 p.m.

March 4—from 9 a.m. to 5:30 p.m.

March 5—from 8 a.m. to 5:30 p.m.

The reviews involves oral comments, discussion of site visits, staff and consultant critiques of proposed research protocols, and similar analytical documents that focus on the consideration of the personal qualifications, performance and competence of individual research investigators. Disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. Disclosure would also reveal research proposals and research underway which could lead to the loss of these projects to third parties and thereby frustrate future agency research efforts. As provided by subsection 10(d) of Public Law 92–463, as amended, closing positions of the meeting is in accordance with 5 U.S.C. 552b(c)(6), and (c)(9)(B).

Those who plan to attend the open sessions should contact Tiffany Asqueri, Federal Designated Officer, Rehabilitation Research and Development Service (122P), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, or at (202) 461–1740.

Dated: January 14, 2010.

By direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. 2010–1001 Filed 1–20–10; 8:45 am]

BILLING CODE P

Federal Register

Thursday,
January 21, 2010

Part II

Department of Housing and Urban Development

HUD Multifamily Rental Project Closing Documents: Proposed Revisions and Updates and Notice of Information Collection; Notice

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5354–N–01]

RIN 2502–AI80

HUD Multifamily Rental Project Closing Documents: Proposed Revisions and Updates and Notice of Information Collection

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice advises that HUD is issuing for public comment a comprehensive set of revised closing documents for use in Federal Housing Administration (FHA) multifamily rental projects. This notice starts anew the process for updating the multifamily rental project closing documents; that process commenced with an August 2, 2004, notice that presented proposed revised closing documents for public comment. The August 2004 notice was followed by an August 31, 2006, notice in which HUD provided updates on the closing document development process, advised of policy decisions that HUD had made at that time, and announced a September 21, 2006, public meeting at which HUD would take questions on the development process and policy decisions announced in the August 31, 2006, notice.

On June 1, 2009, HUD announced, on its Web site, that it would commence review of the multifamily rental project closing documents as last revised by the prior Administration and welcomed the public to review these documents along with HUD, as well as submit any informal comments on the revised closing documents.

In submitting the comprehensive set of revised multifamily rental closing documents for public comment, this notice also complies with the Paperwork Reduction Act of 1995. While complying with the Paperwork Reduction Act of 1995, this notice provides information beyond that normally provided in such notices by identifying changes HUD has made to the proposed closing documents published on August 2, 2004, and summarizing and responding to issues raised by commenters on the 2004 proposed closing documents, and to those issues informally presented on the revised closing documents recently posted on HUD's Web site.

In revising these forms, HUD identified language and policies that were outdated and needed to be changed to be consistent with modern real estate and mortgage lending laws and practices. By reflecting current terminology and current lending laws and practices, updated multifamily rental project closing documents will better protect and benefit all parties involved in these transactions. The multifamily closing documents are posted on HUD's Web site at *http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm.*

DATES: *Comment Due Date:* March 22, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail. Comments* may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. *Comments* submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. *Commenters* should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

Redline/Strikeout Submissions. While commenters may submit, as part of their comments, a redline/strikeout of any one or more of the multifamily rental project closing documents, the redline/strikeout drafts, to be considered, must be accompanied by a narrative statement that explains the proposed changes.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John J. Daly, Office of the General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 9226, Washington, DC 20410–0500; telephone number 202–708–1274 (this is not a toll-free number). Persons with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

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I. Background

On August 2, 2004, HUD published a notice in the **Federal Register** (69 FR 46214) that advised that, consistent with the Paperwork Reduction Act of 1995, it was publishing for public comment a comprehensive set of revised closing forms and documents (closing documents) for use in the FHA multifamily rental project and health care facility (excluding hospitals) programs. In addition to meeting the requirements of the Paperwork Reduction Act, HUD advised that it was not solely seeking public comment on burden hours, as is the primary focus of the Paperwork Reduction Act, but seeking public comment for the purpose of receiving input from the lending industry and other interested parties in HUD's development and adoption of a

set of instruments that offer the requisite protection to all parties in these FHA-insured mortgage programs, while also being consistent with modern real estate practice and mortgage lending laws and procedures. The August 2, 2004, notice advised that HUD's closing documents were significantly outdated and needed a thorough review and update to reflect current HUD policies, as well as current practices in real estate and mortgage financing transactions.

The August 2, 2004, notice followed an earlier informal solicitation of public comment on proposed revisions to the closing documents, that were posted on HUD's Web site in March 2000. In response to the many comments received from the 2000 solicitation of public comment, significant revisions were made to the proposed closing documents, and these revised documents were published in the **Federal Register** on August 2, 2004, for review and public comment.

On August 31, 2006, HUD published a notice in the **Federal Register** (71 FR 51842) that announced certain policy decisions that had been made with respect to HUD's development of closing documents as of August 2006. HUD issued that notice in response to inquiries about the status of HUD's development of the closing documents. In that notice, HUD also announced that it would hold a meeting on the status of development of the closing documents at HUD Headquarters on September 21, 2006. HUD invited to this meeting the 25 individuals and organizations that submitted comments on the August 2, 2004, notice, welcomed other interested parties to the meeting, and made phone lines available to those unable to participate in person. The purpose of the meeting was to brief the commenters and other interested members of the public on the status of the development of revised closing documents as of August–September 2006.

In the August 31, 2006, notice and at the meeting, HUD announced that the following decisions had been made as of that date.

1. Health Care Facility (*e.g.,* nursing homes) documents would be published again for public comment (*e.g.,* on issues such as treatment of accounts receivable financing) as proposed documents;

2. Revised documents other than documents pertaining exclusively to health care facilities (*e.g.,* rental projects) would be published as final documents without further comment;

3. All revised documents would be updated periodically (*e.g.,* every 3 years to coincide with renewal of Office of Management and Budget (OMB) numbers under the Paperwork Reductions Act);

4. Updates to revised documents that are needed more frequently than periodic updates will be made on a case-by-case basis;

5. Recourse liability for Key Principals would not be a HUD requirement, as proposed in the documents in the August 2, 2004, **Federal Register** notice;

6. A clear definition of "HUD Directives" would be provided; and

7. The effective date for the revised documents would provide time for the processing of pending FHA mortgage insurance applications, as well as for training on the revised documents.

HUD was unable to complete the updating of the closing documents during the prior Administration. On June 1, 2009, HUD announced, on its Web site, that it would commence review of the multifamily rental project closing documents, as last revised by the prior Administration, and welcomed the public to review these documents along with HUD, as well as submit any informal comments on the revised closing documents. (*See http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm.*) The revised closing documents reflected most of the decisions previously made in response to public comments received on the August 2, 2004, proposed closing documents, but not necessarily all of the decisions announced in the August 2006 notice. The June 2009 Internet posting advised that the new HUD Administration had begun its review of the closing documents to consider changes that may be appropriate given policy decisions by a new Administration and in recognition of changes in the multifamily rental housing industry that had occurred since the documents were first proposed for public comment. HUD invited its industry partners, the legal community, and other interested members of the public to review the documents along with HUD and to submit informal comments to a specified e-mail address.

II. This Notice

This notice identifies changes HUD has made to the proposed closing documents since it last published them on August 2, 2004. This notice also advises the public of changes proposed by the new HUD Administration, which reviewed those documents in the context of changed industry conditions since 2004 and 2006, and took into consideration changes previously decided to be made, and the feedback received through the June 2009 informal process. This notice summarizes and responds to issues raised in the 2004 public comments and, consistent with the Paperwork Reduction Act and HUD's own interest in receiving further formal comment on the proposed closing documents, solicits public comment on the revised closing documents. All of the closing documents, which include the most recent proposed changes, are posted on HUD's Web site at *http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm.*

III. Overview of Proposed Policy Determinations and Changes Made to Closing Documents

In addition to identifying changes made to the closing documents to update terminology and improve clarity and comprehension, this section of the preamble highlights some of the more significant changes that were made to those closing documents published for public comment in August 2004.

A. Documents to Which No Changes Were Made

As will also be highlighted below, in the overview of key changes to the closing documents, no substantive changes to the documents published on August 2, 2004, were made to the following documents:

Agreement of Sponsor to Furnish Additional Funds;
Bond Guaranteeing Sponsors' Performance;
Completion Assurance Agreement;
Escrow Agreement for Incomplete Construction;
Escrow Agreement for Latent Defects;
Off-Site Bond—Dual Obligee;
Payment Bond;
Performance Bond;
Request for Approval of Advance of Escrow Funds;
Request for Final Endorsement of Credit Instrument;
Residual Receipts Note Limited Dividend;
Residual Receipts Note Nonprofit;
Surveyors Report.

In addition, no comments were received and no changes were made to the Supplement to Building Loan Agreement.

B. Across-the-Board Changes and Policy Determinations

Section 232 (Health Care Facility) Documents

As a result of the comments received on the 2004 proposed Section 232 closing documents, HUD has determined to revise these documents and publish them at a future date for additional public comment.

Recourse Liability

The introduction of certain limited recourse liability for Key Principals in the 2004 proposed closing documents was opposed by several public commenters, and HUD's August 31, 2006, notice stated that HUD had decided not to include provisions for recourse liability of Key Principals. The revised closing documents posted on HUD's Web site on June 1, 2009, however, retained some of those provisions. Some of the informal comments again opposed inclusion of any recourse liability provisions, arguing that inclusion would dissuade individuals from participating in HUD-insured multifamily housing transactions.

In light of the consequences that certain insufficiently regulated actions have had on the housing finance markets in recent years, and given that public funds are put at risk in HUD multifamily housing transactions, it is now HUD's position that it is appropriate for principals to have recourse liability for certain "bad boy acts." Accordingly, these provisions continue to be included in the revised closing documents being issued for comment under this notice.

Directives

One of the more significant changes made in revising the 2004 closing documents is to clarify the reference to the term "Directives" in the closing documents. Concern about the inclusion of this term and its meaning was an issue raised in many of the comments. At HUD's September 21, 2006, meeting to report on the status of the development of the closing documents, HUD advised that it would provide a clear definition of this term. While a clear definition has been provided in the revised closing documents being issued for comment under this notice, on further consideration, HUD has determined to use the term "Program Obligations" rather than "Directives." HUD's view is that the term "Program Obligations" better captures what was intended by use of the term "Directives," namely, to advise parties to the closing documents of the additional requirements, beyond those included in the documents themselves, to which they are expected to adhere. The language would define "Program Obligations," as follows:

Program Obligations means all applicable statutes and regulations, including all amendments to such statutes and regulations, as they become effective; and all applicable requirements in HUD handbooks, notices, and mortgagee letters that apply to the Project, including all updates and changes to such handbooks, notices, and mortgagee letters that apply to the Project, except that updates and changes subject to notice and comment rulemaking shall become effective upon completion of the rulemaking process. Handbooks, notices, and mortgagee letters are available on HUD's official Web site *(http://www.hudclips.org* or a successor location to that site).

The advantage of this language is that it identifies the specific, longstanding, and familiar types of requirements (those in statutes, regulations, handbooks, notices, and mortgagee letters) to which the parties must adhere. To provide an additional level of assurance to commenters who expressed concern over the possibility that they would be required to comply with any future provision that HUD might issue in any manner, the definition also explicitly states that notice and comment rulemaking will be followed for any requirements that would be subject to such procedures. These procedures address concerns raised about adherence to future directives by the commenters, including concerns about conflicts with existing requirements, retroactive application of new requirements, or lack of time to prepare for transition to new requirements.

For example, the imposition of new or revised information collection requirements (that is, generally new or revised forms) must undergo the notice and comment processes required by the Paperwork Reduction Act of 1995. From time to time, mortgagee letters or other types of direct notices will be used to announce new binding requirements. These documents are appropriate for announcements when new legislation imposes requirements that are effective upon enactment and leave HUD no discretion in implementation, and it is important for HUD to relay this information to the industry as quickly as possible. In such situations, mortgagee letters or other types of direct notices are the best vehicles to relay this information to the industry and to advise of implementation dates and provide implementation guidance, including transition periods where applicable and permitted by statute that may be helpful to the industry. From time to time, HUD may also issue mortgagee letters or direct notices to announce clarifications, interpretations, or certain procedural requirements, such as to which HUD offices or HUD officials certain types of executed documents must be submitted. In brief, HUD will follow the applicable procedures, as directed by statute or regulation, that govern issuance of a document which may announce additional policies, processes, forms, or standards to which parties to the closing documents must comply.

C. Changes Made to Specific Documents and Addition of New Document

This section C of the preamble describes changes made to the proposed closing documents since they were published for comment on August 2, 2004, including changes in response to formal comments on the August 2, 2004, proposed closing documents, changes in response to informal public comments on the revised closing documents posted on June 1, 2009, and changes proposed by the new HUD Administration, which reviewed the documents in the context of changed industry conditions. Citations to specific sections or paragraphs of the closing documents refer to the versions of documents currently posted on HUD's Web site and may differ from the section or paragraph designation in which the relevant provision appeared in prior versions of the documents.

In addition, this section C of the preamble addresses a new Subordination Agreement that HUD is proposing to require on affordable housing transactions with government subordinate debt. The Subordination Agreement would replace the rider to the subordinate note that HUD presently uses.

Agreement and Certification Changes

1. In section 4, inserted "managers, managing members, members" to the Borrower entity which may have an identity of interest with the Architect or General Contractor that must be disclosed to HUD.

2. Removed section 14 that required the General Contractor and Borrower to certify that there were no undisclosed side agreements.

Borrower's Oath Changes

1. Added a new section 4 to require the Borrower to certify that it has not and will not enter into any agreement with any party other than the Lender that allows perfection of any security interest in the Uniform Commercial Code (UCC) Collateral through control under the UCC. This change is in accordance with revisions to Article 9 of the UCC.

2. In response to informal public comment, added a new provision regarding knowledge of proposed laws and ordinances that would affect the project. This provision has been removed from Opinion of Counsel to Borrower and added to the Borrower's Oath, because the Borrower is in a better position to have the relevant knowledge.

Building Loan Agreement Changes

1. Clarified paragraph 4(c) by inserting language related to "over and above" funds.

2. Removed paragraph 19 because it contained references to personal liability of Borrower.

3. Revised paragraph 5 to change the reference to a new Exhibit B, which will list applicable charges or items to which advanced funds are to be applied.

4. Revised paragraph 9 to provide that the covered acts constitute abandonment, and to define more precisely what acts constitute abandonment.

Construction Contract Changes

1. Inserted a subsection (11) to Article 2 that adds any HUD-approved change orders.

2. Inserted the following parenthetical, instructional language into Article 4(d): "(Insert that portion of the sum of interest, taxes, insurance, and Mortgage Insurance Premium that appears in section G of HUD–92264 attributable to the construction period. If there has been a change in the interest rate charged for the construction period (see footnote designated (**) on page 1 of HUD–92443), the dollar amount included in section G of HUD–92264 must be adjusted. The adjusted amount must be reflected in the savings computation.) Furthermore, the procedures set forth in footnote designated (**) on page 1 of HUD–92443 must be followed."

3. Added language to Article 6(d) that this section is applicable only if "permitted under state law."

4. Added language to Article 7(c) that the land survey map must be prepared in accordance with American Land Title Association/American Congress on Surveying and Mapping (ALTA/ACSM) standards and the HUD Surveyor's Report. Language is also added in the same section that if the Contractor has deviated from the Plans and Specifications, the Contractor will be responsible, at its own expense, for correcting any such deviations.

5. In Article 2(9), revised the designation for the wage determination number and date to include the modification number and date.

6. In Article 2, added a new paragraph 12 to add "any side agreements disclosed to HUD" to the list of Contract Documents.

Escrow Agreement for Operating Deficit Changes

1. Changed the term "sponsor" to "maker."

2. In accordance with a request in an informal public comment, revised section 4 to provide a definition of Sustaining Occupancy, which provides that Sustaining Occupancy must have been maintained for 10 of the prior 12 months.

3. In response to an informal public comment, revised section 5 to permit the Lender to draw upon a letter of credit in escrow and convert it to cash, provided that interest accrues to the relevant account.

Escrow Agreement for Noncritical Deferred Repairs Changes

1. Inserted a new section 4 to clarify how disbursements from the escrow are to be authorized by HUD.

2. Inserted a new section 11 that Lender will hold and disburse the escrow at HUD's direction.

Escrow Agreement for Working Capital Changes

1. In section 1, added "and/or" after the checkbox for "cash" to show HUD's new policy of allowing a mixture of cash and a letter of credit.

2. In section 3, removed the language that interest earned on the escrow deposit would be returned to Borrower.

3. Modified section 3 to indicate that the remaining balance of the escrow funds would be returned to Borrower after the date of sustaining occupancy.

4. Removed section 4, in accordance with section 2834 of the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289, approved July 30, 2008), which prohibits HUD from requiring the deposit into escrow of equity from Low Income Housing Tax Credits. The remaining sections have been renumbered accordingly.

5. In section 6, removed the language "together with interest" to be consistent with the changes in section 3.

Guide for Opinion of Borrower's Counsel Changes

In connection with HUD's effort to revise the closing documents, HUD also analyzed considerable public comment upon the Guide, as well as ongoing comments by users and the public in the years that the Guide has been in use. The public comment has been invaluable in an effort to bring the Guide into compliance with more modern opinion practice, while simultaneously recognizing the singular and unique role of an attorney representing a Borrower in a HUD mortgage insurance transaction in the areas indicated above.

1. In the introductory section, removed the sentence that describes how the loan is to be funded.

2. In section G, added language that HUD should be listed as secured party, as its interest appears.

3. In section LL, added language to include financing from "other third party sources."

4. Removed section "NN," which required review by counsel of the architect's certificate.

5. In new section "NN" (old section "OO"), added "managing member, or similar person or entity of Borrower" to subsection (iii).

6. In section 2, removed language that has counsel opining as to whether Borrower possesses all necessary governmental certificates, permits, licenses, qualifications, and approvals to own and operate the Property.

7. Removed section 4.

8. Removed section 9.

9. In section 13 (now new section 11), added "as its interest appears" with respect to HUD and Lender.

10. Removed section 14 and moved it to the Lender's Certificate (formerly the Mortgagee's Certificate), because it is more appropriate to have the Lender certify that the Loan does not violate usury laws than to have counsel to Borrower certify this item.

11. In the last portion of the Guide, where counsel certifies certain items, removed sections (e) and (g) and added in (d) a reference to interests disclosed and "approved."

12. In response to informal public comments, removed opinions that are more appropriately rendered by other parties. For example, the Lender, rather than Mortgagor's counsel, is responsible for UCC filings, so the relevant provisions have been added to the Lender's Certificate. Additionally, section 6, regarding proposed laws and ordinances that would affect the project, has been removed and added to the Borrower's Oath.

13. Moved the substance of section 9, regarding pending litigation and claims, to confirmations section (h), since it pertains to a factual matter rather than a legal opinion.

14. Provided for signature of the opinion by an authorized partner of the law firm.

Instructions to Guide for Opinion of Borrower's Counsel

Revised the instructions in accordance with changes to the Guide for Opinion of Borrower's Counsel, which are described above.

Exhibit A—Certification of Borrower

1. Changed section 3 to be in conformity with revised Article 9 of the Uniform Commercial Code (UCC).

2. Added a new section 4 identifying the state where Borrower was formed.

3. Moved section originally designated as 7 (before addition of new section 4, noted immediately above), which contained certification for sources of funds, to section 20(e) of the Lender's Certificate.

HUD Amendment to AIA Document B181 Between Owner and Architect Changes

In former section 10, now section 11, inserted "partners, managers or member" to explain where an identity of interest could exist.

Lease Addendum Changes

Clarified the document to show that this Lease Addendum is to be used for a transaction where the mortgage is secured by a ground lease and is not to be used for the lease of commercial space.

Mortgagee's Certificate Changes

1. Changed the title of the document from "Mortgagee's Certificate" to "Lender's Certificate," to be consistent with the change in all documents that provides for using the term "Lender" instead of "Mortgagee."

2. Added language to section 1 and a new section 3 that make all successors and assigns of the Lender bound by the Lender's Certificate. Succeeding sections have been renumbered accordingly.

3. Removed first checkbox item in section 11, which has been redesignated as section 12.

4. Added language in section 13 that Borrower represents and warrants to Lender that no UCC filings have been made against Borrower prior to the initial or initial/final endorsement of the Note by HUD.

5. Changed language in section 14 to allow other investments approved in writing by HUD.

6. Revised section 16 to indicate that Lender agrees to obtain HUD's approval and consent when needed, as set forth in the Security Instrument, and to furnish HUD with all reports and data as set forth in the Security Instrument.

7. Revised section 20(f) to require the lender to disclose the amount of any trade profit that is to be collected in a transaction. Trade profit, also known as a "premium" or "marketing gain," is the amount of additional funds, over and above the mortgage amount, paid by the purchaser of the mortgage backed securities that are used to fund the HUD-insured loan. The funds are paid in recognition of the difference between the mortgage interest rate used in the HUD-insured loan and what would generally be available at par in the market at any given time.

8. Added, as section 30, a new certification of Lender that Borrower possesses all necessary governmental certificates, permits, licenses, qualifications, and approval to own and operate the Property. This provision was formerly a part of the Opinion of Counsel to the Borrower.

9. Added, as section 31, a new certification of Lender that Borrower has furnished Lender with copies of all authorizations, consents, approvals, and permits from all necessary jurisdictions and courts.

10. Added, as section 32, a new certification of Lender that Lender has reviewed the title policy for any liens not reflected as exceptions to coverage in the title policy.

11. Added, as section 33, Lender's agreement that violations under the Regulatory Agreement will be treated as a default under the Security Instrument only when HUD requires Lender to do so and that Lender may accelerate the debt only upon the direction of HUD when there is a default under the Regulatory Agreement.

12. Added a section that Lender agrees to require Borrower to keep the Mortgaged Property insured at all times.

13. Added a section that Lender certifies that the insured loan does not violate usury laws.

14. Added a section that Lender certifies that, if there is a sale or transfer of all or a partial interest in the Note or a change in the Service Provider, Lender shall ensure that Borrower is given notice of this change.

Multifamily Regulatory Agreement Changes

1. Changed definitions of Fixtures, Mortgaged Property, Personalty, and Principals to be consistent with the Security Instrument definition.

2. Changed definition of Elderly person to be consistent with the definition in the current Regulatory Agreement.

3. Changed the definition of Mortgaged Property to add items (6) insurance policies and (16) deposits and escrows under collateral agreements.

4. Subject to the additional change described below in item number 21, changed the definition of Reasonable Operating Expense to include routine repairs.

5. Changed definition for Rents.

6. Added definition for Waste consistent with the Security Instrument.

7. Added provision to section 13, "Property and Operation; Encumbrances" that Borrower must notify HUD of any bankruptcy filing or insolvency or reorganization or the retention of any attorneys, consultants, or other professionals in anticipation of such a filing (versus an absolute prohibition—HUD is merely giving them notification requirements), that Borrower must notify HUD of all payments received from an insurer and that tax penalties shall not be charged to the Project.

8. Removed section 17.

9. Added provision to section 23 (now designated section 22), "Management Agreement," that a management agreement cannot be assigned without prior written HUD approval.

10. Changed section 26 (now designated section 25) to require that contracts for goods, materials, supplies, and services be obtained at costs, amounts, and terms that do not exceed reasonable and necessary levels and those customarily paid in the vicinity, and that the purchase price is based on quality, durability, and scope of work and shall be most advantageous terms to Project operation.

11. Removed the third-party beneficiary provision from section 28 (now designated section 27).

12. Revised and combined sections 34, 35, 36, and 37 into one section.

13. In section 37(k) (previously designated section 42(k)), changed the litigation costs from $25,000 to $100,000 and qualified its application to situations not funded by proceeds from professional liability insurance.

14. Section 44 has been redesignated section 39, and previous section 44(g), allowing HUD under certain circumstances to direct Borrower to replace certain parties, has been removed.

15. Changed section 46, now designated section 41, to revise references to personal liability of any entity or person and to provide for personal liability of listed Key Principals under the stated circumstances.

16. In section 47, now designated section 43, removed language at end of section regarding tenant protection rights.

17. Revised section I.1.a to define "Affiliate," by cross-referencing to the definition of "Affiliate" in 24 CFR 200.215(a).

18. In section I.1.s, revised the definition for Non-Profit Borrower, to provide that the term means an entity that is treated under the firm commitment as an entity organized for purposes other than for profit or gain, pursuant to section 501(c)(3) or other applicable provisions of the Internal Revenue Code of 1986. This change responds to an informal public comment and recognizes that in most cases a borrower that meets the

requirements of the Internal Revenue Service (IRS) for not-for-profit entities will also meet HUD's requirements, but that there are some circumstances in which a not-for-profit entity will not be treated as a Non-Profit Borrower.

19. In section I.1.w, revised the definition of "Principal," to cross reference to the definition of "Principal" in 24 CFR 200.215(e). This change is consistent with that made to the Security Agreement, discussed above.

20. In section I.1.x, revised the definition for "Project Assets". This change responds to informal public comments and provides a clearer distinction between funds that are subject to HUD requirements and funds that are not.

21. In section I.1.bb, revised the definition for "Reasonable Operating Expenses" to cross-reference Program Obligations.

22. Revised section 11.c to clarify that the Borrower must provide for investment of Reserve for Replacement funds in accordance with Program Obligations. This change responds to an informal public comment stating that the Borrower does not have direct control over funds that remain in the possession of the Lender.

23. In response to an informal public comment, revised section 11(e) to clarify that the reference is to "this Agreement" and to remove the word "charter."

24. Added a section 11.f to clarify that upon satisfaction of all HUD obligations, the Borrower shall receive any remaining Reserve for Replacement funds, so long as HUD has determined that all other obligations have been paid. This change responds to an informal public comment requesting that the disposition of such funds be clarified.

25. Revised section 15 to provide that upon completion of all repairs, HUD may permit escrowing of Distributions, pending inspection of the Project.

26. Revised section 22 to remove the requirement for management agreements to be approved in writing by HUD, but provides that they must be consistent with Program Obligations.

27. Revised section 32(a) to permit the Borrower to exclude children in certain projects, in accordance with Fair Housing Act requirements and as approved in writing by HUD. This change responds to an informal public comment stating that the previous language seemed to prohibit housing designated exclusively for elderly persons.

28. Revised section 37(j) to provide a non-exhaustive list of amendments to the organizational documents that require prior HUD approval, and to require copies of all amendments to the organizational amendments that must submitted to HUD within specified time frames. This change responds to an informal public comment suggesting that some changes to organizational documents are immaterial to HUD and should not require prior HUD approval.

29. Revised and consolidated the signature block and certification so that the Borrower's principals are required to sign the Regulatory Agreement only once. Although HUD disagrees with an informal public comment that the certification serves to expand upon standard recourse carve-outs, HUD agrees that the signature block should be consolidated so that multiple signatures are not required.

Note: 1. The reference to Healthcare Facility has been dropped from the title of the document.

2. Added new section 8(d) regarding Borrower's obligation to indemnify under section 51, now designated section 49, of the Security Instrument.

3. An alternative section 9(a)(1) has been added to provide that the prepayment lockout language will be included in a rider to the Note that will provide appropriate language for the particular transaction involved because it is not possible to include all forms of lockout provisions in the Note.

4. Revised section 7, Late Charge, to provide that the late charge applies when the lender does not receive payment within 10 days after the payment is due. The change responds to an informal public comment that suggested that standardizing the time when the late fee applies would facilitate compliance by Ginnie Mae issuers with their obligation to make payments to investors.

Request for Endorsement of Credit Instrument Changes

I. *Certificate of Lender:*

1. Redesignated section 14, in which Lender certifies that the insured loan does not violate usury laws, as section D.13.

2. Removed section 28 related to off-site components and the filing of UCC financing statements.

3. Redesignated section 32 as new section A.14.

4. Redesignated section 33 as new section A.13.

5. Redesignated section 34 as new section A.9.

6. Redesignated section 35, which states that if the Security Instrument is assigned to HUD, HUD is not bound by the requirements of this document, as section A.12.

7. Revised section 13 to reflect additional lender responsibilities and required representations related to UCC security interests, including performance of UCC searches and the perfection and maintenance of UCC security interests. The provisions have been removed from the Guide for Opinion of Borrower's Counsel to reflect that the Lender, rather than Mortgagor's counsel, is responsible for these UCC matters.

8. Revised section 15 to remove the requirement for the Lender to notify HUD when it knows that the Borrower is not in compliance with Program Obligations with respect to Residual Receipts. The change responds to an informal public comment stating that the Lender is not likely to know whether or not the Borrower has deposited the correct amounts with the Lender.

9. Revised section 38 to clarify the definition of Finance Charges.

10. Added section 40, in which the Lender certifies that a perfected first lien security interest has been established in favor of the Lender and HUD.

II. *Certificate of Borrower:*

1. Removed sections 1, 3, and 5.

2. Added a new section B.4 regarding UCC filings.

Security Agreement Changes

1. Changed title from "Multifamily/ Health Care (Mortgage, Deed of Trust, or Other Designation as Appropriate in Jurisdiction) Assignment of Rents and Security Agreement" to "Multifamily (Mortgage, Deed of Trust, or Other Designation as Appropriate in Jurisdiction) Assignment of Leases and Rents and Security Agreement."

2. Replaced the term "Directives" with "Program Obligations" and provided a definition for "Program Obligations." (Please see discussion of "Directives" and "Principal Obligations" earlier in this preamble.)

3. Changed the definition of "Mortgaged Property", now designated section 1(y), to add insurance policies to section 1(y)(6).

4. Added as section 1(y)(16) in the definition of "Mortgaged Property," that all deposits and/or escrows held by or on behalf of the Lender under collateral agreements are part of the Mortgaged Property.

5. Changed the definitions of "Fixtures" and "Personalty" to be consistent with the revised Article 9 of the UCC.

6. Changed definition of "Waste."

7. Changed section 6, "Exculpation," to indicate that no personal liability is being imposed on Borrower except such judgment or decree as may be necessary to foreclose or bar Borrower's interest in the Mortgaged Property and all other property mortgaged, pledged, conveyed, or assigned to secure payment of the Indebtedness.

8. Removed section 9 dealing with collateral agreements, moved text to section 7(c), and renumbered remaining sections.

9. Added "upon reasonable notice" to the notice provision in section 14, which previously was designated as section 15.

10. Revised the introductory language of section 15(b) (section 15 was previously designated as section 16) to clarify that Borrower provides the listed information for review by Lender, added new section 15(e) and redesignated section (e) as section (f), and redesignated remaining section accordingly.

11. Removed section 20 (Management Contracts) and renumbered remaining sections.

12. Added to section 23 (renumbered as section 21) new sections (d) and (e) to address ownership changes due to corporate restructuring and first-user syndications, respectively.

13. Removed section 22(b)(5) (section 22 was previously designated section 24), which included bankruptcy as a Class B Event of Default.

14. Removed from section 40, previously designated as section 42, the waiver of Borrower rights concerning disclosures of information.

15. Removed section 51(b)(i) and (ii) (section 51 is now redesignated as section 48) and renumbered remaining sections. Additional changes to the environmental requirements in section 51, now redesignated section 48, are discussed in the responses to the public comments on these requirements that appear below in this preamble.

16. In section 1, revised the definition of Principal to cross-reference to the definition of this word in 24 CFR 200.215(e). This change responds to an informal public comment that expressed concern about uncertainty that might arise from inconsistent definitions.

17. In section 2, updated provisions governing the perfection of security interests, in accordance revised Article 9 of the UCC.

18. Removed section 4(f)(3), which set forth provisions that must be included in telecommunications leases. This change responds to an informal public comment stating that the conditions were too prescriptive, and allows approval of any proposed nonresidential lease to be considered by HUD on a case-by-case basis.

19. Revised section 21 to permit the Lender to charge the Borrower a fee, in accordance with Program Obligations, for the Lender's increased responsibilities in reviewing a proposed transfer of physical assets. This change responds to informal public comments expressing concern that a Lender should not be expected to perform additional responsibilities without reasonable compensation.

20. In response to informal public comment, clarified section 22(a), by replacing the potentially confusing term "grace period" with the term "period."

Surplus Cash Note

1. In response to an informal public comment, revised the introductory paragraph to provide for the possibility of semi-annual payment.

2. In response to an informal public comment, revised paragraph 7 to clarify that the Surplus Cash Note shall not be prepaid, except from non-Project sources and with written approval from HUD.

HUD Survey Instructions and Report Changes

Changed reference to the land Title Surveys standards of the ALTA and ACSM from the 1999 version to the 2005 version.

Supplementary Conditions of the Contract for Construction

Changed article 1.B.3(ii) regarding the required submission of payroll records without individuals' Social Security numbers and addresses. The change conforms to revisions to Department of Labor regulations at 29 CFR 5.5.

Additional Proposed Closing Document: Subordination Agreement

HUD is also proposing to require a new Subordination Agreement on affordable housing transactions with government subordinate debt. The Subordination Agreement would replace the rider to the subordinate note that HUD presently uses. Use of a HUD-proscribed form of Subordination Agreement is consistent with the established practice in the wider lending industry and better protects HUD's security in the real estate. The Subordination Agreement contains specific conditions on allowing the subordinate debt in order to protect HUD's first lien security. The Subordination Agreement is more expansive than the Rider, and it addresses a variety of legal issues that arise in the relationship between senior and subordinate lenders. Finally, the Subordination Agreement is a recorded instrument that appears in the chain of title and is easily located and amended to accommodate unique loan issues that may be important to the subordinate lender and acceptable to HUD.

IV. Discussion of Public Comments

The public comment period on the August 2, 2004, notice closed on October 1, 2004. HUD received 25 comments on the notice. *Comments* were received from law firms, mortgage companies, and industry organizations. In addition, five comments were submitted after the close of the comment period. Although submitted after the comment period, HUD reviewed these comments to determine whether issues were raised that had not been raised by the timely submitted comments.

The following discussion presents the significant issues, questions, and suggestions submitted by the public commenters and HUD's response to these issues, questions, and suggestions. The discussion first addresses general comments, then comments that address particular documents. The section or paragraph of a document addressed by the comment is also identified. For consistency, the term "section" rather than "paragraph" is used throughout the discussion. This discussion addresses comments received in response to the closing documents when they were published for public comment on August 2, 2004, but does not provide individual responses to informal public comments on the revised closing documents posted on June 1, 2009. Citations to specific sections of the closing documents in the summaries of public comments, below, refer to the versions of closing documents originally published for public comment on August 2, 2004. HUD's responses to the public comments below reflect the versions of closing documents currently posted on HUD's Web site. Section designations and substantive provisions may differ from versions of the closing documents previously published in the **Federal Register;** discussed in the August 31, 2006, **Federal Register** notice or at the September 21, 2006, public meeting; or posted on HUD's Web site on June 1, 2009.

As noted above in the discussion of HUD's August 31, 2006, notice and September 21, 2006, meeting, the Section 232 Health Care Facility documents will be published again for public comment. The comments received on the Health Care Facility documents will be discussed when these documents are published again for public comment.

General Comments

Comment Period

Comment: While some commenters commended HUD for providing a notice and comment opportunity on the

revised documents, other commenters wrote that the 60-day comment period was not a fair and reasonable response time frame considering the magnitude of the changes proposed. Commenters asserted that there had been virtually no private sector discussion on matters that FHA must have known would raise serious industry concerns and expressed concern that while many of the changes may be appropriate, without careful coordination, there will be unplanned consequences and conflicts with existing HUD documents, many of which may be to HUD's detriment. Several commenters requested additional time for consideration of the documents and the submission of comments.

HUD response: Since HUD is issuing revised closing documents once again for public comment and allowed for informal comment in 2009, the concern raised by the commenters is no longer relevant. Clearly, to date, HUD has provided more than 60 days to review revised closing documents. Nevertheless, HUD found this concern not to be accurate as applied to HUD's 2004 notice soliciting comment on revised closing documents. When HUD published revised closing documents for comment in 2004, HUD's plans to revise these documents were already well known in the private sector for a considerable period of time before the publication of the 2004 revised documents. This was recognized by several commenters who noted, in their comments on the 2004 documents, the long gestation period for revised closing documents to be issued. As the preamble to the proposed revised documents published in 2004 noted, HUD determined how the forms could be revised with input from HUD attorneys, FHA multifamily lenders, and counsel to parties to HUD-insured transactions. Drafts of proposed revised closing documents were first posted on a HUD Web site at the end of March 2000, and comments were solicited from the public and industry representatives. In response to the many comments received at that time, significant changes were made to several of the draft documents, and those changes were incorporated in the proposed closing documents published for comment on August 2, 2004.

With issuance once again of revised closing documents with a 60-day period to public comment, and given the opportunity in June 2009 to further comment on revised closing documents, HUD believes that the adequacy of opportunity to review and comment on revised closing documents should no longer be an issue. Given the breadth of the public comments received, it does not appear that any significant issue has been overlooked. With respect to the careful coordination of changes to the documents to avoid unplanned consequences and conflicts, HUD has strived to assure clarity and consistency throughout the documents. As part of this assurance, it is HUD's intent to undertake regular, periodic review of the documents to revise and update them.

Proposed Documents Contain Profound Policy Changes That Have Not Been Adequately Debated

Comment: Commenters stated that the documents contain major and minor changes in policy and requirements; that there are dozens, perhaps hundreds, of changes not related to modernization. The commenters stated that certain regulations and several major closing documents are being so radically changed that successful, longstanding HUD policy and practice are being reversed with little or no justification and without apparent consideration for the practical impact on affordable housing production, lenders, borrowers, and residents. The commenters stated that there is little or no evidence that these changes are necessary to reduce the level of insurance claims and HUD's losses on claims, and that the tone created by the documents is one of great distrust. Other commenters stated that it may be the inadvertent result of trying to fit the Freddie Mac loan documents to the HUD programs, or a deliberate focus on the complete elimination of any risk to HUD without regard to the impact on the market. The commenters stated that if there is no difference between the programs of HUD and Government Sponsored Enterprises (GSEs), it could be argued there is no need for HUD programs at all.

HUD response: The programs that HUD administers must be conducted in accordance with statutory and regulatory requirements that govern such programs, and in that way HUD's programs will always differ from the lending programs offered by private entities. One of the primary differences between HUD programs and those of private lenders is demonstrated by the opportunity for review and public comment on significant changes made to HUD programs, including changes that HUD makes after consideration of the comments before adopting changes in final rules.

While HUD studied the Freddie Mac closing documents as a current and widely-used model, HUD's revised closing documents differ from that model. Within the parameters of its statutory and regulatory mandates, HUD's goal in revising its multifamily housing closing documents is to develop forms that are consistent with existing HUD administrative policy and that are also consistent with modern lending and credit enhancement practices. The forms currently in use and that are proposed to be replaced by the revised closing documents have not been changed in any significant fashion since the 1960s. The tone of distrust perceived by some of the comments may reflect, in part, the changes in lending practices over the more than 40 years since the documents have been revised. The issue from HUD's perspective is not one of trust or distrust, but recognition of responsible practices in which the reasonable expectations of the parties are informed by the transparency of the transaction, and in which obligations and outcomes are clear.

Comment: Several commenters wrote that Fannie Mae and Freddie Mac regularly negotiate, modify, and waive certain provisions in their form documents, to tailor them to the deal at hand, and asked if HUD is equipped to negotiate these documents to any extent.

HUD response: HUD is not a lending entity and does not negotiate directly with Borrowers. However, the revised closing documents are not absolute in their requirements. The documents often make reference to actions or events that are subject to HUD approval. Some documents also contain instructions about permitted transactional changes. To that extent, the documents provide a degree of direction with respect to modification or waiver.

Proposed Documents Add Significant Expense and Administrative Burden

Comment: Commenters wrote that among many new obligations, the proposed modifications would require the mortgagee to notify HUD of Regulatory Agreement violations and to review Transfer of Physical Asset requests; the proposed Security Instrument would require the borrower to provide and the mortgagee to collect extensive books, records and financial data; the proposed modifications to the Regulatory Agreement would impose new categories of actions that a borrower cannot take without obtaining HUD approval; and the proposed modifications to the Escrow Agreement impose new responsibility upon the mortgagee for approving escrow advances. The commenters stated that these additional burdens are imposed without any mechanism for compensation for the added expense

and without any staffing increases at HUD. The commenters further stated that additional monitoring and processing requirements are not needed to protect or preserve the properties.

HUD response: HUD has made a deliberate effort to include, in the revised closing documents, provisions that specify the oversight and diligence that a reasonable, prudent lender would observe in the usual course of business, that reflect current policy, and that do not add significantly greater burdens. As such, HUD is not requiring extraordinary measures that impose extraordinary costs, but is only memorializing good practice in a uniform template to provide clarity of expectation and a level playing field to all lenders.

Comment: Several commenters wrote that they believed that current HUD staffing, structure, and resources are not adequate to accommodate the everyday demands and consequences of the proposed documents and regulations.

HUD response: HUD has considered that there will likely be at least an initial increase in the demands upon its resources as a result of the revised documents and regulations, and will allocate the resources necessary to address them.

Comment: The documents lack standards for HUD staff to apply in considering various approval requests.

HUD response: HUD will apply the standards of reasonableness and good cause, as it does in considering regulatory waivers (*see* 24 CFR 5.110). Where more particularized standards become necessary, HUD will provide for them in handbooks or regulations, as appropriate.

Comment: Several commenters wrote that HUD insurance programs could well become solely an "option of last resort." Increased operations oversight and regulation on unsubsidized projects will further frustrate profit-motivated owners and discourage use of the program. As the quality of the HUD portfolio diminishes, there will be a higher percentage of defaults.

HUD response: HUD does not consider that any owners will be discouraged from participating in HUD's programs, particularly after the changes made to the revised closing documents in response to public comment. HUD expects that the resulting consolidation and simplification of requirements will not only encourage increased participation, but will result in better supervision of loans and a reduction in claims. In addition, as this preamble and changes to the revised closing documents reflect, HUD has responded favorably to numerous public comments. One of the main objections was in the area of the regulation of health-care facilities. As stated earlier in this preamble, HUD has separated those closing documents pertaining exclusively to health-care facilities from the rental housing documents for further analysis and later public comment.

Comment: Commenters stated that potential borrowers like the long-term, fixed-rate, non-callable programs at very competitive rates and limited recourse that HUD programs offer. Commenters stated that they are willing to tolerate nontraditional costs and impediments/irritants such as annual audits, extra origination expenses, restricted profit payments, inspections by HUD's Real Estate Assessment Center (REAC), management review, and inconsistent timeliness and processing requirements. The commenters stated that advantages of long-term, fixed-rate non-callable programs will be overcome by the detrimental consequences of the proposed recourse liability for Borrowers, Principals, and yet-to-be defined Key Principals; increased liability issues; increased potential for HUD micro-management; additional duties with no further remuneration; and the opportunity to be sued more often.

The commenters stated that proposed changes will render HUD programs uncompetitive and unworkable for many Borrowers, including Low income Housing Tax Credits (LIHTCs) and nonprofit Borrowers, thereby reducing the number of new construction projects, which will drastically reduce the current job and tax base growth across the country.

HUD response: Please see the immediately preceding comment and HUD response. As discussed above, HUD has determined not to include broad recourse liability in the revised proposed closing document but has retained recourse liability for certain "bad boy acts."

Residual Receipts and Nonprofit Sponsors

Comment: No public purpose is served by limiting nonprofit sponsor access to project surplus cash, which discriminates against this sector and only makes nonprofit sponsor operations more confusing and problematic.

HUD response: Consistent with current practice, a nonprofit entity may elect to be treated as a for-profit entity. Nonprofits may elect to utilize certain programs that are limited to nonprofit and/or limited distribution mortgagors because of the benefits provided to such mortgagors, *e.g.,* 100 percent mortgages versus the 90 percent mortgages typically available to profit-motivated entities. An example of such a program is the section 221(d)(3) program (section 221(d)(3) refers to section 221(d)(3) of the National Housing Act). In section 221(d)(3) transactions, HUD must regulate such nonprofit entities to a greater extent than HUD regulates profit-motivated or general mortgagors. If, on the other hand, a nonprofit elects to utilize a program designed for profit-motivated or general mortgagors, e.g., the section 221(d)(4) program, the nonprofit would be regulated in the same fashion as the profit-motivated entity. In such instances, the nonprofit entity would be entitled to distributions under the HUD regulations. HUD has always added the caveat that nonprofits still would be subject to any Internal Revenue Service (IRS) regulations as to distributions.

HUD Directives

Comment: A theme through most of the new closing documents is the requirement to comply with HUD "Directives." At a minimum, commenters urged that HUD expressly limit the definition of applicable Directives to those that do not conflict with regulations in effect at the time of commitment issuance and establish a protocol to ensure that any such Directives are: (a) Developed with adequate notice and comment and (b) widely disseminated and published by HUD in a manner reasonably calculated to ensure that the entire HUD Multifamily Accelerated Processing (MAP) lender community, current and prospective borrowers, and the general public have affirmative notice. Commenters stated that mere posting of such proposals or changes on HUD's Web site would not be sufficient.

HUD response: As discussed above under the heading of "Across the Board Changes," HUD's use of "Directives," now called "Program Obligations," is defined in a manner to address the commenters' concerns and assure that adequate notice and comment is provided.

Definition of New Terms

Comment: Several new and material terms (for example, "Directive," "Affiliate," and "Key Principal") lack clear definition, which can result in uncertainty and unfairness.

HUD response: As noted in the discussion of article definitions, HUD has revised many definitions in response to the public comments received. HUD will continue to clarify the terms used, as may be necessary, in

the course of HUD's periodic review of these documents.

Exhibits To Be Removed From Closing Checklist

Comment: The following application exhibits should be removed from the HUD closing checklist, as redundant: HUD 2010; Title VI Certification; LIHTC Certification; Byrd Amendment Certification; Owner's Certification Regarding Architectural and Engineering Fees; and Identity of Interest Certification (other than HUD–93306M).

HUD response: The HUD closing checklist was not one of the documents published in the **Federal Register** for notice and comment in 2004, and it is not being published under this notice for comment. This is a document that is tailored to the needs of each closing.

HUD Multifamily Security Instrument HUD–94000M

State-Specific Components

Comment: One commenter wrote that the necessary state-specific components of the Security Instrument also demand notice and comment. Another commenter asked if there are any provisions giving the beneficiary the right to appoint a successor trustee or requiring the borrower to receive, at the address shown in the Deed of Trust, a Notice of Default from the beneficiary.

HUD response: The state-specific components are imposed by state law, not by HUD, and are not subject to HUD's notice and comment requirements. Similarly, the provisions that are the subject of the commenter's inquiry are governed by state law and would be covered, as necessary, by the state-specific components.

Section 1—Definitions

Comment: The definition of Building Loan Agreement in section 1(b) should provide that references to the Building Loan Agreement may be removed if not applicable, for example, in refinancing transactions.

HUD response: Redesignated Section 47 (section 50 in the proposed document), the only section of the Security Instrument in which the term Building Loan Agreement is used, has been qualified by adding, "(If Applicable)" to the heading of that section. Therefore, a determination of whether the section applies will be made on a case-by-case basis.

Comment: A definition should be added for "Business Day" as "any day other than a Saturday, a Sunday or any other day on which Lender or HUD is not open for business."

HUD response: Business Day is added as a new definition at section 1(c) with a cross-reference to section 31, which includes the definition suggested by the commenter; it is the only section in which the term Business Day is used.

Comment: A commenter wrote that under section 1(c), agreements of Lenders and Borrowers that are proprietary in nature should not be included in the definition of "Collateral Agreement."

HUD response: HUD does not agree that proprietary, or any other, agreements should be excluded from the definition of Collateral Agreement, because HUD needs to have access to all documents to understand the risk that it is underwriting. The definition of Collateral Agreement has been moved to section 1(e).

Comment: Collateral Agreement should be defined as "any separate agreement between Borrower and Lender (excluding the Note, this Security Instrument and the Building Loan Agreement, if any) for the purpose of establishing and/or maintaining any reserves, escrows and/or funds that are required by Lender and/or HUD in connection with the Mortgaged Property (including, but not limited to, reserves, escrows and funds for repairs, replacements, improvements, off-site improvements, demolition, assurance of completion, working capital, minor moveable equipment, operating deficits, debt service reserves and/or sinking funds), as the same may be amended, modified, renewed, extended, replaced and/or supplemented from time to time." This definition better harmonizes with the scheme of insurance closings and documentation, and it is broadened to eliminate the need to identify specifically the agreements that are captured within this definition.

HUD response: This suggested revision broadens the definition of Collateral Agreement by providing a greater number of examples of agreements that may be covered by the definition, but it also narrows the scope of the definition by limiting the covered agreements to reserves or escrows "required by Lender and/or HUD." The current language is broader in scope in that it is "not limited to those reserves and escrows required by HUD." The suggested revision is not consistent with the goal of full disclosure of, and approval for, all agreements executed in connection with the Mortgaged Property, which is necessary for HUD to make valid judgments about the risk it is underwriting. The original proposed language has, therefore, been retained.

Comment: A definition should be added to state, "Condemnation has the meaning ascribed thereto in section 22(a)."

HUD response: HUD believes the term "Condemnation" is widely understood and thus unnecessary to define.

Comment: A definition should be added to state, "Contract of Insurance means the contract between the Lender and HUD whereby HUD insures the Borrower's repayment of the Loan to Lender pursuant to the National Housing Act, as amended, the Department of Housing and Urban Development Act, as amended, and all other federal laws and regulations pertaining to HUD's insurance of the Loan, all applicable Directives, and HUD's commitment to insure the Loan."

HUD response: HUD has added Contract of Insurance as section 1(g), with a cross-reference to section 3(e), which refers to the Contract of Insurance, "as set forth in applicable HUD regulations." HUD considers this long-used reference to be sufficient to identify the Contract of Insurance for purposes of the Security Instrument.

Comment: A definition should be added for "Loan means the loan made by the Lender to Borrower in connection with the Mortgaged property which is evidenced by the Note and secured by this Security Instrument."

HUD response: A definition of "Loan" has been added as section 1(u), which references "the opening paragraphs of this Security Instrument," and a parenthetical reference to Loan has been added to the opening paragraphs following the space provided for entering the principal amount of the Loan.

Comment: A definition should be added that "Loan Application" means the application for mortgage insurance made to HUD in connection with the Loan, together with all supporting exhibits, schedules, and reports.

HUD response: "Loan Application" has been added as section 1(v) with a cross-reference to the definition in redesignated section 41, No Change in Facts or Circumstances, which was section 43 in the proposed Security Instrument. This definition references the Loan Application that is submitted by the Borrower to the Lender, not the Application for Mortgage Insurance that is submitted to HUD.

Comment: The definition of Loan Documents should include "the Building Loan Agreement, the Collateral Agreements, and any other documents executed by the Lender and Borrower to evidence or secure the Loan."

HUD response: The definition of Loan Documents continues to be limited to "the Note, this Security instrument, and the Regulatory Agreement." These are

the only documents that HUD will permit to evidence or secure the loan. The Building Loan Agreement and Collateral Agreements relate to important aspects of the project, but the Note, Security Agreement, and Regulatory Agreement are the key documents that relate directly to the HUD-insured mortgage.

Comment: A commenter wrote that the definition of Mortgaged Property at section 1(q) (redesignated as section 1(y) in the revised document) should expressly include all deposits and/or escrows held by or on behalf of the Lender under the Collateral Agreements.

HUD response: HUD agrees, and has included escrows and deposits in the definition of Collateral Agreements as items included in the definition of Mortgaged Property at section 1(y)(16).

Comment: A commenter wrote that in the definition of what is included in "Mortgaged Property," section 1(q)(11), now redesignated as section 1(y)(11), must provide a carve-out of Surplus Cash and all syndication proceeds and partner contributions that are not part of the HUD insured loan.

HUD response: HUD agrees, in part, with the comment. The definition of "Mortgaged Property" is deliberately broad to make resources available in the event there is an underwriting or asset management issue. However, to address the concerns in the comment, section 13(a) of the Regulatory Agreement has been revised to provide that "Equity or capital contributions shall not include certain syndication proceeds, such as proceeds from Low Income Housing Tax Credit transactions used to repay bridge loans from members/partners of Borrower, all as more fully set forth in Program Obligations."

Comment: In the definition of "Mortgaged Property," references to personal property (such as section 1(q)(11), now redesignated as section 1(y)(11)), should be moved to the definition of "Personalty".

HUD response: HUD declines to make the suggested change. While there is some redundancy in listing individual examples of Personalty in section 1(y)(11) of the definition of Mortgaged Property, which also includes Personalty, generally, at section 1(y)(4), such repetition serves to underscore the intended wide breadth of coverage of the term "Mortgaged Property."

Comment: A commenter wrote that in section 1(q)(14), tenant security deposits that "have not been forfeited" should be changed to "have been forfeited."

HUD response: HUD disagrees. Tenant security deposits are funds that are held in trust on behalf of a tenant, so long as they have not been forfeited.

Comment: Borrowers should be able to exclude capital contributions receivable and syndication proceeds receivable, listed in section 1(q)(16), from the Mortgaged Property. To include these is a major policy change.

HUD response: As noted above, the definition of "Mortgaged Property" is deliberately broad to make resources available in the event there is an underwriting or asset management issue, but HUD has removed "certain syndication proceeds" from being included as equity or capital contributions.

Comment: The definition of Mortgaged Property should explicitly exclude surplus cash and related Borrower funds, which HUD has not traditionally viewed as Project funds.

HUD response: HUD disagrees. Surplus cash has always been considered part of the Mortgaged Property until it has been disbursed.

Comment: In section 1(q), a leasehold estate should be included in the definition of Mortgaged Property.

HUD response: A leasehold estate is covered by the definition of "Land" (which is redesignated as section (1)(q) in this final version) as "the estate in realty described in Exhibit A" and which appears as the first item listed under the definition of "mortgaged property."

Comment: In the definition of "Principals" at section 1(t), if, for example, the Bank of America is a 25 percent limited partner in an LIHTC project, will each vice president be a principal?

HUD response: HUD has replaced the definition of "Principals" with a cross-reference in redesignated section 1(dd) to the definition at 24 CFR 200.215(e). In accordance with the terms of the definition in the 2004 proposed Security Agreement and the definition at 24 CFR 200.215(e), only vice presidents (or other officers) "who are directly responsible to the board of directors" would be Principals. HUD intends to update the definition at 24 CFR 200.215(e) through rulemaking.

Comment: In section 1(t), the term "Principal" must be narrowed significantly to capture only those entities that have actual control over the project.

HUD response: The persons listed in the definition included in the 2004 proposed Security Agreement have authority for actual control and, therefore, are appropriately included as principals. HUD intends to update the definition at 24 CFR 200.215(e) through rulemaking.

Comment: The definition of Property Jurisdiction should be changed to read, "means the State in which the Land is located."

HUD response: HUD disagrees with the suggested revision, because the term Property Jurisdiction is used in the context of identifying the governing law for the documents, and governing law may include both local and state laws not preempted by federal law. HUD retains the definition of Property Jurisdiction in section 32(a) (redesignated as section 30(a) in this final document) with an added clarification that both state and local jurisdictions are relevant. The phrase, "jurisdiction in which the Land is located" has been revised to read, "jurisdictions in which the Land is located" to describe more precisely, the term " Property Jurisdiction".

Comment: A definition should be added for Title Policy to read, "Title Policy means the policy of title insurance issued to the Lender contemporaneously with the closing of the Loan and insuring the priority of the lien of this Security Instrument."

HUD response: The term "Title Policy" is commonly understood in the field of real property transaction, and need not be defined in this document.

Comment: Section 1(y)—The definition of "waste" is too broad, with no indication how it would be applied to Real Estate Assessment Center (REAC) scores.

HUD response: The references to "HUD requirements regarding physical condition standards for HUD housing" in the definition of "waste" are removed.

Comment: There are no appeal rights provided for findings of "waste."

HUD response: HUD is not aware of any appeal right as an industry-wide practice with respect to Security Instrument covenant violations. Such disputes would be governed by state law.

Comment: In section 1(y), the definition of "Waste" should remove all references to financial obligations such as failure to pay taxes add a materiality standard in clause (1) add such language as "in a manner customary for similar properties in the area in which the Mortgaged Property is located" to clause (2) and limit clause (4) to failure to comply with 24 CFR 5.703.

HUD response: A failure to meet financial obligations would impair the value of the Mortgaged Property, and must therefore be included in the definition of waste to protect HUD's interest. A materiality standard is added for failure to comply with covenants. A reasonableness standard is added to the obligation to maintain and repair the property. HUD is removing failure to comply with HUD requirements for

physical condition standards as a basis of waste.

Comment: The definition of "Waste" should be removed.

HUD response: A definition of Waste is necessary to provide all of the parties to the transaction with a common understanding of this significant term, which serves to preserve the Mortgaged Property over the term of the agreement.

Section 3—Assignment of Rents; Appointment of Receiver; Lender in Possession

Comment: In section 3(c), imposition of personal liability is not acceptable.

HUD response: This section is not an imposition of personal liability, but a representation and warranty that there had not been a prior assignment of rents.

Comment: Section 3(c) will need to be revised in the event HUD permits any supplemental or subordinate loans (*e.g.*, loans insured under Section 223(d) or 241).

HUD response: A revision to section 3(c) would not be necessary in the circumstances described by the comment, because the parenthetical clauses in the section provide for exceptions in the cases of assignments and collections in connection with commercial transactions as "approved by HUD."

Comment: In section 3(d), prior written approval by HUD of actions by Lender is impracticable. A Lender must be able to move quickly to preserve its collateral.

HUD response: HUD's prior written approval to take control of the Mortgaged Property is required only in the event of a nonmonetary default. The remedy of taking control of the Mortgaged Property is not frequently exercised in the context of a nonmonetary default, and HUD must be consulted before such an extraordinary action can be taken to assure that HUD's interest is protected.

Comment: In section 3(e), to the extent that this section exonerates a Lender for negligent or intentional acts, this provision will not be enforceable, and Borrower's counsel will take exception to it in the Opinion Letter.

HUD response: Section 3(e) will be enforceable in accordance with its specific terms; otherwise, the Lender is released from liability "to the fullest extent permitted by law."

Section 4—Assignment of Leases; Leases Affecting the Mortgaged Property

Comment: In section 4(c), the term "mortgagee in possession" should be substituted for "Lender in possession."

HUD response: HUD does not agree that the suggested change is necessary. The definition of Lender, now at section 1(s), provides that the Lender is deemed to be the Mortgagee.

Comment: Section 4(e) should be revised to contemplate cooperating housing arrangements and other instances where flexibility to permit Leases with terms longer than 2 years might be desirable by including the following language at the end: "If a Borrower is a cooperative housing corporation, association, or other validly organized entity under municipal, county, state or federal law, notwithstanding anything to the contrary herein, so long as Borrower is not in breach of any covenant of this Security Instrument, Lender hereby consents to the execution of Leases for terms in excess of two years from Borrower to tenant shareholders of Borrower, to the surrender or termination of such leases where the surrendered or terminated Lease is immediately replaced or where the Borrower makes best efforts to secure such immediate replacement by a newly executed Lease of the same residential unit to another tenant shareholder of the Borrower. However, no consent is hereby given by Lender to any execution, surrender, termination or assignment of a Lease under terms that would waive or reduce the obligation of the resulting tenant shareholder under such Lease to pay cooperative assessments in full when due, or the obligation of the former tenant shareholder to pay any unpaid portion of such assessments."

HUD response: The suggested revision is not necessary because of the flexibility provided in section 4(b), which states, in part: "Until Lender gives Notice to Borrower of Lender's exercise of its rights under this section 4, Borrower shall have all rights, power and authority granted to Borrower under any Lease (except as otherwise limited by this section or any other provision of this Security Instrument), including the right, power and authority to modify the terms of any Lease or extend or terminate any Lease."

Comment: Section 4(f) should specify that the requirements for approval of nonresidential leases apply after the date of execution of the Security Instrument.

HUD response: HUD disagrees with the suggested revision. It is only a prudent business practice for the Lender and HUD to know the status of all nonresidential leases and consider whether or not they are acceptable prior to the execution of the Security Instrument.

Comment: Section 4(f) should provide that consent of the Lender and HUD to modify, extend, or terminate a lease for nonresidential use is "not required for the modification or extension of non-residential Leases if such modification or extension is required under the terms of the Lease or is on terms at least as favorable to Borrower as those customary at the time in the applicable market and the annual income from the extended or modified Lease will not be less than the income from the Lease during the year prior to the effective date of the extension or modification."

HUD response: HUD does not agree with the comment because the suggested revision describes the kind of considerations the Lender or HUD would take into account in determining whether to approve a lease modification, but additional considerations may also be relevant in any particular case. Determining whether or not a lease modification satisfies the conditions in the suggested revision would itself be a form of approval review. As long as the Lender or HUD would still be undertaking a review of a lease modification, it would not be prudent for HUD to exclude any relevant considerations. This is not a new requirement, and HUD is not prohibiting modifications, extensions, or renewals, only prudently requiring that HUD's consent be obtained.

Comment: A commenter asked whether HUD intends to deny applications for mortgage insurance if an existing lease does not meet the requirements of 4(f)(1) and the lessee refuses to amend its lease.

HUD response: Generally, HUD will only approve applications that meet HUD requirements except in cases where HUD approves a waiver of a requirement.

Section 5—Payment of Indebtedness; Performance Under Loan Documents; Prepayment Premium

Comment: A specific provision to require payment of Mortgage Insurance Premium (MIP) should be added to this section, since none of the Loan Documents specifically require it.

HUD response: HUD disagrees with the comment. Section 7(a)(1) provides for the payment of MIP.

Section 6—Exculpation

Comment: The proposed exceptions to Owner nonrecourse liability are not acceptable.

HUD response: HUD has revised section 6 to indicate that no personal liability is being imposed on Borrower.

Section 7—Deposit for Taxes, Insurance, and Other Charges

Comment: This section should be re-titled: "Imposition Deposits; Application of Payments; Advances by Lender for Impositions."

HUD response: HUD does not agree that the suggested recommendation is necessary.

Comment: The amount in section 7(a)(1)(ii) should be revised to "* * * an amount equal to one-twelfth of ___ percent * * *" with the blank filled in, since the mortgage insurance premium varies by program.

HUD response: The amount in section 7(a)(1)(ii) refers to the service charge when the Note and Security Instrument are held by HUD rather than the mortgage insurance premium. This amount remains constant across FHA programs.

Section 8—Imposition Deposits

Comment: A provision should be added that if the Note secured hereby ("Junior Note") is junior in priority to a HUD-insured Note ("First Note") where the First Note holder is collecting Imposition Deposits, collection of Imposition Deposits, other than mortgage insurance premium deposits on the Junior Note are waived for the period the First Note holder continues to collect such Imposition Deposits.

HUD response: HUD agrees, in part, and has clarified section 8 so there should not be confusion with respect to the right of Lender regarding any securitization of imposition deposits.

Sections 8 and 9—Lender's Payment of Interest to Borrower

Comment: Section 8 and section 9 both state, "unless applicable law requires otherwise, lender shall not be required to pay borrower any interest, earnings or profits on the Imposition Deposits." Section 11, Reserve for Replacement, of the Regulatory Agreement requires that the Reserve for Replacement "be invested in interest bearing accounts or investments, and any interest earned on the investment shall be deposited in the Reserve for Replacement for use by the Project." This inconsistency needs to be resolved.

HUD response: To resolve this inconsistency, the phrase, "or as otherwise required by HUD," is added following, "unless applicable law requires," in section 8. Section 9 has been removed.

Section 9—Collateral Agreements

Comment: Section 9 is probably superfluous in light of the provisions of sections 7 and 8, and should be removed.

HUD response: HUD agrees, and the text of section 9 is removed, with the remaining sections renumbered accordingly.

Section 10—Regulatory Agreement Default

This section is now designated as section 9.

Section 13—Use of Property

This section is now designated as section 12.

Comment: This provision precludes a Borrower from establishing any condominium or cooperative regime with respect to the mortgaged property, if such use did not exist at the time the security agreement was executed. The provision should be removed so that this option remains available.

HUD response: HUD has changed "Unless required by applicable law," to "Unless permitted by applicable law," so as not to preclude a change in use of the property, where permitted.

Comment: This language should be changed to "Unless required by applicable law and/or approved by Lender and HUD."

HUD response: As noted above, HUD has changed "Unless required by applicable law" to "Unless permitted by applicable law."

Comment: Because there are certain instances in which the use of a portion of a Project may change following construction or rehabilitation, the first sentence should be qualified by adding "except as contemplated in the Loan Application."

HUD response: HUD recognizes that in some instances the use may change, and the document allows for changes in use, but only with the approval of the Lender and HUD. HUD does not agree with the suggested revision, which would allow changes in the use of the property without the approval of the Lender and HUD.

Section 14—Protection of Lender's Security

This section is now designated as section 13.

Comment: Section 14(a) should refer to obligations under the Security Instrument or "any of the other Loan Documents" to expand the list of references to Loan Documents under which the Lender may seek recourse to protect its and HUD's interests.

HUD response: HUD does not consider that including a reference to the term "Loan Documents" would provide any additional protection of a Lender's security beyond the broad power already conferred in section 14, now redesignated section 13, which extends to any action or proceeding that purports to affect the Mortgaged Property or the Lender's security and permits the Lender to take, with HUD approval, such actions as the Lender deems necessary. The term "Loan Documents" is defined in section 1(w) to include the Note, Security Instrument, and Regulatory Agreement, and redesignated section 13 references the obligations under each of these documents.

Section 15—Inspection

This section is now designated as section 14.

Comment: This section should provide for proper notice, except where there is an emergency or an Event of Default has occurred.

HUD response: HUD has revised section 15, now redesignated as section 14, to provide for inspections "upon reasonable notice." Inspections to determine compliance will be conducted in compliance with state law, which should address such concerns.

Section 16—Books and Records; Financial Reporting

This section is now designated as section 15.

Comment: The period for Borrower to furnish documents to Lender in section 16(b)(1) should be changed from 90 days to 120 days, to be consistent with Freddie Mac.

HUD response: HUD has determined that the 90-day period should not be changed.

Comment: The periods for Borrower to furnish documents to Lender in sections 16(b)(2) through (b)(4) should be limited to "upon Lender's or HUD's request, but not more frequently than quarterly unless an event of default exists."

HUD response: HUD has not adopted the suggested revisions. It has not been HUD's experience that requests for financial records from Borrowers have been excessive or abusive, and HUD does not anticipate or condone the development of abusive practices in the future.

Comment: The certification in section 16(c) should be "to the best knowledge of such individual."

HUD response: HUD's purpose and expectation is that the certification reflects an active and critical review, more than a passive, general acknowledgement of documents, and for that reason does not adopt the suggested revision.

Comment: This section and the corresponding provisions of the Regulatory Agreement should be revised so as to be consistent.

HUD response: Such a revision is not necessary because the documents are not inconsistent. The Security Instrument is a Lender-specific document and includes provisions that directly affect only the Lender.

Comment: Requiring the Borrower to provide a list of all owners with any interest in the Borrower, directly or indirectly, is an unnecessary burden, and perhaps impossible. Consider the effect of including all the officers of a public company.

HUD response: HUD is revising this provision to require only a list of persons or entities required to be identified by HUD's applicable previous participation requirements.

Comment: Required certifications should be to the knowledge of the individual providing the certification.

HUD response: HUD does not agree with this comment. The Lender and HUD are entitled to rely upon the accuracy of the required statements, schedules, and reports, and the authorized individual is in a position, and has an obligation, to confirm and certify the accuracy of these records.

Comment: The proposed requirements go far beyond current requirements by including a statement of income and expenses for borrower's operation of the Mortgaged Property, a statement of change in financial position, a rent schedule, and an accounting of all security deposits, to be submitted to the Lender. What duties and obligations are imputed to the Lender by receipt of these documents? Such documents should be provided only upon Lender's or HUD's specific request.

HUD response: The obligation to act in the manner of a prudent Lender is not a new requirement. The enumeration of specific documents to be provided to a Lender empowers Lenders to act prudently in performance of their contractual obligations and also does not permit Lenders to claim lack of access to pertinent information as an excuse for not performing their oversight duties. To remove any doubt and make this responsibility clear rather than imputed, the Security Instrument is revised to specify that Borrower is furnishing the documents "for review by Lender" and that Lender must report irregularities to HUD.

Comment: At the current time, there is no requirement for Borrowers to deliver any of these documents to the Mortgagee. There is no necessity to have a recourse carve-out for a process HUD has already updated by having Borrowers file audited financial statements electronically directly to HUD and that HUD already monitors with various enforcement remedies.

HUD response: While the recourse carve-out has been eliminated, the requirement to deliver documents to Lender is retained because Lenders do not have access to HUD's data.

Comment: Lender should be allowed to charge a reasonable fee for collecting and reviewing any documents.

HUD response: These activities are a normal part of servicing, and should not entail a separate or additional fee.

Section 17—Taxes; Operating Expenses

This section has been redesignated section 16.

Comment: Sections 17(a) and 17(b) should state they are also subject to the provisions of section 8(c).

HUD response: HUD does not consider it necessary to include the reference to section 8(c) in redesignated sections 16(a) and 16(b), both of which are subject to section 16(c). Section 16(c) relieves the Borrower from the obligations imposed under sections 16(a) and 16(b) to pay impositions and expenses to the extent that sufficient Imposition Deposits are held by the Lender. Section 8(c) records the Lender's obligation to pay any bill or invoice received for an imposition from, and to the extent of, Imposition Deposits held by the Lender. The requirement that the Borrower's obligation to pay is relieved only to the extent of Imposition Deposits held by the Lender is present in 16(c), and there is no need to reference section 8(c) too.

Comment: In section 17(b), "HUD approved operating budget" should be removed, since there may not always be a HUD-approved operating budget.

HUD response: Section 17(b) in the 2004 proposed Security Agreement (now redesignated section 16(b) in the revised proposed Security Agreement) creates no difficulties, since it refers to the HUD-approved operating budget, "if any."

Section 18—Liens; Encumbrances

This section is now designated as section 17.

Comment: Subjecting the Borrower to personal liability in the event a voluntary or involuntary lien is placed on the Mortgaged Property is unacceptable. A lien that might not be material should not automatically subject the Borrower to personal liability, and a Borrower should have the right to have personal liability removed if the new lien is cleared up.

HUD response: HUD has modified the section to remove the reference to personal liability at the end.

Comment: Inferior liens are not an Event of Default if approved by HUD and Lender. The exception should cover inferior or HUD-insured or HUD-held superior liens, because such liens may be in existence and will continue.

HUD response: HUD agrees, and has revised the section accordingly.

Section 19—Preservation, Management, and Maintenance of Mortgaged Property

This section has been redesignated section 18.

Comment: The Borrower should not have the obligation under section 19(c) to restore the Mortgaged Property when insurance proceeds or condemnation awards are not available to cover the costs of such restoration or repair. This is unfair and unreasonable.

HUD response: HUD determined that it is appropriate to require the Borrower to restore the Mortgaged Property in order to protect the Lender's and HUD's interests in the property, especially since the Borrower is in the best position to ensure that adequate and appropriate insurance remains in place. However, HUD has revised section 19(c) to provide that HUD may approve an exception to this requirement if circumstances warrant.

Comment: Section 19(e) requires the Lender to approve the property manager and management contract. Section 20 gives the Lender the right to terminate the management contract without cause. What is the purpose of giving Lender these new rights, and what standards is a Lender to apply in acting under these rights?

HUD response: Section 19(e), redesignated as section 18(e), has been revised to provide that property management approval must be "consistent with HUD management certification and/or Program Obligations." Section 20 has been removed.

Comment: Section 19(f) requires HUD to be notified of any action or proceeding purporting to affect the Mortgaged Property. Does HUD want to be inundated with notices of evictions, spurious counter-claims, minor slip and fall claims, etc?

HUD response: HUD agrees, and in the phrase "purporting to affect the Mortgaged Property" in redesignated section 18(f) is changed to "which could impair the Mortgaged Property" to limit the required notifications.

Comment: A commenter stated that section 19(g) provides that Borrower shall not "remove, demolish, or alter the Mortgaged Property" without HUD approval. The commenter asked whether HUD wants to be inundated with permission requests to dispose of insignificant personal property or to make minor alterations to projects.

HUD response: Section 19(g), redesignated as section 18(g), is revised to permit "minor alterations which do not impair the security."

Comment: A commenter asked how HUD will define "reasonable and necessary operating expenses."

HUD response: The definition of 'Reasonable Operating Expenses" from section I.1.bb of the Regulatory Agreement is incorporated by reference in the Security Instrument by the introductory paragraph of section 1. The document language is conformed in section 18(h) by removing "and necessary."

Comment: Provisions in section 19 conflict with the Regulatory Agreement, and should be removed in favor of the Regulatory Agreement.

HUD response: The language "pursuant to the Regulatory Agreement" is added in redesignated section 18 as appropriate for consistency.

Section 20—Management Contracts

Comment: If there is no Event of Default, the Lender should not have the right to terminate a management contract without cause. Provisions conflict with the Regulatory Agreement, and they should be removed in favor of the ones in the Regulatory Agreement, which make HUD the regulator of management issues.

HUD response: Due to such concerns, section 20 has been removed.

Comment: This section should be divided into section (a), a new section to require management contract compliance with the Regulatory Agreement (RA) so long as the Security Instrument (SI) is insured or held by HUD, and section (b), to consist of the current text to allow for Lender control over the property manager issues if the SI is no longer insured or held by HUD.

HUD response: Section 20 has been removed.

Section 21—Property and Liability Insurance

This section is now designated as section 19.

Comment: Section 21(a) should cover Fixtures and tangible Personalty in addition to Improvements.

HUD response: HUD agrees that the term "Improvements" as used in section 21(a) and redesignated here as section 19(a), is too narrow for the intended purpose of ensuring adequate hazard insurance coverage. In the first sentence of 19(a), HUD has substituted for "Improvements" the term "Mortgaged Property," which provides a wider scope of coverage and internal consistency within section 19(a), since "Mortgaged Property" was already used in the third sentence of section 19(a). The term "Improvements" continues to be used in section 19(a) as the appropriate term for purposes of flood insurance.

Comment: In section 21(b), a requirement that a Borrower deliver to its Lender the original or a duplicate original of a policy "at least thirty days prior to the expiration date of any policy" is impracticable, if not impossible. Insurers do not forward a new policy to their insured for days or weeks after renewal.

HUD response: To address the concerns raised in the comment, HUD has revised redesignated section 19(b) by removing the requirement that Borrower deliver the insurance policy to Lender and by instead requiring the delivery of evidence of continuing coverage in form satisfactory to Lender.

Comment: Section 21(b) should specify that the Lender is named as loss payee.

HUD response: HUD agrees with the suggested revision, and redesignated section 19(b) is revised to require that the Lender, its successors, and assigns be named as loss payee.

Comment: The current policy stipulating that HUD be listed as an additional insured should be retained.

HUD response: As originally published, section 21(b) already provides that policies of property damage insurance must include a noncontributing, nonreporting mortgage clause in a form approved by Lender, and in favor of Lender and HUD, as their interests may appear. In addition to retaining this language, redesignated section 19(b) has been revised to require that the Lender, its successors, and assigns be named as loss payee.

Comment: In section 21(g), any Lender discretion to apply insurance proceeds to the payment of indebtedness or to the restoration of the Mortgaged Property must be exercised reasonably.

HUD response: The conditions in redesignated section 19(g) that limit the Lender's option to apply insurance proceeds to the payment of the indebtedness provide a standard of reasonableness for the exercise of the Lender's discretion.

Comment: Section 21(g)(2) should include language that there will be sufficient funds to pay all amounts due under the Loan Documents during the Restoration period.

HUD response: HUD does not agree with the suggested language because sufficient funds should be available in virtually all cases. In those cases where sufficient funds are not available, Lender would exercise its options under section 19(f) to use proceeds for either Restoration or payment of the Indebtedness in accordance with Program Obligations. Generally, insufficient funds would constitute an Event of Default under section 19(g)(1).

Comment: A new section 21(g) should be added (current 21(g) to become 21(h)) to exclude HUD or Lender involvement for insurance claims arising from casualties up to $10,000 and to allow Borrower adjustment with Lender control of proceeds for claims arising from casualties ranging from $10,000 to $50,000.

HUD response: HUD and the Lender may exclude themselves from involvement in particular instances, but need to do so on an informed basis because of the uncertainties that are inherent in casualty claims. For this reason, HUD declines to adopt the suggested revisions.

Comment: In section 21, language should be added to clarify that mortgage payments are still due on time regardless of any insurance adjustments and generally to require the Borrower to provide such additional documentation as may be required to account for insurance proceeds.

HUD response: There is nothing present in the document to suggest that any insurance adjustments affect the Borrower's obligation to pay the Indebtedness when due in accordance with section 5, and HUD does not consider clarification of that issue to be necessary. However, HUD is adopting the suggestion to require the Borrower to provide documentation to account for insurance proceeds and is adding to redesignated section 19(f) the sentence, "Borrower shall notify the Lender of any payment received from any insurer."

Section 22—Condemnation

This section is now designated as section 20.

Comment: In section 22(a), language should be added that the Borrower will reimburse and indemnify the Lender for expenses incurred or actions taken in connection with a Condemnation.

HUD response: The remedy sought by the comment is provided under redesignated section 13, "Protection of the Lender's Security," of the document. The expenses incurred by the Lender in connection with a Condemnation, permitted by section 13(a), would become part of the principal of the indebtedness and be immediately due and payable under section 13(b).

Comment: Section 22(b) precludes the ability of the Borrower to provide one large principal payment to the Lender in the event there is an award of compensation under a condemnation.

Such payment to the Lender should be allowed.

HUD response: Section 22(b), redesignated as section 20(b), does not preclude a large principal payment in the event of a compensation award, but explicitly allows condemnation awards to be applied to installments of principal. Condemnation compensation may be applied in large principal payments and to the outstanding Indebtedness in accordance with the amortization schedule in the Note.

Section 23—Transfers of the Mortgaged Property or Interests in Borrower

This section is now designated as section 21.

Comment: The extent of required HUD approval here greatly exceeds existing requirements, which already exceed those of Freddie Mac or Fannie Mac.

HUD response: There is essentially no change in the requirements, other than to clarify and limit the scope of actions subject to HUD approval; two additional exceptions are added to redesignated section 21: Corporate restructuring mergers when there is no change in control and first user syndication prior to final endorsement of the Note by HUD. To permit additional exceptions, the introductory clause, "Unless permitted by Program Obligations," is added to redesignated section 21.

Comment: The list of transfers not requiring prior HUD approval should include: transfers pursuant to court decrees; leases of units in the ordinary course of business; dispositions of obsolete or deteriorated Personalty or Fixtures that are replaced by items of equal or greater quality and value; creation of mechanic's or judgment liens that are released or otherwise remedied to the Lender's satisfaction within 90 days after Borrower is notified of such lien; transfers of shares or any assignment of occupancy agreements or leases of a housing cooperative; and as otherwise specifically permitted under the Loan Documents.

HUD response: Court decrees do not require approval pursuant to section 21(c); residential leases are not subject to approval; disposition of replaced Personalty or Fixtures is permitted under section 18(g); liens are subject to approval under section 17; housing cooperatives are governed by a cooperative agreement document, which is not relevant in this document; and if an assignment or lease is specifically permitted in another loan document, the specific requirement takes precedence over the general requirement.

Comment: There should be an exception to obtaining HUD approval prior to the addition of a Principal for properties financed with LIHTCs, as currently allowed if the Principals (partners) are brought in between initial and final endorsement.

HUD response: As noted in HUD's response to a previous comment, an exception for first-user syndication prior to final endorsement of the Note by HUD has been added to section 23, now designated as section 21.

Comment: HUD has insufficient staff to handle all transfer requests.

HUD response: HUD will allocate its resources as necessary to carry out its responsibilities.

Comment: Imposition of personal liability for unauthorized transfers is not acceptable.

HUD response: References to personal liability have been removed from redesignated section 21.

Sections 24 and 45—Two-Tiered Default Approach Will Hamper Ability To Minimize Losses and Damages

Section 24 is now designated as section 22. Section 45 is now designated as section 43.

Comment: The scope of Class B, which includes any failure of Borrower to perform any of its obligations under the Security Instrument, is too broad.

HUD response: A standard of material failure of Borrower to perform any of the obligations under the Security Instrument has been added to narrow the scope of Class B Events of Default in redesignated section 22.

Comment: The distinction between Class A and Class B defaults places an unreasonable burden of oversight on the Lender, and exposes the Lender to litigation by creating a new contractual remedy for borrowers to contest the existence of any default.

HUD response: The Lender's responsibility for prudent oversight of the loan, and the exposure to litigation resulting from the exercise of that responsibility, are always present, regardless of HUD's classification of, and procedures for, Class A and Class B defaults. Lenders should have no difficulty in distinguishing between a Class A monetary default and a Class B covenant default. To underscore the intended reasonable scope of the Lender's responsibility and to emphasize that HUD's focus is not on trivial events, a standard of materiality has been added in redesignated section 22 to qualify the kind of event that would constitute a Class B default. In addition, to address the litigation concerns expressed by commenters, and to mitigate a Lender's exposure to lawsuits under the Security Instrument, the statement in redesignated section 43, concerning a Borrower's right to bring an action to assert the nonexistence of an Event of Default, is removed.

Comment: The changes deny the Lender its longstanding right to declare a covenant default and exercise its rights under the loan documents. The Lender's leverage over the Borrower is eliminated by inability to enforce covenant defaults, and will require HUD to handle directly all covenant defaults.

HUD response: The change does not remove the Lender's right to declare and ability to handle directly a covenant default, but includes HUD, which has a substantial interest in the matter, in the decision to proceed. Because the interests of HUD and the Lender will not always coincide, HUD has determined it must assert the authority to concur in the declaration of a covenant default, to safeguard properly the public assets that HUD administers.

Comment: If HUD retains its two-tiered default scheme, Lender should be able to declare a default and exercise all remedies for all defaults that involve nonpayment that significantly threaten the security of the Lender's collateral, including failure of payment, failure to maintain clear title, and failure to maintain insurance.

HUD response: Section 22(a), which appeared as section 24(a) in the August 2, 2004, publication, defines a Class A Event of Default as, "Any failure by Borrower to pay or deposit when due any amount required by the Note or Section 7(a) or (b) of this Security Instrument within a grace period of thirty (30) days after the due date thereof." Section 43 (section 24(a) in the August 2, 2004, publication), which addresses acceleration and remedies, provides: "At any time during the existence of a Class A Event of Default, Lender, at Lender's option, may declare the Indebtedness to be immediately due and payable without further demand, and may invoke the power of sale and any other remedies permitted by applicable law or provided in this Security Instrument or in the Note." A default that involves nonpayment, including failure to maintain insurance, which is specifically covered under section 7(a), would be a Class A Default that permits the Lender to exercise all remedies. Failure to maintain clear title, however, does not involve nonpayment but would be a covenant default, which is a Class B Event of Default. Lender action under a Class B Default is subject to prior HUD approval.

Comment: If Lender makes an advance that Borrower does not repay, the Lender has no effective recourse.

HUD response: The Lender has effective recourse against the Borrower under sections 8(a) and 13 (previously designated section 14), both of which make sums paid or advanced by the Lender on behalf of the Borrower a part of the principal of the Note, bearing interest from the date of payment and due and payable on demand. A Borrower's failure to repay then would be the basis for a financial, Class A default under current section 22(a).

Comment: Section 45 requiring prior HUD approval before accelerating debt contradicts the intent of 24 CFR 207.256, that mortgagee must give HUD only notice of covenant defaults, regardless of whether the mortgagee has already accelerated the loan.

HUD response: The rule at 24 CFR 207.256 addresses the notice that must be provided to HUD of a mortgagor's failure to comply with a covenant, even if such failure does not constitute a default. The cited section does not address the question of HUD approval before accelerating debt, which section 43, previously designated section 45, requires only for covenant defaults.

Comment: HUD has not provided any criteria for approving a Class B default. Would HUD permit the Lender to foreclose on an aging property with a REAC score below 60?

HUD response: As noted earlier, HUD has added a standard of materiality for Class B defaults. While HUD does not consider a low REAC score to be a trivial matter, HUD will consider each instance separately on a case-by-case basis in determining whether to approve a Class B default, and will create an administrative record to support HUD's decision. Among the elements HUD would consider is the record supporting the Lender's decision to accelerate the indebtedness.

Comment: It would be beneficial to provide Borrowers more opportunity than currently available to avoid potential defaults, and the period when HUD would decide whether to approve an insurance claim could provide such an opportunity. But criteria for HUD approval, established after notice and comment, are necessary.

HUD response: The requirement for HUD to approve covenant defaults would likely have the effect of providing Borrowers more opportunity to avoid potential defaults. Until experience provides a basis for HUD to formulate appropriate, generally applicable criteria, HUD will proceed on a case-by-case basis, as described above, when determining whether to approve a covenant default.

Comment: Longstanding rights of Lender, such as right to consent to junior mortgages, are essentially eliminated.

HUD response: Prior HUD approval for an encumbrance of the mortgaged property has been a longstanding requirement that is carried through into the new documents, leaving the Lender's rights essentially unchanged.

Comment: Fannie Mae and Freddie Mac models allow mortgagee discretion to declare default and accelerate the loan. Current HUD documents and Fannie Mae and Freddie Mac impart waivers and consents on the Borrower's part with respect to certain actions by the Lender, which are important protections for the lender, HUD, and the security.

HUD response: These important protections are preserved in section 43, previously designated section 45, of the Security Instrument, which leaves at the Lender's option the acceleration of the debt and any other available remedies upon a financial default. The requirement for HUD approval before a Lender may take action upon a covenant default is intended to provide additional protection, particularly for HUD and the security. Section 43 also waives, on the Borrower's part, a judicial hearing prior to the sale of the property exercised by the Lender under the Agreement and entitles the Lender to collect all costs and fees incurred in pursuing remedies.

Section 27—Loan Charges

This section is now designated as section 25.

Comment: This section is not necessary since the Lender should be able to determine if the loan is usurious, and because the Lender and HUD require an opinion from Borrower's counsel to that effect. In rare instances where charges are usurious, the Lender should bear the consequences and the Borrower should have the right to recover costs and expenses in enforcing penalties.

HUD response: Section 25 (previously, section 27) of the Security Instrument, as well as section 13 of the Note, direct the manner in which charges are to be reduced and allocated for achieving and determining compliance with laws that limit loan charges. These sections also direct how the excess charges paid by the Borrower are to be applied in those rare instances, as the commenter acknowledges, where loan charges are usurious. As such, these provisions provide additional clarity and guidance should this rare instance occur. The provisions, however, do not address the issue of recovery of costs.

Section 29—Waiver of Marshalling

This section is now designated as section 27.

Comment: It is inappropriate for HUD to have any input in the Lender's election of remedies following a default where the Lender has elected not to assign the loan.

HUD response: As noted previously, the interests of HUD and the Lender often, but not always, coincide. In order to protect its interests from being adversely affected by action that may be taken by the Lender, HUD insists on such action being subject to HUD's rights and requirements.

Comment: It is inappropriate to include provisions in the Security Instrument, such as section 29 (redesignated as section 27), that address the relationship between HUD and the Lender.

HUD response: HUD disagrees that such provisions are inappropriate. Including provisions in section 27 and elsewhere that make certain actions subject to requirements of or approval by HUD, which is the insurer of the Loan, is appropriate to provide notice to all the parties of such requirements.

Section 31—Estoppel Certificate

This section is now designated as section 29.

Comment: There is no limit on the number of Estoppel Certificates that can be requested. They should be required of Borrower only at reasonable intervals.

HUD response: HUD does not consider a limit on such requests to be appropriate, as a limitation would impair the rights of the Lender. HUD presumes the right would be exercised reasonably and not abused, but HUD will investigate allegations of abuse should they arise.

Comment: No Borrower can give such a certificate until the loan documents are drafted to conform and remove conflicts.

HUD response: One of the goals of publication, public review, and revision of the documents is to ensure their consistency. As discussed previously in this preamble, HUD will conduct periodic reviews of the documents and update them to maintain and improve consistency.

Section 32—Governing Law; Consent to Jurisdiction and Venue

This section is now designated as section 30.

Comment: Section 32(b) should add language to permit Lender and HUD to bring actions in any jurisdiction.

HUD response: HUD declines to adopt this suggestion. Redesignated section

30(b), which identifies the Property Jurisdiction as the venue for bringing an action, is consistent with redesignated section 30(a), which identifies the law of the Property Jurisdiction as governing. The courts of the Property Jurisdiction are the most familiar with their own requirements and procedures and would be the most competent courts to apply those requirements and procedures necessary to resolve a controversy. Defining the governing law and venue also permits all of the parties to make plans and act on them with a reasonable expectation of how controversies will be resolved.

Comment: A new Section 32(c) should be added to include a waiver by Borrower and Lender of right to trial by jury.

HUD response: HUD declines to adopt, as a matter of HUD policy, the imposition of a jury trial waiver upon parties participating in its FHA mortgage insurance programs. This policy does not prevent parties from agreeing to such a waiver in a collateral agreement subject to HUD approval.

Section 35—Single Asset Borrower

This section is now designated as section 33.

Comment: This is more appropriately incorporated in the Regulatory Agreement.

HUD response: HUD disagrees with this comment, because the Lender also has an interest in imposing and enforcing this provision.

Comment: Language should be added to clarify that the infusion of cash from investors is "additional property" that may be owned by Borrower and that is not subject to restrictions applying to Project assets.

HUD response: HUD does not permit any unapproved encumbrance of the Mortgaged Property. It is HUD's long-established position that any infusion of cash, secured or not, is a project asset that is subject to withdrawal restrictions.

Section 36—Successors and Assigns Bound

This section is now designated as section 34.

Comment: Language should be added to provide that upon assignment by Lender of its interest under the Security Instrument, Lender shall automatically be released from any and all obligations under the Security Instrument, and Borrower shall look solely to the assignee of the Security Instrument for the enforcement of any of Borrower's rights under the Security Instrument.

HUD response: HUD does not agree that an assignment should operate as a hold harmless provision, particularly with respect to acts that are undisclosed or undiscovered at the time of assignment.

Section 38—Third-Party Beneficiaries

This section is now designated as section 36.

Comment: Section 38(b) should be modified to make HUD a third-party beneficiary of the Security Instrument.

HUD response: At present, it does not appear that such a requirement is necessary to protect HUD's interest in the property, particularly in light of the adoption of the revised Regulatory Agreement. Additionally, HUD is not the lender, so it is not a beneficiary of the Security Instrument. HUD will reconsider this issue periodically when reviewing and updating the documents.

Section 42—Disclosure of Information

This section is now designated as section 40.

Comment: This provision is overly broad, since "third party" is not defined. It authorizes the Lender to give information to virtually any person.

HUD response: In addition to being limited to the extent permitted by law, the disclosures authorized by section 42 are permitted only to third parties "with an existing or prospective interest in the servicing, enforcement, evaluation, performance, purchase or securitization of the Indebtedness."

Section 43—No Change in Facts or Circumstances

This section is now designated as section 41.

Comment: This language should be conformed to language in the Event of Default section, or cross-referenced to that section, and must contain a materiality clause.

HUD response: Section 43, redesignated section 41, does address materiality, and requires that information be "accurate in all material respects and that there has been no material adverse change in any fact or circumstance." As noted in the discussion of the comments that addressed section 24, a standard of materiality has been added to Class B covenant defaults.

Comment: Language should be added that qualifies Borrower's certification of facts to be "to the best of Borrower's knowledge."

HUD response: HUD does not agree with this comment. As noted in the response to a similar comment on section 16, redesignated as section 15, the Lender and HUD are entitled to rely upon the accuracy of the required statements, schedules, and reports, and the individual authorized to certify to this information is in a position, and has an obligation, to confirm and certify the accuracy of these records. However, the certification is not absolute or focused on petty detail, but is qualified by a standard of materiality.

Comment: The last sentence, "The submission of false or incomplete information shall be a Class B Event of Default," should be removed.

HUD response: HUD does not agree that the last sentence in redesignated section 41 should be removed. This section requires Borrower to certify that information submitted in, and in connection with, the Loan Application is complete and accurate in all material respects. A violation of this requirement would be a material failure of Borrower to comply with this obligation under the Security Instrument, which is included in the definition of Class B Event of Default at redesignated section 22(b)(3).

Section 45—Acceleration; Remedies

This section is now designated as section 43.

Comment: Waiting for HUD approval could jeopardize a Lender's security, and should not be required for Class B defaults.

HUD response: HUD approval would not jeopardize the security, but would tend to safeguard it, because HUD is also concerned with preserving the security. Increasing the options for preservation of the security is one of HUD's motives in asserting authority to approve Class B covenant defaults.

Section 47—Remedies for Waste

This section is now designated as section 45.

Comment: The remedies listed create confusion regarding what are, or are not, events of default, and how they are determined.

HUD response: Waste may be the basis for a default, or a remedy for Waste may be pursued independently of a default. If a remedy for Waste is sought without declaring a default, the remedies listed in section 45, now designated as section 43, such as collection of all costs and expenses, would be available in addition to the remedies specified for Waste under section 47, now designated as section 45.

Comment: Section (c) adds a very broad notion of valuation that opens the Borrower to interpretations of value, this increasing Borrower's exposure.

HUD response: HUD disagrees with this comment. Rather than broadening the notion of valuation, section 47(c), now designated as section 45(c), limits recovery of damages to the extent that

the Waste has impaired the Lender's security. The effect of such a provision would be to narrow, rather than broaden, the Borrower's exposure to liability.

Section 50—Construction Financing

This section is now designated as section 47.

Comment: Construction financing does not apply to all programs, and this section should clarify under which programs this section applies.

HUD response: Section 47 has been qualified by adding, "(If applicable)" to the heading of that section. The determination of whether the section applies will be made on a per transaction basis.

Section 51—Environmental Hazards

This section is now designated as section 48.

Comment: Section 51(f)(2) is confusing because it requires the Borrower to warrant to the Lender that no prohibited activities or conditions exist or have existed on the site. This warranty could not be made if the Borrower has identified such activities or conditions and has remedies or plans to remedy them. Section (f)(2) should read similarly to (f)(3), which provides for previous disclosures to the Lender, and should take into account remedies.

HUD response: The concern of the commenters is addressed by the definition of "Prohibited Activities or Conditions," which appears in section 48(b), previously designated section 51(b), and excludes "matters covered by a written program of operations and maintenance approved in writing by Lender."

Comment: The proposed language is overly detailed. The section should provide only that: (a) Borrower will comply with all applicable environmental laws; (b) Borrower will comply with any remediation plan required; and (c) Borrower will indemnify Lender and HUD for any environmental violations.

HUD response: HUD considers the notice provided by the more detailed requirements of redesignated section 48 to be of more assistance in addressing and avoiding environmental risks that may endanger the Mortgaged Property than the very general language suggested by the commenter.

Comment: This section is overly broad and complex, and unreasonable. Substantial reworking is necessary.

HUD response: Section 48 has been revised to address such concerns. Sections previously designated 51(b)(i) and (ii), dealing with the presence, handling or transportation of Hazardous Materials on the Mortgaged Property, are removed, leaving the focus on noncompliance with Hazardous Materials Laws or Environmental Permits. Section 48(c) now specifies that the exclusion from "Prohibited Activities or Conditions" applies to supplies customarily used in the operation of multifamily properties, and that the exclusion for petroleum products used in motor vehicles also applies to motor-operated equipment. Section 48(e) is clarified by specifying that persons who must comply with the written program of operations and maintenance approved in writing by Lender (an "O&M Program") are those "encompassed by the O&M Program." The introductory clause of section 51(f)(3) (as previously designated), "except to the extent previously disclosed by Borrower to Lender in writing," is removed as redundant, since the last sentence of (f)(3) refers to previous disclosures by the Borrower.

The language, "to the best of Borrower's knowledge after reasonable and diligent inquiry," is moved to qualify all of section 48(f)(6) and cover actions both pending and threatened. Communications of environmental, health, or safety matters subject to section 48(f)(7) are limited to those "which have not already been resolved." Section 48(k) on Borrower's indemnity obligation is revised to permit a transferee to assume a Borrower's environmental obligations and to remove the provision about presence of Hazardous Materials from coverage under section 48(k) as redundant. Section 51(n)(3) (as previously designated) is removed as inconsistent with HUD's decision to narrow the circumstances under which Key Principals are subject to personal liability.

Comment: The indemnification provision is overly broad. Out of what funds (project funds, surplus cash, others) is the Borrower to indemnify?

HUD response: The provisions of section 48(o), previously designated as section 51(o), explicitly provide that the covered indemnifications are at the Borrower's "own cost and expense." The funds available for indemnification are those, such as surplus funds or distribution funds, that would be available to the Borrower after project costs have been paid.

Mortgagee's Certificate, HUD–92434M

This document has been renamed "Lender's Certificate."

General Comments

Comment: The term "Mortgage" should be changed to "Security Instrument" or "Loan," as appropriate.

HUD response: HUD agrees the language used throughout the closing documents should be consistent, and is replacing the term "Mortgage" with the term "Security Instrument." The title of this document and usage throughout has been changed from "Mortgagee's Certificate" to "Lender's Certificate," to be consistent with the change from using the term "Mortgagee" to using the term "Lender" in all of the documents.

Comment: In many places, the Certificate refers to attached documents. These documents are submitted separately at the closing, and attaching them is unnecessarily duplicative.

HUD response: The requirement to attach certain documents is the current practice, which HUD intends to continue under the revised documents. Attaching the documents may be an inconvenience initially, but is an invaluable convenience subsequently when the documents need to be consulted or if an assignment takes place.

Comment: The Mortgagee's Certificate should be reorganized (*i.e.,* one section should list all amounts paid to HUD, another section should list all financing charges, and all sections dealing with various escrows should be consolidated).

HUD response: HUD generally agrees with the comment and, while not adopting all of the suggested changes, had undertaken considerable restructuring from the existing Mortgagee's Certificate that is now being replaced by the Lender's Certificate.

Section 2

Comment: HUD should insert clarifying language to the certification in section 2 that Lender certifies only "to the best of its knowledge" that all conditions of the Commitment have been fulfilled, since many conditions (in particular "special conditions" inserted by HUD offices) are HUD's responsibility.

HUD response: HUD relies upon this certification to protect HUD's interests, and intends for Lender to have an affirmative duty to confirm that conditions have been met, consistent with its prudent servicing responsibilities. The certification has been clarified to cite specifically that all HUD-imposed work conditions have been met.

Section 3

This section is now designated as section 4.

Comment: "For all cases involving construction advances" should be removed since the Mortgagee's Certificate is only used for this type of loan.

HUD response: HUD disagrees with the comment, because the Certificate applies more broadly and is used in construction loan transactions as well as in other transactions, e.g., insurance upon completion, and refinancing.

Comment: Language that the Building Loan Agreement is between the Borrower and Lender should be added.

HUD response: HUD does not consider the suggested limiting language to be necessary.

Section 5

This section is now designated as section 6.

Comment: Rather than an extension of the title policy for each insured advance, the alternative of current mechanic lien reports should suffice in a state where the insured loan has continued priority over liens.

HUD response: HUD finds the current practice of extending the title policy for each insured advance to be uniform and reliable regardless of specific state requirements and exceptions and for that reason will continue the practice.

Comment: For Multifamily Accelerated Processing (MAP) loans, interim advances are not submitted to HUD prior to disbursement and HUD does not approve interim advances, so language reading "if required" should be added. The same comment applies to advances under section 21.

HUD response: HUD agrees with the comment and has revised redesignated section 6 to provide that applications for insurance of advances shall be submitted if and as required. Section 21 has been revised to apply to loan advances, if required.

Comment: In the third sentence, language should be changed from "extension" to "endorsement."

HUD response: Extension is used in a broader, generic sense in the third sentence of redesignated section 6 to cover legal obligation of the title company to insure the advance. To clarify this intent in the document, language is added to identify the referenced title policy as insuring Lender and HUD.

Comment: Language that excepts the "liens of taxes and assessments not delinquent" from the priority of the Security Instrument should be added.

HUD response: HUD agrees with the comment, and has added "tax liens not delinquent" to exceptions to the priority of the Security Instrument.

Section 6

This section is now designated as section 7.

Comment: The language, "The changes enumerated below are included in mortgage proceeds and will be disbursed by the Lender at such time as is approved by HUD," should be changed to, "The changes enumerated below have been paid or will be paid promptly following the date hereof." Some or all of these amounts may be paid from sources other than mortgage proceeds and not necessarily at a time approved by HUD.

HUD response: HUD agrees with the reason provided in the comment, but rather than adopt the suggested language, HUD is returning to the language of the current Mortgagee's Certificate, which is being replaced by this Lender's Certificate. This language, which refers to charges that have been collected in cash or will be so collected not later than the date of initial endorsement, provides a more definite time frame for payment than the term "promptly" does.

Comment: The enumerated charges are not included in mortgage proceeds but rather in the Total Estimated Development Cost.

HUD response: Consistent with the revision described in the preceding comment, HUD is removing the reference to mortgage proceeds.

Comment: Title and recording expenses should be removed, since they are costs that are not paid to or collected by Lender.

HUD response: The Lender is in the best position to collect these expenses, and this has been a longstanding HUD requirement.

Comment: Third-party contractor fees should be removed because they are typically included in the "other fees" or "organizational costs" line items in the form HUD–92264, and draws from loan proceeds to pay or reimburse third-party contractor fees must be supported by invoices. Invoices are not required to draw loan proceeds for financing charges and HUD fees.

HUD response: The Lender is in the best position to collect these expenses, and this has been a longstanding HUD requirement.

Section 7

This section is now designated as section 8.

Comment: An option to disclose a demolition escrow should be added.

HUD response: HUD has added a new subsection (iv) to section 9(a) in order to list other escrows, *e.g.,* demolition.

Comment: This section should state that working capital deposit funds may not be used for any other purpose than in accordance with the Escrow Agreement, unless the Lender obtains the prior written approval of HUD.

HUD response: HUD has made an editorial change to redesignated section 8 to use specifically the term, "Escrow Agreement for Working Capital."

Section 8

This section is now designated as section 9.

Comment: This section should recognize and provide for a portion of the over-and-above money that may consist of eligible costs paid by or on behalf of Borrower prior to initial closing.

HUD response: HUD does not consider it appropriate to list as escrows and deposits under the Lender's Certificate costs paid by or on behalf of Borrower without going through Lender.

Comment: The amount of the governmental funding source escrow should be specified as 10 percent of the grant/loan proceeds being provided by the applicable governmental sources.

HUD response: HUD agrees, and the Lender's Certificate specifies 10 percent of the proceeds provided by the governmental source.

Comment: The offsite escrow language should be moved to section 9 with other offsite items.

HUD response: HUD considers the offsite escrow agreement, now specifically cited in redesignated section 9 as the Escrow Agreement for Off-Site Facilities, to be more appropriately included together with other escrows in section 9.

Section 9

This section is now designated as section 10.

Comment: In addition to the offsite escrow, a demolition escrow provision should be added to this section. Demolition escrows are more common than several other escrows included in the Mortgagee's Certificate.

HUD response: Neither the original Mortgagee's Certificate nor the new Lender's Certificate specifically addresses demolition activities. An additional escrow to address demolition is permissible within the scope of the Lender's Certificate, and should be listed under section 9(a)(iv) in the space provided.

Section 11

This section is now designated as section 12.

Comment: The outdated reference to bearer bonds should be removed.

HUD response: HUD agrees, and the reference to bearer bonds has been removed.

Section 14—Reserve for Replacements Fund

Comment: The permissible investment of funds is narrower than what is currently permitted.

HUD response: HUD has revised this section to allow other investments as approved by HUD or permitted by Program Obligations.

Comment: The Borrower should be obligated to provide IRS form W–9 and other documents required by the Lender to facilitate investment.

HUD response: HUD declines to impose the suggested requirement upon Borrower in the context of the Lender's Certificate, but Lender may independently require Borrower to provide this information without a HUD requirement.

Comment: Since Lenders often administer thousands of escrows, the Lender should have the right to approve and/or select investments.

HUD response: HUD considers it necessary to review and approve investments other than obligations of, or guaranteed by, the United States, in order to ensure that HUD's interests are protected. The investment administration experience of the Lender and the type of investment will be among the factors HUD will consider in determining whether to approve another form of investment.

Comment: HUD should specify the amount to be withdrawn, and if HUD fails to do so, the Lender should make an allocation as it deems appropriate.

HUD response: The suggested procedure is the current practice under form HUD–9250, which HUD intends to continue following.

Comment: Deposits into the Reserve for Replacement should be cash rather than U.S. Treasury securities, since there is no provision in the Regulatory Agreement that provides for the deposit of Treasury securities.

HUD response: HUD disagrees with the comment. Section 11.a. of the Regulatory Agreement specifically permits investments in Treasury securities.

Section 15—Residual Receipts Fund

Comment: The responsibility for maintaining and administering the Residual Receipts accounts should remain with the Owner and not be shifted to the Lender.

HUD response: Section 15 does not shift any responsibility, but maintains the status quo. It has been a longstanding requirement that, with the exception of Section 202 project Owners, all project Owners are required to deposit Residual Receipts with their Mortgagees/Lenders (*see,* for example, Chapter 25, Residual Receipts, of Housing Handbook 4350.1, Multifamily Asset Management and Project Servicing).

Comment: Given the nature of current HUD programs, very few projects funded with new loans will likely have residual receipts accounts.

HUD response: Section 15 of the Lender's Certificate refers to cases where a Residual Receipts account is required under the Regulatory Agreement. Section 12 of the Regulatory Agreement requires Section 221(d)(3) and 231 Non-Profit, Public Body, and Limited Dividend Borrowers to establish and maintain a Residual Receipts account.

Comment: Deposits into the Residual Receipts Fund are not fixed as to amount or date, and therefore, the Lender will not know whether or not the proper amount has been received within the specified time frame. Language should be added to require the Lender to review the Project's annual financial statements and then notify HUD if a required deposit has not been made within 45 days after Lender's receipt of the annual statement.

HUD response: HUD agrees, in part, with the comment, and has added language to redesignated section 15 of the Security Instrument to provide explicitly that Lender is to review financial information that Borrower is required to provide Lender within 90 days of the end of Borrower's fiscal year. Based upon this review, Lender should be able to determine if Borrower has complied with Residual Receipts requirements. Rather than requiring Lender to report any noncompliance of Borrower within a specific time frame, such as 45 days, section 15 of the Lender's Certificate now requires reporting of Borrower's noncompliance when known to Lender.

Comment: Language allowing withdrawals pursuant to the Regulatory Agreement without HUD's permission should be removed, since under the Regulatory Agreement, HUD's approval is required to make distributions from the Residual Receipts account.

HUD response: HUD agrees with the comment, and the reference to withdrawals pursuant to the Regulatory Agreement is withdrawn.

Comment: Language should be added permitting the investment of funds in interest-bearing investments.

HUD response: HUD agrees with the comment and has added language permitting other investments approved in writing by HUD.

Comment: The last sentence requiring notification to HUD of "any irregularity" is vague and should be removed. The Lender is already required to notify HUD of any shortfall or of any known violation of the Regulatory Agreement.

HUD response: The language of the last sentence of section 15 has been clarified by replacing the term "irregularity" with the phrase "noncompliance with Program Obligations."

Section 19—Insurance Policies

Comment: It is inappropriate for the Lender or HUD to be named as a "loss payee" on policies other than property insurance. Such insurance as general liability, professional liability, and worker's compensation involve defending claims against the Borrower, and payments are made to claimants, not to lenders. The Lender and HUD should be included as "additional insureds."

HUD response: HUD agrees that it is not appropriate for Lender or HUD to be named as loss payees on policies other than property insurance where payments are made to claimants. The language "where applicable" has been added to section 19 to qualify the types of insurance where Lender is to be named as a loss payee.

Comment: In Housing Notice H–92–76, pertaining to "Directors and Officers Liability Insurance versus Indemnification by the Corporation," issued September 30, 1992, HUD determined that HUD not be named as a loss payee on property insurance policies. HUD will be included as a payee on settlement checks if it is named as a loss payee, and obtaining HUD endorsement of settlement checks is an unnecessary burden on the Borrower, the Lender and HUD staff. Naming HUD an insured is contrary to current HUD policy and would imply HUD's participation in the inspection and funding of claims.

HUD response: HUD agrees with the comment, and HUD has been removed as a loss payee under section 19.

Section 20—Financing Charges

Comment: Language should be added based on HUD's existing policy set forth in the Map Guide at section 12.1.6.D.3c, to reflect that most loans made today are "unitary loans."

HUD response: HUD does not consider any additional language to be necessary to take into account the cited policy.

Comment: The circumstances in which Lender may impose administrative fees and charges should be expanded, since the greater burdens on Lender should appropriately be passed on to Borrower.

HUD response: HUD does not consider the revised documents to impose any additional obligations upon Lender that are over and above current obligations and that would not be ordinarily exercised in the prudent conduct of Lender's business.

Comment: Section 20(e) should be amended to reflect that costs of issuance are not collected by Lender, but paid by Borrower from loan proceeds or other funds.

HUD response: In order to better protect HUD's interest, HUD wants all costs of issuance to pass through Lender. To clarify this intent, HUD has added language to section 20(e) to provide that Lender not only collects, but also distributes from loan proceeds amounts to cover the costs of issuance.

Comment: Sections 20(h) and (i) are unnecessary and should be removed.

HUD response: The subsections in section 20 are to be checked and completed as they are applicable to the transaction. As noted previously, the full disclosure of financing arrangements that HUD seeks is necessary to protect HUD's interests.

Section 23—Letter of Credit

Comment: The requirement that Lender notify an Issuer that its letter of credit might be drafted is unnecessary and potentially gives the Issuer an excuse not to do what it is otherwise legally required to do.

HUD response: HUD agrees with the comment and accordingly is removing section 23(d).

Comment: The Lender should have the right to negotiate with the sponsors and others for recourse against parties other than Borrower if the issuer of a letter of credit fails to fund, and reference to "any sponsor, the general contractor or the architect" should be stricken.

HUD response: HUD's intention is to ensure the availability of an unconditional, irrevocable letter of credit and for that reason it does not agree with the comment.

Section 24—Extension of Election To Assign

Comment: The language in this section is not consistent with the proposed change to 24 CFR 207.258.

HUD response: HUD agrees with the comment, and section 24 is revised to refer to procedures set forth in the Contract of Mortgage Insurance. HUD plans to make a conforming change to 24 CFR 207.258.

Comment: "Participation certificates" should be included in this section to clarify that this commonly used arrangement is subject to § 207.258.

HUD response: HUD considers the current language of section 24 to be broad enough to encompass the arrangement described in the comment.

Section 26

Comment: The language should be changed to state that no portion of the amounts included in the Loan for the Borrower's attorneys' fees has been paid to the Lender or its employees.

HUD response: HUD agrees with the comment, and language has been added to section 26 to address the concerns raised.

Section 27

Comment: Language should be added that would limit the certification to funds "except as disclosed in this Certificate (for example, funds held in connection with a tax-exempt bond transaction to satisfy rating agency requirements)" and held "by or at the order of Lender."

HUD response: HUD agrees in part with the comment, and has added language to limit the certification to all funds, escrows, and deposits specified in the Certificate and any and all other funds held by or at the order of Lender in connection with the Loan transaction covered by the Certificate.

Section 28

Comment: There is no reason to restate in the Mortgagee's Certificate HUD's requirements related to components stored off-site. Advances for this purpose are extremely rare.

HUD response: HUD considers it appropriate to include in the Lender's Certificate those requirements that apply specifically to the Lender, such as those referred to by the commenter.

Section 29—Changes in Forms

Comment: The process described in this section is cumbersome and confusing.

HUD response: HUD does not consider the requirement to attach a memorandum listing changes and modifications to the documents to be overly burdensome. The listing of items that are not considered to be changes and modifications is intended to make the process even less burdensome, but if there is any uncertainty or confusion as to whether any particular item is a change, the simple resolution is to err on the side of inclusion. HUD must control the form and consistency of the documents to present a level playing field to applicants for insurance and to protect HUD's interest.

Comment: The effective date of each form should be included to provide a basis for determining the version of each document that was used.

HUD response: Although HUD does not consider the practice recommended by the comment to be necessary, because whatever documents are used will comprise the loan package for any particular transaction, each form will include the paperwork approval expiration date. The paperwork approval must be renewed, generally every 3 years, and the documents will include the new expiration date following each renewal. The latest version of HUD documents will be available from HUD on HUD's official Web site *(http://www.hudclips.org* or a successor location to that site).

Comment: Language relating to "no changes" made to HUD's form documents should be replaced with whether "material changes" have been made to such documents.

HUD response: HUD does not agree with the comment. HUD considers the listed exceptions (filling in blanks, attaching exhibits or riders, deleting inapplicable provisions, or making changes authorized by applicable Program Obligations) to what is included in changes and modifications that must be approved by HUD to provide more specific and definite guidance than the use of the term "material changes."

Comment: All material changes in the documents should be identified by the use of type styles and strike-through that allow all parties to easily identify changes.

HUD response: HUD agrees that all changes, with the exceptions noted in section 29, must be identified, but does not consider it necessary to specify the method of identification.

Comment: An Exhibit should be attached to the Lender's Certificate that would contain a list of all HUD closing forms and indicate for each form: (1) Whether or not the form has been submitted and (2) whether or not there have been material changes to the form.

HUD response: HUD has no objection to Lender preparing a list as described in the comment, but HUD does not require and will not accept such a list.

Section 30—Lender Violation Notification to HUD

This section is now designated as section 33.

Comment: Lender faces a risk of violating this provision if it does not report a possible violation that is unclear, or Lender may be liable to the Borrower if the Lender reports a possible violation if it turns out not to be one.

HUD response: Lender is required to report only the facts and circumstances that appear to be violations, consistent with prudent servicing responsibilities. HUD, not Lender, makes the determination of whether or not a violation is actually present.

Comment: A Lender should be required to advise HUD only of material, uncured violations of the Regulatory Agreement by a Borrower. Does HUD want to know if a replacement reserve deposit is not received on the first day of the month if it is received by the 15th day?

HUD response: The comment appears to assume more responsibility than the requirement is intended to impose. Upon receiving Lender's report of the facts and circumstances noted by Lender, HUD will make the determination of whether a violation is present, and whether it is material. There is currently a reporting requirement in place for delinquencies, which is not changed by this section.

Comment: Lender is not a party to the Regulatory Agreement and should not be responsible for reporting violations to HUD.

HUD response: While Lender is not a Regulatory Agreement party, as noted in the comment, the Regulatory Agreement is incorporated into the Security Instrument, to which Lender is a party. It is within the ordinary course of Lender's responsibility to monitor its Borrower, and Lender has greater contact with Borrower and knowledge of Borrower's activities than HUD. If, in the course of its routine monitoring and contact with Borrower, Lender becomes aware of acts or omissions that do not appear to conform to the Regulatory Agreement, HUD expects Lender to advise HUD of the situation so that HUD can take appropriate action.

Comment: Lender staff should not be expected to know and understand the complex and extensive legal obligations of the Borrower and, if applicable, the lessee. It is possible that the Lender's servicing staff may be aware of the facts that constitute a violation, but not know that those facts constitute a violation.

HUD response: HUD expects that Lender staff is at least familiar with the terms of the documents that underlie Lender's transactions and protect Lender's interests, and would recognize issues that could be referred to more expert Lender staff for additional consideration and guidance.

Comment: What is HUD's capacity to respond to such notices?

HUD response: HUD intends to respond to such notices as appropriate, considering the materiality and magnitude of any violations determined to be present. A pattern of repeated violations, even if relatively minor, could draw HUD's attention for closer monitoring and identification and correction of systemic problems.

Section 31—Lender Review and Approval of Transfer of Project

This section is now designated as section 34.

Comment: HUD does not currently require Lenders to review and consent to such transfers, and does not provide reimbursement for expense of such activity. HUD should permit a set fee (Fannie Mae and Freddie Mac allow $3,000) or remove the requirement.

HUD response: Rather than a set fee, HUD is permitting Lenders to recover the costs of conducting a review. Redesignated section 34 also provides that Lender may not unreasonably withhold approval of the transfer, with the implication being that Lender could and would withhold approval as a part of prudent servicing practices. HUD considers the recovery of costs for the exercise of prudent servicing to be more than reasonable.

Comment: Lender should be able to require that the Borrower provide a deposit to cover Lender's processing fee and out-of-pocket expenses; otherwise, a lender will have no way to collect amounts due if a transfer does not go forward if the Lender cannot condition its review on receipt of a deposit.

HUD response: HUD disagrees with the comment because redesignated section 34 specifically permits Lender to require Borrower to reimburse Lender for expenses incurred in connection with reviewing the transfer, and there is no prohibition against a reasonable deposit for this purpose.

Comment: The transfer requirements do not fully address Lender concerns, particularly with respect to filing UCC financing statements; UCC searches; and tax compliance (e.g., IRS form W–9). The Lender should have the right to impose reasonable conditions for approval.

HUD response: HUD agrees that Lender should have the right to impose reasonable conditions for approval, and for that reason, this section provides only that Lender will not unreasonably withhold approval of the transfer. This provision leaves the door open for the imposition of reasonable conditions for approval.

Comment: Parties should be permitted to use existing documents to avoid materially harming the Transfers of Physical Assets market and the value of existing insured projects, raising the possibility of "takings" challenges by borrowers.

HUD response: HUD considers it necessary to update the closing documents, and has not observed any significant objection to the general proposition of making the documents more reflective of current practice, as opposed to objections to only certain changes. With the revisions being made to the new documents, such as revising the provisions dealing with personal liability of Key Principals, the concerns expressed by the comment should be mitigated.

Comment: Where loans are in lockout, the significantly more burdensome requirements of the new forms could preclude transfers altogether.

HUD response: HUD has revised the documents, as noted above, making them less burdensome, and does not expect the concern raised by the comment to materialize.

Certification

Comment: It is unreasonable and unfair to require Lender to certify to the truth, accuracy, and completeness of the statements and representations contained in the "supporting documentation"—which is an undefined term. The certification should be affixed to specific items or the specific items should be identified. This language could be viewed as making the Lender responsible for the statements and representations of others.

HUD response: HUD agrees with the comment, and the reference to "all supporting documentation" is replaced with the more focused and appropriate, "all documents submitted and executed by Lender in connection with this transaction".

Regulatory Agreement, Form HUD–92466M

Introductory Provisions

Comment: It appears that the Regulatory Agreement is to be used in lieu of, or in addition to, Use Agreements in varying transactions.

HUD response: The Regulatory Agreement would not be used in lieu of Use Agreements, but Use Agreements could be used to supplement the Regulatory Agreement.

Comment: In the type of Borrower required to be listed in the introductory provisions, "individuals" are omitted, although referenced later in the document.

HUD response: Individuals would clearly fall under the type of Borrower listed as "Profit-Motivated" in the introductory provisions. The list of the types of Borrowers in the introductory provisions should not be confused with the definition of Borrower, which is

found in section 1.b. The definition in section 1.b. applies to "all persons or entities identified as Borrower in the first paragraph of the Security Instrument," and encompasses individuals. If the Borrower is an individual, the striking of the "organized and existing under the laws of" language in the first section of the Security Instrument would be a permissible deletion of an inapplicable provision consistent with section 29 of the Lender's Certificate.

Comment: The "Date of Note" line should be removed, since the information is included in the definition of "Note" in section 1.

HUD response: The line is not being removed. It is important to reference the Note in section 1 with particularity because the Regulatory Agreement is incorporated into the recorded Security Instrument.

Comment: The line requiring recordation information for the Security Instrument should be removed. It is nearly impossible to get this information inserted in each deal as the Security Instrument and Regulatory Agreement are taken to the recorder's office at the same time for simultaneous recording.

HUD response: This line has been removed.

Comment: All limited dividend entities are not alike and cannot be treated in this document as though they are.

HUD response: To address this comment, the definition of Limited Dividend Borrower, originally at section 1.o. but redesignated here as section 1.q., has been broadened to apply to both limited dividend and limited distribution entities.

Comment: The Regulatory Agreement is stated to ensure compliance with the National Housing Act, although it also deals with Section 8 contracts and requirements of the United States Housing Act of 1937.

HUD response: The introductory provisions refer to compliance with the requirements of the National Housing Act and any related legislation, which would certainly include the relevant provisions of Section 8 of the United States Housing Act of 1937. Further, section 42, originally designated section 29, requires Borrower to comply with all applicable laws, not only with the National Housing Act. Article IX of the Regulatory Agreement contains additional provisions that are applicable to Projects for which Borrower has entered into a Section 8 Housing Assistance Payments Contract.

Comment: It is stated that this document stays in place as long as HUD is "obligated to protect rights of tenants of the Mortgaged Property." It is not clear why HUD would attempt to keep the regulatory agreement in place upon payment of the FHA loan. Are the requirements meant to apply where HUD vouchers are used after a loan is paid off? HUD's stated purpose to protect the tenants is not well founded. Use Agreements may offer protections.

HUD response: HUD agrees that HUD is obliged to protect tenants under Use Agreements and other appropriate legal authority independent of the Regulatory Agreement. The reference to that obligation has been, accordingly, removed from the Regulatory Agreement.

Comment: It is stated that violations could cause the Borrower and "related parties" to be subject to adverse actions. The document can be enforced only against parties to it.

HUD response: HUD agrees that the Regulatory Agreement can be enforced only against parties to it. The definition of Borrower at section 1.b. includes successors, heirs, and assigns, which are the "related parties" that are contemplated in the introductory provisions. The unnecessary reference to "related parties" in the introductory provisions has been replaced with "other signatories."

Comment: The document does not provide for waiver, amendment, appeal of decisions, or evidence of authority on the part of HUD personnel.

HUD response: The authority of HUD personnel is provided in Delegations of Authority. The Regulatory Agreement does not preclude amendment and, in fact, section 42 (originally section 29), Compliance With Laws, refers to compliance with all subsequent amendments, revisions, promulgations, or enactments of, among other items, covenants and agreements recorded against the Mortgaged Property. Appeal of decisions, which HUD takes to mean an appeal of a HUD denial of an approval required under the Regulatory Agreement, is not provided.

Comment: The introductory items should include lines for "Project Name" and "Project Location."

HUD response: The suggested changes have been made.

I. Definitions

Definition of "Affiliate"

Comment: The reference to post-debarment entities is particularly opaque.

HUD response: The definition of Affiliate in the 2004 proposed Regulatory Agreement, including the reference cited in the comment, is consistent with, and is commonly understood within the context of, the definition of Affiliate at 24 CFR 180.905, a section of the governmentwide system of debarment and suspension that is adopted in HUD's regulations at 24 CFR part 24. The revised Regulatory Agreement now cross-references the definition in 24 CFR 200.215(a), which HUD intends to update through rulemaking.

Comment: It is unreasonable to qualify a person as an affiliate merely for sharing facilities or equipment with another. The ability to control must be a factor.

HUD response: HUD agrees that the ability to control is the decisive factor. While sharing facilities or equipment can be an indication of control, merely sharing facilities with no other indicia of control would not lead to a conclusion that control is present.

Comment: The definition of "Affiliate" should explicitly exclude non-HUD projects, because HUD should not have the right to control or otherwise to restrict property that is not financed with HUD-insured loan proceeds.

HUD response: HUD must have the right to control all security property, as well as property owned by the mortgagor entity (and other affiliated parties) that affects the security property, in order to protect the interests of HUD.

Definition of "Borrower"

Comment: HUD can define "Borrower" as broadly as it wants, but this document cannot bind anyone who has not executed it.

HUD response: As noted previously, HUD agrees that the Regulatory Agreement can be enforced only against parties to it.

Distribution—Definition at Section 1.e.; Procedure at Section 15

This section is now designated as section 1.f.

Comment: The definition of "Distribution" includes control over the distribution of "any asset of the Borrower," while the current Regulatory Agreement refers to "any assets of the project." The long-recognized FHA distinction between "project assets and expenses" and nonproject assets and expenses should be maintained.

HUD response: Section 42, formerly section 29, Compliance with Laws, specifically requires Borrower to comply with the Security Instrument. Redesignated section 33 of the Security Instrument, formerly section 35, requires Borrower, as a single asset Borrower or a natural person, to maintain the assets of the Mortgaged Property in segregated accounts until

the Indebtedness is paid in full. In addition, under redesignated section 33, Borrower, if not a natural person, shall not acquire any real or personal property other than the Mortgaged Property and personal property related to the operation and maintenance of the Mortgaged Property and shall not own or operate any business other than the management and operation of the Mortgaged Property. The single asset Borrower requirement is a longstanding FHA requirement that does not provide the basis for any meaningful distinction between project assets and expenses and non-project assets and expenses where Borrower is not a natural person. HUD does not intend to restrict disbursements of non-project assets of a Borrower who is a natural person.

Comment: Since it includes control over the distribution of "any asset of the Borrower," this definition constitutes a major policy change. There has always been a distinction between project assets and nonproject assets.

HUD response: Please see the immediately preceding HUD response.

Comment: This definition is inconsistent with section 5 in the proposed new Surplus Cash Note, which permits payments from sources other than project income or assets.

HUD response: Section 15.a. of the Regulatory Agreement provides that no Distribution shall be made or taken from borrowed funds. However, section 16 provides that any advances made by Borrower, on behalf of Borrower, or for Borrower, must be deposited into the Project account. Under section 16, if such advances are used for Reasonable Operating Expenses, the advances may be reimbursed, with interest, from Surplus Funds and such repayment is not considered a Distribution.

Comment: The new definition excludes "payments of expenses that are determined by HUD to be reasonable and necessary." HUD has replaced an objective standard with its own subjective standard, and it is no longer sufficient for an expense to be reasonable.

HUD response: In response to the comment, HUD has replaced the "reasonable and necessary" language with the defined term "Reasonable Operating Expenses," which has been redesignated as section 1.bb.

Comment: In the definition of "Distribution," "any asset of the Borrower" should be "any asset of the Project." There does not appear to be any reason why nonproject assets such as capital contributions should be limited.

HUD response: It is necessary to use the words, "any asset of the Borrower," to protect the interests of HUD.

Comment: In the definition of "Distribution," "payment of expenses that are determined by HUD to be reasonable and necessary expenses" should be changed to "payment of reasonable expenses." Requiring HUD approval replaces management's decision on running the project with a decision by HUD, and "reasonable" is a sufficient standard without the additional requirement of "necessary."

HUD response: As noted previously, the defined term "Reasonable Operating Expenses" is now used. It is necessary to provide HUD with this control to protect the interests of the government.

Definition of "Elderly Project"

Comment: The definition of Elderly Project should be revised to read "designed for occupancy by a single person 62 years of age or older or a household whose primary occupant is 62 years of age or older."

HUD response: HUD has decided to address policy considerations related to Elderly Projects separately and, consequently, has removed the definition from the Regulatory Agreement.

Definition of "Fixtures"

Comment: This definition is broader than under any state's law, and, therefore, probably is not usable.

HUD response: The definition of "Fixtures" has been revised to quote the definition provided in Article 9 of the UCC.

Comment: In the definition of "Fixtures," the word "including" should be replaced with "which may include, but is not limited to."

HUD response: HUD agrees and has made this change and a conforming change in the Security Instrument.

Definition of "HUD"

Comment: In the definition of "HUD," "Secretary" should be replaced with "Federal Housing Commissioner."

HUD response: In the interest of consistency, all references are to the Secretary of HUD rather than to heads of component entities that comprise HUD and that act pursuant to delegations of authority from the Secretary.

Definition of "Leases"

Comment: The definition of "Leases" should include language stating that the term "Leases" does not apply to a lease of the Land to Borrower on which Improvements will be constructed.

HUD response: A parenthetical has been added to the definition of "Leases" to make the suggested clarification.

Definition of "Mortgaged Property"

Comment: A leasehold estate should be included in the definition of "Mortgaged Property."

HUD response: A leasehold estate would be included in the Exhibit "A" description of the estate in realty required under the definition of "Land." Land, in turn, is included in the definition of Mortgaged Property.

Comment: This definition seems unrelated to use of the term later in the document and therefore is very confusing as to what "funds," for example, are being addressed in given situations.

HUD response: The term Mortgaged Property is broadly defined, and its usage in a particular context determines which aspects of the broad definition are being addressed.

Comment: Subparagraph (6) of the definition of Mortgaged Property should begin with the phrase, "all insurance policies covering the Mortgaged Property and all payments and * * *."

HUD response: HUD agrees in part with the suggested language and has made a revision to include language covering "all insurance policies."

Comment: In the definition of "Mortgaged Property," subsection (8) should provide for agreements for "use" in addition to "sale."

HUD response: The "for use" wording would permit subleasing, which is contrary to HUD policy.

Comment: Is subsection (8) of the definition of "Mortgaged Property" intended to include a lease of the Land to Borrower under the 207 Lease addendum?

HUD response: Yes, the definition covers any estate in realty. See the definition of "Land."

Comment: In the definition of "Mortgaged Property," subsection (9) should include language that proceeds include both non-cash proceeds and cash proceeds.

HUD response: HUD agrees and has the revised definition.

Comments: In the definition of "Mortgaged Property," subsection (11) should include the words, " * * * commodity accounts, commodity contracts, deposit accounts, other funds, receipts, any rights to payments evidenced by chattel paper * * *."

HUD response: This change was not deemed necessary because the definition should be adequate to cover all security property.

Comment: In the definition of "Mortgaged Property," subsection (11)

should include the words, "and escrows required by HUD."

HUD response: Such escrows are covered by the definition.

Definition of "Non-Profit Borrower"

Comment: In section (q), there is no mention of the tax status of the organization. HUD should use 501(c)(3) in the definition of "Non-Profit Borrower."

HUD response: In this context, HUD does not rely upon or examine the federal tax status of an organization, and is not required to do so. The principal factor in HUD's consideration is the absence of self-interested financial profit or gain in the purposes of an organization. While federal tax status may demonstrate the presence of this factor, such status also requires many elements of technical compliance that are beyond HUD's purview. An organization formed under, and acting in compliance with, a state's nonprofit organization statute could qualify as a nonprofit for purposes of HUD's program, even though the organization may not have section 501(c)(3) status.

Comment: This definition is contrary to longstanding HUD policy and section 8.12.E of the MAP Guide that permit nonprofit entities to be treated as "for profit" so long as they have not received benefits from HUD due to their nonprofit status.

HUD response: The definition does not prevent a nonprofit organization from electing to be regulated as a for-profit organization by HUD in programs not restricted to nonprofits. Such an election would require compliance with all of the requirements applicable to a for-profit organization.

Comment: In the definition of "Non-Profit Borrower," HUD should not change its present policy of treating a legally organized nonprofit entity as a for-profit, if it receives no benefits due to its nonprofit status, if it signs a for-profit Regulatory Agreement and otherwise subjects itself to all HUD for-profit requirements. Such a nonprofit sponsor should also be entitled to Surplus Cash distributions to affiliate companies.

HUD response: The definition only applies to nonprofits that use the nonprofit status to qualify for HUD program eligibility. In other words, if the HUD program requirement is that the mortgagor be a nonprofit entity to be eligible, then the definition is applicable to that entity. The policy of permitting nonprofit entities to operate projects as general mortgagors, public mortgagors, or for-profit mortgagors is not changed. Such nonprofit entities would be entitled to distributions; however, any IRS restrictions would continue to be applicable. The definition does not need to be changed.

Comment: In "Non-Profit Borrower," the use of the term "minimally" preceding "the entity may not make Distributions to any individual member or shareholder" is not clear.

HUD response: HUD agrees and the word, "minimally," has been replaced with the words, "at a minimum."

Comment: The language, "The payment of salaries or other fees for services performed to ex-officio members shall not be subject to the provisions of this Agreement other than as a normal operating expense of the Project" should be added at end of the definition of "Non-Profit Borrower."

HUD response: As HUD understands the comment, the suggested policy change would be contrary to long standing HUD policy prohibiting the payment of salaries and fees to such individuals.

Definition of "Personalty"

Comment: The definition of "Personalty" should include inventory.

HUD response: Inventory is included in the definition of Personalty.

Comment: "Land or the Improvements" in the definition of "Personalty" should be replaced with "Mortgaged Property."

HUD response: HUD does not agree that such a circular reference would be helpful.

Comment: The definition of "Personalty" should include certificated securities, certificates of letter, chattel paper, documents, electronics chattel paper, general intangibles, financial assets, investment property, letter of credit, negotiable instruments, promissory notes, security accounts, securities, security certificates, security entitlements, tangible chattel paper, uncertificated securities, unrestricted cash, and investments derived from the Mortgaged Property.

HUD response: HUD agrees in part with the comment and has added investments to the definition.

Definition of "Principals"

Comment: If this definition is set in the Regulatory Agreement, it will be out of sync with previous participation requirements, thus causing confusion.

HUD response: The definition of Principals in the 2004 proposed Regulatory Agreement is not out of sync with previous participation requirements, but is based directly on form HUD–2530, Previous Participation Certification, which has been in use for a significant period of time. The revised proposed Regulatory Agreement now cross-references the definition at 24 CFR 200.215(e), which HUD intends to update through rulemaking.

Comment: The defined term "Principals" should be changed to "Principals of the Borrower" to reflect the actual usage of this term in this particular document.

HUD response: All principals involved in the operation of the security property are covered by the term "Principal."

Comment: The term "natural persons" in the definition of "Principals" should be qualified by "who have the authority, acting individually, to control or contractually to bind the Borrower."

In the definition of "Principals," the 25 percent limited partner threshold should be changed to "greater than 50%;" the phrase, "in the case of public or private corporations or governmental entities," should be followed by the phrase "any officer or director who has the authority, acting individually, to control or contractually to bind the Borrower;" the 10 percent stockholder interest threshold should be replaced with "greater than 50%;" and the 10 percent governance interest and the 25 percent financial interest thresholds following "members or partners" should be replaced with "who have the authority, acting individually, to control or contractually to bind the Borrower, as well as each member or partner with an interest in the Borrower greater than 50%."

It is unreasonable to hold individuals, particularly limited partners, responsible for the acts of the Borrower if they do not have any say over costs and events outside their control. Passive investors will not want to expose themselves to liability beyond their equity investment.

HUD response: Because these are matters controlled by the 2530 regulations (24 CFR part 200, subpart H—Participation and Compliance Requirements) and Program Obligations, the suggested changes have not been made.

Definition of "Project"

Comment: This definition includes assets not traditionally included in the definitions of "project" and "project assets."

HUD response: The definition, by its own terms, applies only to assets used in, owned by, or leased by, the Borrower in conducting the business on the Mortgaged Property. Assets unrelated to the business conducted on the Mortgaged Property are not affected by the definition.

Comment: The definition of "Project" should read: "Project means the Land

and the Improvements on the Mortgaged Property."

HUD response: The suggested change is not being made because it would be too restrictive. The policy of HUD is to include all property, as indicated in the definition.

Definition of "Reasonable Operating Expenses"

Comment: The meaning intended by the language that Reasonable Operating Expenses "must benefit the project more than the owner" is not easily understood. There needs to be clarification, to prevent HUD from using it to suit its purpose from time to time.

HUD response: The definition of Reasonable Operating Expenses is not changed from the definition in use for a substantial period of time, and is based on case law. See *United States* v. *Frank,* 587 F.2d 924, 927 (8th Cir. 1978); *Arizona Oddfellow-Rebekah Housing, Inc.* v. *United States,* 125 F.3d 777 (9th Cir. 1997); *United States* v. *Coleman,* 200 F.Supp.2d 561 (E.D.N.C., 2002); *United States* v. *Schlesinger,* 88 F.Supp.2d 431 (D. Md. 2000). Courts have reviewed many types of project expenditures and decided whether or not they are Reasonable Operating Expenses, and HUD will follow the guidance provided in such decisions in its review of particular disbursements.

Comment: In the definition of "Reasonable Operating Expense," the use of the term "everyday" is unclear. What if the expense is required only once or twice in any given period?

HUD response: HUD agrees with the comment and has dropped the word "everyday."

Definition of "Rents"

Comment: This definition includes assets not previously included, and inclusion of items not within the common meaning of rents is inappropriate and misleading.

HUD response: The definition of Rents is intended to specify, to a greater degree, all of the miscellaneous items of value that accrete to the mortgaged property and that are not specified elsewhere.

Definition of "Residual Receipts"

Comment: The definition of "Residual Receipts" should be removed. There does not appear to be any underwriting or business purpose necessitating different standards based on form of ownership. Nonprofits should have same privileges as proprietary sponsors.

HUD response: HUD rejects the comment, because the longstanding policy of HUD is to regulate distributions of nonprofit entities. The definition does not represent a change from present practice.

Additional Definitions

Comment: A definition for "Construction Contract" should be added, to read "means the form of the Construction Contract approved by HUD for the Project; provided such term is applicable only to those transactions for which HUD has issued a Commitment to Insure Upon Advances."

HUD response: HUD agrees in part with the comment and has revised section 6 to read: " * * * Construction Contract, as approved by HUD." With this modification, a definition is unnecessary.

II. Construction

Comment: A provision should be added to remove this section for loans that do not involve new construction or substantial rehabilitation.

HUD response: It is clear by its own terms that this section would not apply for loans that do not involve new construction or substantial rehabilitation.

Comment: A provision should be added to allow deletion of this section as appropriate.

HUD response: HUD disagrees with the comment. Many of the provisions of the section could be applicable to a refinancing transaction where there is something less than substantial rehabilitation. Furthermore, refinancing transactions are specifically excluded where appropriate by specific language.

Section 2—Construction Funds

Comment: Construction funds and operating funds are to be kept separate, but there is no definition of either term, and no definition of funds (such as syndication proceeds) that might not logically fall into either category.

HUD response: Construction funds include mortgage proceeds and other funds budgeted for the hard and soft costs of construction of the project.

Comment: In section 2, Construction Funds, the Borrower does not hold the Construction Funds, so what is the purpose of this provision? The entire section should be removed.

HUD response: Construction funds is not a defined term; however, the context makes the meaning clear, that the Borrower is to use funds disbursed to the Owner for construction expenses and not to commingle or place such funds in the operating accounts of the Project.

Section 3—Unpaid Obligations

Comment: "Final closing" is an undefined term.

HUD response: HUD has clarified the point at which the unpaid obligations requirement is triggered, by specifying it is upon final endorsement of the Note by HUD.

Section 4—Lender's Certificate

Comment: It makes no sense for the Borrower to be bound by various provisions of the Mortgagee's Certificate. The Borrower has no control over the Mortgagee's actions.

HUD response: This section has been revised to refer to those terms of either the Lender's Certificate or the Request for Endorsement of Credit Instrument & and Certificate of Lender, Borrower and General Contractor, as applicable, insofar as the applicable document establishes or reflects rights and obligations of Borrower. As noted, the Mortgagee's Certificate in now entitled "Lender's Certificate."

Comment: The last two lines of this section after the word "Certificate" should be removed. A borrower cannot certify as to a future event controlled by some other entity; such certification fails to take into account either instance where Lender applies the funds for different purposes or where HUD approves a different use of such funds in the future.

HUD response: HUD agrees in part with this comment and has revised section 4 to clarify that the obligation only relates to rights and obligations of the Borrower.

Section 5—Construction Commencement/Repairs

Comment: This provision excludes a "refinance" but not transfers of physical assets and other nonconstruction activities.

HUD response: Section 5 is a construction-related provision, and addresses only early start issues that arise in the construction context. The nonconstruction activities described in the comment are beyond the scope of this section.

Section 6—Drawings and Specifications

Comment: Neither "construction contract" nor "drawings and specifications" are defined terms. To add requirements to the Regulatory Agreement that do not parallel the construction documents (Building Loan Agreement, Construction Contract) is unnecessary and will lead only to confusion and paralysis.

HUD response: To clarify the consistent use of the terms pointed out in the comment, the phrase "as approved by HUD" is added following Construction Contract. The Drawings are to be identified in accordance with

Article 2.A. (6), and the Specifications are to be identified in accordance with Article 2.A. (5), of the Construction Contract as approved by HUD.

Comment: In section 6, Drawings and Specifications, the term "Construction Contract" in this section needs to be defined.

HUD response: The Construction Contract is a closing document and goes hand-in-hand with the other construction documents and the industry and users are familiar with the document based upon decades of use. To provide additional clarity, the phrase "as approved by HUD" has been added following "Construction Contract."

Section 7—Required Permits

Comment: It must be clear that permits are not required to the extent that jurisdictions do not require permits for certain activities.

HUD response: HUD considers the modifier "all necessary," as applied to permits in section 7, to be self-explanatory.

Section 8—Outstanding Obligations

Comment: This section should be revised to accommodate leasehold estates.

HUD response: A leasehold estate is an obligation that is subject to HUD approval. Leasehold estates would be covered in section 8 under the "except those approved by HUD" language. There is no reason to change this section to provide such an exception, because such an agreement obviously would have been approved in writing by HUD. A sentence has been added to section 8 that, "All contractual obligations of Borrower or on behalf of Borrower with any party shall be fully disclosed to HUD." In addition, HUD has added the following parenthetical sentence to the definition of "leases" in the Regulatory Agreement: "(Ground leases that are security for the loan are not included in this definition.)"

Comment: With respect to section 8, Outstanding Obligations, "Land" in this section should be replaced with "Mortgaged Property."

HUD response: It is clear from the construction-related context of the section that the use of the term "Mortgaged Property" would be inappropriate.

Comment: Section 8 needs reworking. This section should be construction-related only.

HUD response: It is clear that this section is construction-related only. Therefore, changes to address the comment are not necessary.

Section 9—Accounting Requirements

Comment: "Receipts and disbursements" may not be the correct term for what is required here, and brings up the question of whether more than project funds are covered.

HUD response: "Receipts and disbursements" is the correct phraseology. During the construction period, upon initial occupancy and through the cost certification cutoff date, the borrower does cash accounting of the rental receipts and operational disbursements, and any excess of receipts over disbursements offsets construction costs.

Comment: In section 9, Accounting Requirements, the following language should be inserted at end of section 9: "Such funds can either be used to reduce the insured loan amount, or, with HUD's approval, deposited into surplus cash or reserve for replacement accounts."

HUD response: The suggested change is contained in the well-known and universally followed HUD cost certification requirements. It would be inappropriate to repeat those requirements in this section.

Section III—Financial Management

Section 11—Reserve for Replacement Fund

Comment: Currently, only Section 223(f) projects require a reassessment of the reserve every 10 years. Is this an intentional change in policy?

HUD response: Yes, HUD is adopting this now-common industry practice, consistent with prudent servicing, to be applicable to all Borrowers.

Comment: This section purports to put certain requirements on Lenders, who are not party to this agreement.

HUD response: Section 11.a. of the Regulatory Agreement reflects section 14 of the Lender's Certificate, which provides Lender must require a monthly deposit with Lender or in a depository satisfactory to Lender. The wording of section 11.a. has been revised to provide that the Reserve for Replacement shall be deposited with Lender, rather than held by Lender, to reflect the fact that Lender is not a party to the Regulatory Agreement.

Comment: No one will use FHA financing for new construction if the Regulatory Agreement is deemed to give HUD control over investment funds.

HUD response: The requirement to obtain HUD's written approval in order to invest Reserve for Replacement funds in forms other than insured deposits, obligations of the United States, or obligations guaranteed by the United States, is a current requirement for FHA-insured financing. The Regulatory Agreement does not give HUD control over investment funds, but merely provides for HUD's approval, in order to ensure that the Reserve for Replacement is not put at risk.

Comment: The "contract of mortgage insurance" should be defined in a meaningful way as opposed to saying, "Read the regulations."

HUD response: The contract of mortgage insurance will vary in accordance with the section of the National Housing Act and the implementing regulations under which the insurance is authorized. For that reason, the contract of mortgage insurance is defined by reference to the relevant regulations.

Comment: HUD's ability to increase the monthly deposit must be subject to some standards, not be left as an unappealable arbitrary decision.

HUD response: This amount is determined by a formula and is covered by the FHA insurance commitment and Program Obligations.

Comment: HUD should be able to approve alternative "amounts" in the funds, as well as "methods."

HUD response: HUD is able to approve alternative amounts, as specifically provided in the last sentence of section 11.b., and HUD may allow alternative methods pursuant to section 11.a.; for example, investments other than those federally guaranteed under section 11.a.

Comment: In section 11(b), a letter of credit should be permitted for funding the account.

HUD response: The policy of HUD is not to permit the use of letters of credit to fund the Reserve for Replacement, because mortgaged proceeds are used for the initial funding of the Reserve for Replacement. Allowing a letter of credit to fund the Reserve for Replacement could create a windfall for the mortgagor.

Comment: Section 11(b) should provide that in the case of section 223(f)/223(a)(7) projects, the deposit is made at initial/final endorsement of the Note.

HUD response: The deposit is required at endorsement of the Note. Since there is only one endorsement for refinancing transactions, the suggested change is not necessary.

Comment: Section 11(b) should allow the cost of the written analysis required every 10 years to be paid with funds on deposit in the Reserve for Replacement.

HUD response: HUD agrees that the requested concept is reasonable and can permit the payment from the Reserve for Replacement. The Regulatory Agreement permits Borrowers to request

the prior written approval of HUD on a case-by-case basis for this procedure.

Comment In section 11(c), to clarify that there is no change in Lender's statutory rights to set the interest per 12 U.S.C. 1715w(i)(2)(B), language should be added that Lender has no obligation to obtain any particular rate of return on the investment of funds, and shall not be liable to Borrower for any losses incurred in connection with the investment of funds.

HUD response: The Lender is not a party to the Regulatory Agreement and such a provision would be inappropriate therein.

Comment: A paragraph 11(f) should be added to provide that upon termination of this Agreement, any requirement to fund the Reserve for Replacement fund will terminate and the monies shall be returned to the Borrower, provided the Borrower is not otherwise required to retain the fund under any other contract with HUD.

HUD response: Upon termination of the Regulatory Agreement, HUD does not control these assets. It is not necessary for HUD to specify what is to be done with assets of the project once HUD's control is removed.

Section 12—Residual Receipts

Comment: A deposit of residual receipts required at the time of a semiannual distribution is unheard of.

HUD response: It is a current and ongoing requirement that, if a surplus is declared on a semiannual basis, a deposit must be made at that time as well.

Comment: Consistent with the comments on the definition of "Residual Receipts," section 13 should be removed and the discriminatory Residual Receipt limitation eliminated, or this section should be made applicable only if a nonprofit or public body mortgagor uses the benefits of nonprofit underwriting.

HUD response: HUD disagrees with the suggested major change to current HUD policy, which is longstanding and designed to protect the interests of HUD.

Section 13—Property and Operation; Encumbrances

Comment: HUD must clarify if the deposit requirements apply to the proceeds (equity) from an LIHTC transaction. There should be a distinction between the equity required to keep the mortgage loan in balance and all other equity belonging to the property.

HUD response: HUD agrees and has clarified this section to indicate that equity or capital contributions shall not include certain syndication proceeds, such as proceeds from LIHTC transactions used to repay bridge loans from members/partners of Borrower, all as more fully set forth in Program Obligations.

Comment: HUD must define "Project Property." If this is meant to capture all of the Borrower's funds, FHA financing is finished.

HUD response: In response to the comment, HUD has removed the term "Project" from the caption of section 13, leaving the heading as "Property and Operation; Encumbrances," to avoid the confusion that may be suggested by use of the undefined term.

Comment: In section 13(a), the reference to the deposit of receivables should be removed, because receivables cannot be deposited in a bank.

HUD response: HUD agrees in part with the comment in that receivables cannot be deposited so the section now reads: "* * * rents and other receipts of the project * * *."

Comment: The word "necessary" should be removed from "reasonable and necessary expenses" because this term is too subjective and causes too much intrusion into the mortgagor's management of the project.

HUD response: As noted previously, the defined term "Reasonable Operating Expenses" is now used.

Comment: The phrase "for the benefit of the Project" should be added at the end of section 13(a).

HUD response: HUD disagrees with the comment because inserting the suggested language could cause considerable confusion and conflict regarding interpretation of the phrase, "for the benefit of the Project."

Comment: Whose delinquent taxes are referenced in section 13(d)?

HUD response: It is not relevant to whom the delinquent taxes are a liability. Such expenses cannot be charged to the project.

Section 14—Security Deposits

Comment: This section requires the Borrower to pay interest on security deposits, which is in conflict with current HUD policy, which imposes no requirement beyond state law.

HUD response: There has been no change in HUD policy on this issue. Section 14(b) only provides for interest-bearing accounts only "to the extent required by State or local law."

Comment: It is unnecessary for the Borrower to acknowledge that the unauthorized use of security deposits "may" constitute theft and is prosecutable. This is a state law issue and should not be inserted gratuitously into this Agreement.

HUD response: HUD agrees with the comment and has removed the last sentence of section 14, which is the sentence that contained the statement noted.

Section 15—Distributions

Comment: The reference in section 15.c. to whoever receives funds needing to return the funds to the Project would not affect persons not bound by the document.

HUD response: There is no change here from current requirement, which imposes a constructive trust upon Distributions made improperly. Borrower should seek the return of the funds.

Comment: Injecting what a Borrower "should have known" in section 15.b. adds to the muddle about the clarity and legal effect of Directives. If Distributions are not to be taken, there should be clear standards, not whether the Borrower "should have known."

HUD response: HUD considers the "due care" standard for what a Borrower "should have known" as a basis for suspending Distributions under section 15.b. to be in keeping with longstanding practice and to be a reasonable standard, particularly when the standard is applied to a failure to provide necessary services that Borrower is required to provide. To the extent that Program Obligations apply, they will clarify the extent of Borrower's obligation and responsibility.

Comment: In section 15.d., the second sentence should be revised to read, "All such Distributions to Section 220 (if so regulated), Section 221(d)(3) and 231 Limited Distribution Borrowers in any one fiscal year shall be limited to an amount approved by HUD that is not less than 6 percent on the initial equity investment * * *."

HUD response: HUD agrees in part with the comment, and has revised the second sentence of section 15.d. to refer generally to Limited Dividend Borrowers. Rather than specify 6 percent as the minimum distribution, HUD has left the percent as a blank, to be completed in accordance with market conditions at the time the Regulatory Agreement is executed.

Comment: Prohibiting distributions is problematic and unduly punitive when the Borrower receives a nonpassing REAC score and HUD has not performed a second inspection. A provision should be added requiring HUD to inspect within 60 days and, if not, allowing distributions.

HUD response: HUD's multifamily inspection procedures are governed by the regulations in subpart P of 24 CFR part 200. HUD's time frame for reinspection is determined in part by the response time of the owner in

addressing repairs and deficiencies and HUD's subsequent scheduling of reinspections into the framework of regularly scheduled inspections. HUD's intention is to complete reinspections in a timely manner.

Comment: In section 15.b.i, what does the phrase "should have known about" mean and what standard will HUD use to make this determination?

HUD response: HUD believes the language is clear that a due care standard will be applied and has made no change.

Comment: Section 15.c. requires action from parties that do not execute this document or otherwise may have no privity with HUD.

HUD response: This provision is deliberately broad to maximize the ability to recover funds in cases of equity skimming, fraud, etc., for example by imposing an obligation on the Borrower to attempt such recovery.

Comment: The limitation on Distributions to nonprofits in section 15.d. should be removed to reflect the argument that nonprofits should have the same rights as proprietaries.

HUD response: Although minor changes have been made for purposes of clarification and to provide HUD some flexibility with respect to the permissible percentage, the longstanding HUD policy of restricting distributions will be continued.

Section 16—Reimbursement of Advances

Comment: This section appears to prevent such customary transactions as reimbursing an employee for purchasing miscellaneous, minor items; reimbursing a management company for funds advanced to pay employees; or other recurrent problems of short-term advances needed to make required payments in advance of rent collection day or when Section 8 or other subsidy money is delayed.

HUD response: HUD disagrees with the comment. Section 16 does not prohibit such transactions but only requires advances to be deposited in the Project Account prior to being paid out, rather than being used to make payments directly. This requirement provides an accurate accounting for advances and does not constitute a change from current practice. Under section 16, repayment of advances is not considered a Distribution and may be done on a monthly basis with HUD approval. The requirement for prior HUD approval of repayments other than through reimbursements from Surplus Cash at the end of the annual or semiannual period is an important control and is HUD's longstanding practice.

Comment: Is interest on advances permitted?

HUD response: Yes, interest on advances is permitted with the prior written approval of HUD, and a sentence specifying this provision has been added to section 16.

Comment: The term "project account" should be defined.

HUD response: HUD sees no need to define project account, because any advances referenced in section 16 could conceivably be made to one of several Project accounts, which are specified in several places in the Regulatory Agreement. See, for example, the definition of "Personalty."

Section 17—Identity of Interest

Comment: HUD has previously not objected to a "captive" mortgagee controlled by the principals of a mortgagor, but now would prohibit such a relationship under section 17. Section 223(a)(7) projects are not covered in the MAP Guide, yet some local offices are applying the MAP Guide to all insured projects, including 223(a)(7). May a local office prohibit a mortgagee from making loans to a non-MAP Guide project owner having an identity of interest with the Lender?

HUD response: HUD has determined to withdraw the identity-of-interest provisions of section 17 for further consideration.

Section 18—Financial Accounting

This section is now designated as section 17.

Comment: It is unclear what an "undocumented expense" is.

HUD response: An "undocumented expense" is an expense without sufficient documentation that provides reasonable identification of the basis of the expense. The term includes not only expenses for which there is no documentation, but expenses for which the documentation is in such unspecific, general terms that the basis of the expense cannot be reasonably determined; for example, a notation for "services rendered" or for "supplies received." This definition has been added to the Regulatory Agreement.

Section 19—Books of Management Agents

This section is now designated as section 18.

Comment: If a manager manages 50 properties of which only one is HUD related, what books must be open to HUD?

HUD response: The response to the comment is provided in the first sentence of redesignated section 18, which addresses only books and records "as they pertain to the operations of the Project."

Section 20—Annual Financial Audit

This section is now designated as section 19.

Comment: What happened to the small project exception?

HUD response: Small projects are required to submit annual financial statements, but they are not required to be audited. HUD has added the qualifier, "subject to Program Obligations."

Comment: What type of Borrower certification is required?

HUD response: Borrower certification is included in the electronic Multifamily Financial Management Template currently in use.

Comment: Can Borrower's auditor also audit an upper-tier investment partnership or fund?

HUD response: The Borrower's Auditor needs to follow prudent accounting standards and practices. In every instance, the auditor must be guided by American Institute of Certified Public Accountant (AICPA) standards.

Comment: The sentence limiting the Borrower's relationship with the certified public accountant (CPA) should be removed. Many elderly housing providers use their CPAs as consultants, limiting their activities could be harmful to sponsors and ultimately more expensive to Borrowers as they go to other firms for managerial and consulting services that historically have been provided by their auditors. This limitation could also disproportionately affect smaller, unsophisticated Borrowers.

HUD response: This HUD restriction is consistent with the AICPA standards, which do not permit a consulting CPA to work also as an auditor for the same entity.

Comment: The list of items ("equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers and instruments") following "Mortgaged Property," which must be maintained and are subject to HUD examination, should be removed.

HUD response: HUD disagrees with the comment, because some of the listed items could conceivably fall outside of the definition of "Mortgaged Property." For example, HUD sometimes requires a lender to impose collateral security mortgages upon additional properties of a mortgagor and sometimes permits a Lender to release a portion of the Mortgaged Property pursuant to the

partial release of security procedures. Books and records could be located in such released property.

Section IV—Project Management

Section 21—Preservation, Management, and Maintenance of the Mortgaged Property

This section has been redesignated as section 20.

Comment: What does the requirement that there be "no deterioration" mean? Is normal aging excluded?

HUD response: HUD agrees that the reference to "no deterioration" was too broad, and redesignated section 20(a) now requires only that Borrower "shall not commit Waste." A definition of Waste has been added to section 1.mm. of the Regulatory Agreement, which conforms to the definition of Waste in the Security Instrument.

Section 22—Flood Hazards

This section is now designated as section 21.

Comment: One can insure for flood hazards only if the insurance is available.

HUD response: HUD agrees with the comment. Redesignated section 21 is clarified by adding that an area must be identified by the Federal Emergency Management Agency, or successor agency, as having special flood hazards. If the Improvements are located in such an area and flood insurance is not available, the Loan will not be insured by HUD.

Section 23—Management Agreement

This section is now designated as section 22.

Comment: Currently, HUD relies on the Management Certification and does not review or approve management agreements. Does HUD now intend to review and approve such agreements to determine acceptability?

HUD response: Redesignated section 22 is revised to clarify that there is no requirement for the agreement to be approved in writing by HUD.

Comment: The undefined term "Management Certification" should be replaced with "HUD form of management certification regarding such agreement and other management requirements."

HUD response: HUD agrees in part with the comment and has revised that portion of the section (now designated section 22) to read, "* * * management certification meeting standards consistent with Program Obligations."

Section 24—Acceptability of Management of the Mortgaged Property

This section is now designated as section 23.

Comment: Giving HUD the right to replace the management agent is a change from existing HUD policy, which provides such a right only if there is a default. What standards will HUD employ in making these decisions?

HUD response: HUD disagrees that there is a change from existing HUD policy. Failure to conform the Project to HUD's overall management policies consistent with Program Obligations, as stated in redesignated section 23 of the Regulatory Agreement, would constitute a default under section 18, "Preservation, Management, and Maintenance of Mortgaged Property, of the Security Instrument." HUD is linking the remedy of replacing the management agent only to the appropriate basis of default, rather than to any default. The current management agent's certification, form HUD–9839–C, contains an acknowledgement that HUD has the right to terminate the management agreement for failure to comply with the provisions of the management agent's certification or "other good cause." Evaluation criteria for a management agent are detailed in HUD Handbook 4381.5, *The Management Agent Handbook*.

Section 25—Termination of Contracts

This section is now designated as section 24.

Comment: This section gives HUD the right to direct termination of all third-party vendor contracts without penalty and without cause upon 30 days, notice. This is a significant intrusion into Borrower's operation of the project, without any clear benefit to HUD.

HUD response: This section is linked to redesignated section 23, which gives HUD the right to replace management for failure to conform the Project to HUD's overall management policies consistent with Program Obligations. HUD must be able to direct the termination of third-party vendor contracts in order to ensure acceptable overall management of the Project, and redesignated section 24 provides notice of the requirements that Borrower must include in its contracts to allow HUD to do so.

Comment: This section includes no standards for HUD to apply in making decisions.

HUD response: HUD requires Borrower to include termination provisions in management and vendor contracts to allow HUD to act as necessary to protect Project assets and the public investment in the Project. HUD will make its decisions on a case-by-case basis while establishing an administrative record of its actions to demonstrate HUD is not acting in an unreasonable or arbitrary manner.

Comment: The language authorizing HUD to require termination of a contract with "any third-party vendor" and not just the managerial agent is an unjustifiable intrusion into the Borrower's right to operate the Project and should be removed. It creates enormous potential contract liabilities for the Borrower and HUD, and a HUD termination right would make such contracts more costly.

HUD response: This power of HUD to require Borrower to terminate third-party contracts is long standing policy and necessary to protect the interests of HUD.

Section 26—Contracts for Goods and Services

This section is now designated as section 25.

Comment: Is there a difference between "amounts customarily paid" and "costs not in excess?"

HUD response: HUD has revised redesignated section 25 to make it more internally consistent. Costs, amounts, and terms are linked to the reasonable and necessary level customarily paid in the vicinity of the Land, and the reference to "costs not in excess" has been removed.

Comment: This section, requiring HUD approval of all betterments and Improvements will place a tremendous burden on HUD and is an unjustifiable intrusion into the Borrower's right to operate the project.

HUD response: HUD will dedicate the resources necessary to carry out its responsibilities under the revised closing documents. HUD considers such prior approvals to be justifiable and necessary for HUD to meet its obligations of preserving the public interest in Projects.

Comment: This would change the current standard of "not exceed the amount ordinarily paid" with the unreasonable "at the lowest possible cost."

HUD response: HUD agrees that "lowest possible cost" will not always result in reasonable expenditures for goods and services and has removed the reference to "lowest possible cost" removed.

Comment: The meaning of "betterments" should be defined.

HUD response: The term "betterments" is now qualified by language that states, "as defined in the

Property Jurisdiction," to clarify the policy of HUD.

Section 28—Tenant Organizations

This section is now designated as section 27.

Comment: Tenants may sue Borrowers, but not HUD, and Borrowers may not join HUD to any lawsuits brought by tenants. This is unreasonable and unnecessary and should be removed. How are tenants, who are not a party to the Regulatory Agreement, precluded from suing HUD for anything?

HUD response: HUD is removing the second section of redesignated section 27, which contains the provisions identified by the comment.

Section V—Admissions and Occupancy

Section 31—Lease Term

This section is now designated as section 29.

Comment: Exceptions should be permitted with HUD's prior written approval to accommodate displaced persons, corporate units, etc.

HUD response: The prohibition against transient housing, meaning rental for any period less than 30 days, is required by Section 513 of the National Housing Act (12 U.S.C. 1731b), and HUD has no authority to permit exceptions.

Section 32—Commercial (Nonresidential) Leases

This section is now designated as section 30.

Comment: Borrower should not be required to seek HUD pre-approval. As long as there is no use restriction violation, Borrowers should be permitted to maximize the property's utility.

HUD response: The commercial use limitations in redesignated section 30 follow existing HUD practice, which reflects HUD's interest in prudent management of the Project. A sentence has been added to require Borrower to deliver an executed copy of the commercial lease to HUD.

Section 33—Subleases

This section is now designated as section 31.

Comment: The Regulatory Agreement does not bind tenants. How can the Regulatory Agreement do more than require a Borrower to enforce the lease?

HUD response: The Regulatory Agreement does not bind tenants directly, but requires Borrower to include certain provisions in leases that are then enforceable against tenants by Borrower. Redesignated section 31 does not require Borrower to do more than include the specified provisions in the lease and enforce the lease.

Comment: Corporations have rented apartments to employees for short periods in section 221(d)(4) transactions. The proposed language would no longer permit this.

HUD response: As noted earlier, the prohibition against transitory housing is statutory under Section 513 of the National Housing Act. Although the comment is not precise as to the duration of the "short periods" involved, a period of less than 30 days would not be permitted under the statutory provision.

Section 35—Section 231 Projects

Sections 34, 35, 36, and 37 have been combined into a single, revised section 32 entitled "Tenant Selection/ Occupancy."

Comment: This section and section 36 should be stricken.

HUD response: The general reference to complying with all HUD regulations and Program Obligations in selecting tenants for Section 231 Projects in the previous version of section 35 has been replaced with the more specific provisions of redesignated sections 32c and d, which are longstanding provisions in the Regulatory Agreement. Section 32c states that at least 75 percent of the units in a Section 231 Project shall be designed for elderly persons, unless HUD gives its written approval for a lesser number of units. Redesignated section 32d requires all advertising for Section 231 Project rentals to reflect a bona fide effort by Borrower to obtain occupancy by elderly persons. The previous section 36 has been replaced by redesignated section 32a and is discussed in more detail under the comment heading dealing with section 36—Families with Children.

Section 36—Families With Children

Comment: The Regulatory Agreement should not prohibit discrimination against otherwise eligible applicants with children for admission to elderly units. Section 3.2.L. of the MAP Guide specifically allows for housing that is intended exclusively for the elderly, as do the Fair Housing Amendments Act of 1988, Section 542 of the Housing and Community Development Act of 1992, and 24 CFR 266.220.

HUD response: Redesignated section 32.a. clarifies the scope of the previous section 35 and provides that Borrower shall not, in selecting tenants, except for units designated for elderly persons in a section 231 Project, discriminate against any person or persons by reason of the fact that there are children in the family.

Comment: As written, this section would also appear to apply to loans insured under Section 231 of the National Housing Act, which conflicts with discussions held with the Department.

HUD response: Redesignated section 32a excludes Section 231 from the prohibition against discrimination because there are children in the family.

Comment: There is no statutory or regulatory basis for this provision as it would apply to the Section 221(d)(4), 223(f), 223(a)(7) and 231 programs.

HUD response: Except as noted for the section 231 program and as permitted by the Housing for Older Persons Act, which amended the Fair Housing Act, tenants may not be selected on the basis of whether they are families with children. (*See* 42 U.S.C. 3604.) Revised redesignated section 32 clarifies that the prohibition applies, except as provided in the Fair Housing Act and otherwise approved in writing by HUD.

Comment: This change requires notice and comment rulemaking, with a title and description that clearly state the intent of the proposal. The legal consequences of the consolidation and updating of forms are different from the consequences of imposing new occupancy requirements.

HUD response: These provisions, which have been the subject of the current notice and comment rulemaking, have been revised merely to restate current law.

Comment: The refusal of FHA to provide mortgage insurance for loans on elderly housing properties will significantly restrict the supply of affordable elderly housing.

HUD response: It is not HUD's intent to refuse mortgage insurance for elderly housing, as demonstrated by HUD's revision of the Regulatory Agreement's occupancy requirements.

Comment: This provision may call into question the legality of Regulatory Agreements for existing elderly housing communities.

HUD response: As noted above, the provision has been revised to restate current law consistent with Regulatory Agreements for existing elderly housing communities.

Comment: This section should provide, "Except in the case of a project specifically designed exclusively for the elderly or insured under Section 232."

HUD response: As noted previously, HUD has adopted the exclusion for projects designed for the elderly. This Regulatory Agreement does not apply to nursing home projects with financing insured under Section 232.

Section 38—Rents

This section is now designated as section 33.

Comment: The method of rent approval depends on the program.

HUD response: HUD agrees with the comment. The provisions of redesignated section 34 are conditioned on the regulation of rent by HUD. References to a specific program are not included, so as to provide flexibility for the Regulatory Agreement to be used in different programs.

Section 39—Charges for Services and Facilities

This section is now designated as section 34.

Comment: There is no reason for HUD to use this document to attempt to have a blanket prohibition of charges that leases and house rules may permit.

HUD response: This section does not have a blanket prohibition, but applies only if the Project is subject to regulation of rent by HUD, as is intended to avoid distortion of the HUD-approved rents by the imposition of additional charges.

Section 40—Prohibition of Additional Fees

This section is now designated as section 35.

Comment: This section is more appropriate in the healthcare context and not applicable to apartment projects. Regardless, the Borrower should not be prohibited from charging credit check or criminal background fees, pet fees, deposits or other fees or charges common in the rental marketplace and tailored to a particular purpose.

HUD response: HUD agrees in part with the comment and has reworded the section to limit the section to those "certain" described fees originally iterated in the section. A sentence has been added to redesignated section 36, "Security Deposits and Other Fees," so that the additional fees indicated in the comment can be charged. HUD does not agree that the section should appear only in the healthcare regulatory agreement as seems to be the suggestion. Founder's fees, admission fees, etc., could be charged in connection with elderly projects, as well as for health care facilities.

Section VI—Actions Requiring the Prior Written Approval of HUD

Section 42—Actions Requiring the Prior Written Approval of HUD

This section is now designated as section 37.

Comment: Individually and collectively, the powers reserved by HUD may create potential HUD liability to Borrowers and third parties, due to the extensive nature of the controls HUD would have.

HUD response: HUD disagrees that requiring HUD approval would create any HUD liability to Borrowers or third parties. Borrower is placed on notice of, and agrees to, the requirement of HUD approval in the Regulatory Agreement, and would act in disregard of such requirement at Borrower's, not HUD's, peril. Similarly, Borrower's acts with respect to third parties with knowing disregard of the HUD approval requirement would not create any HUD liability to third parties. In addition, HUD approval does not constitute a guarantee of Borrower's obligations to any party. HUD's primary concerns in determining whether or not to provide any required approval are the prudent management and preservation of the Project, so as to protect HUD's interests, and HUD will not provide approvals for acts and obligations that would jeopardize those interests.

Comment: This section includes 13 separate categories of actions that Borrower shall not do without prior written approval by HUD. Will HUD have the staffing to accommodate promptly the large number of expected requests? These requirements constitute an overwhelming workload for HUD.

HUD response: As noted previously, HUD will commit the resources necessary to fulfill its responsibilities.

Comment: These requirements constitute a massive increase in HUD's involvement in Project operations and impose controls far greater than Fannie Mae, Freddie Mac, or any other lender.

HUD response: The remaining approvals required under redesignated section 37 are generally consistent with current HUD requirements, rather than a "massive increase in HUD's involvement." HUD has determined not to impose broad recourse liability on Key Principals and considers it necessary to require prior written approvals, as provided in redesignated section 37.

Comment: These requirements suggest a complete lack of trust or confidence in a Borrower's ability to operate its own Project. While some of these controls may be appropriate during the existence of an Event of Default, these controls simply are not workable.

HUD response: HUD considers the comment's emphasis on trust and confidence to be misplaced. HUD is responsible for administering programs intended to facilitate transactions that provide a significant public and private benefit, but that also place substantial HUD resources at risk. HUD is obliged to strike a balance between maximizing the facilitation of transactions and minimizing the risk to HUD resources, and considers the requirements of these documents, developed over a long period of deliberation that took into account extensive public comment, to strike an appropriate balance. HUD disagrees that the controls are not workable, but expects they will be applied in a reasonable manner that will neither discourage enterprise nor encourage imprudence.

Comment: A number of these actions, including incurring liabilities, paying out funds, incurring obligations to partners, only make sense if they apply to Project funds.

HUD response: The approvals noted by the comment apply in the context of activities in connection with the Project, as required by section 13.b. of the Regulatory Agreement.

Comment: With respect to transfers of property or interests, does HUD really intend to review and approve a corporate shareholder going from a 9 percent to a 10 percent stake, or a limited partner dropping from 25 percent to 23 percent under the definition of Principal and proposed section 23 of the Security Instrument (now designated section 21), which requires prior written approval of HUD if the effect of a transfer of any interest in the borrower is the "creation or elimination of a Principal"?

HUD response: HUD approval of such transactions is a current practice that is continued under the revised documents.

Comment: Section 42(a) effectively prohibits the Borrower from hiring contractors to perform repairs or replacements without HUD's prior written approval, since such contractors would have rights to file mechanic's liens regardless of whether they actually "establish or maintain a lien."

HUD response: To the extent that work performed by contractors constitutes Reasonable Operating Expenses, as redesignated section 37.c. has been revised to provide, HUD approval would not be required. Work that goes beyond Reasonable Operating Expenses would require HUD approval in any event.

Comment: Section 42(b) requires HUD's consent to borrow funds or finance any purchase. If the sponsors wish to loan money to cover a project's operating deficit, they cannot do so without getting HUD's prior written approval. If a Borrower wants to charge incidental purchases to a credit card, HUD's prior written approval, technically, would also be required.

HUD response: As similarly noted in a previous response, to the extent loans

are used for current Reasonable Operating Expenses, prior written approval of HUD is not required.

Comment: Section 42(c), taken literally, prohibits a borrower from making payments of principal and interest on the note, payments for mortgage insurance premiums, or deposits into the replacement reserve (since these items are not reasonable operating expenses or necessary repairs) without HUD's prior written approval except from Surplus Cash.

HUD response: Section 10 of the Regulatory Agreement requires Borrower to make promptly all payments due under the Note and Security Instrument, and section 11 requires Borrower to establish and maintain a reserve for replacement account. HUD approval is not necessary for these explicit requirements with which Borrower must comply.

Comment: Section 42(d) requires approval for payment of any compensation to Principals or others with no exception for payments from Surplus Cash.

HUD response: In response to the comment, HUD has revised redesignated section 37.d. to exclude "permissible withdrawals" of Surplus Cash from the requirement for prior written HUD approval.

Comment: Approval under section 42(e) for any change of a management agreement is a dramatic change from current practice that only involves HUD if there is a change in the Management Certification.

HUD response: Because the management contract as a whole is subject to HUD approval, HUD approval is also required for any change to a management contract, to avoid piecemeal revisions of the original, approved terms of the contract. HUD Handbook 4381.5, *The Management Agent Handbook,* details the requirements for HUD approval of the Management Agreement, and therefore any changes to it.

Comment: Would HUD want to approve remodeling of a model unit or a leasing office, or the demolition or reconstruction of a carport or a storage shed, as would be required under section 42(g)?

HUD response: HUD agrees, in part, with the comment and redesignated section 37(g) will now permit Borrower to dispose of and replace Fixtures and Personalty and make minor alterations or changes that do not impair the security, without HUD's prior written approval.

Comment: The prohibition on reconstruction without HUD approval is inconsistent with the provision requiring restoration on an unconditional basis, even if HUD has failed to meet its obligations.

HUD response: The requirement for HUD approval for reconstruction in redesignated section 37(g) is not inconsistent with the requirement under redesignated section 20(c) to restore or repair any damage to the Mortgaged Property. To help clarify the intended distinction, section 37(g) has been revised to allow replacement and disposal of obsolete or deteriorated Fixtures or Personalty and minor repairs to be made without HUD approval. More substantial undertakings constituting "reconstruction" require HUD approval. In the event of uncertainty in a particular situation, approval may be requested, and HUD may determine if approval is required.

Comment: Section 42(g) must include some standard of materiality or be limited to expenditures over a certain threshold, *e.g.* $100,000.

HUD response: As noted above, redesignated section 37(g) has been revised to allow replacement and disposal of obsolete or deteriorated Fixtures or Personalty and minor repairs to be made without HUD approval.

Comment: HUD does not have authority for the 42(i) requirement that a Borrower cannot receive any endowment that is not pledged to the Loan unless prohibited by the terms of the endowment.

HUD response: HUD has authority to establish the parameters of an eligible Borrower, and the requirement with respect to endowments is consistent with other requirements concerning the receipt of property to be used in connection with the Project.

Comment: HUD does not underwrite endowment funds (other than to meet closing requirements), should not have a security interest therein, and should not restrict a Borrower's right to receive endowment funds.

HUD response: As noted above, HUD considers its requirements with respect to endowment funds to be consistent with HUD's regulation of Borrower use of property in connection with the Project.

Comment: The section 42(j) requirement that HUD approve virtually all amendments to the organizational documents of the Borrower is an unreasonable interference with the rights of the Borrower's owners and a dramatic change from current practice, which is limited to approvals of changes that affect HUD's requirements.

HUD response: HUD must have the right to approve in advance any changes in a Borrower's organizational documents that could affect the organization's ability to comply with its contractual and programmatic obligations or otherwise affect HUD's interests, so that HUD may exercise prudently its duty of oversight of the use of HUD resources. Redesignated section 37.j. now provides a nonexhaustive list of the types of amendments to the organizational documents that require HUD's prior approval.

Comment: Section 42(j) does not contain any standards for HUD to apply to consider requests for amendments to organizational documents.

HUD response: As noted previously, HUD will make its decisions based on the totality of the circumstances and proposed changes, and on a case-by case basis, while establishing an administrative record of its actions to demonstrate that HUD is not acting in an unreasonable or arbitrary manner.

Comment: The section 42(k) litigation threshold should be increased to at least $50,000.

HUD response: HUD has reconsidered this litigation approval threshold in light of current litigation and settlement costs, and has increased the threshold in redesignated section 37(k) to $100,000.

Comment: Section 42(k) would unnecessarily delay the process for the Owner and should be removed.

HUD response: While not removing the requirement for HUD approval of litigation, HUD has increased the threshold that triggers the approval requirement, as noted above.

Comment: Section 42(k) is a new requirement with no basis for the monetary cap. Is HUD seeking to convert all multifamily housing into a form of operated public housing?

HUD response: HUD has no such intent with respect to multifamily housing as stated in the comment. Because litigation may pose a substantial threat to the financial well-being of the Project, it is necessary for HUD to be apprised of significant activity in this area and to object to actions it determines to be inconsistent with that well-being. HUD considers the requirement to be reasonable in light of HUD's responsibilities.

Comment: What happens if the statute of limitations expires on a claim while HUD is considering a request under section 42(k)?

HUD response: If the statute of limitations is an issue with respect to any particular matter, HUD should be alerted about that issue as soon as possible, and HUD will expedite its response.

Comment: Requiring HUD to be a party to the settlement of litigation is not appropriate.

HUD response: It is not correct to refer to HUD as a party to the settlement of litigation. HUD's involvement is limited to assessing the effect of litigation on the Project.

Comment: Section 42(l), requiring approval of reimbursements for payment of expenses or costs of the Project, simply ignores the way projects are managed and operated.

HUD response: HUD has revised redesignated section 37(l) for clarity and to conform it more explicitly with other provisions of the Regulatory Agreement by adding the phrase, "except for Reasonable Operating Expenses and in a manner consistent with Section 16." Section 16 requires advances to be deposited into the Project account and permits reimbursement of advances without prior HUD approval. HUD expects that reimbursements for payments other than for Reasonable Operating Expenses will be an infrequent occurrence.

Comment: Section 42(m), taken literally, would prohibit a Borrower from receiving a refund of an overpayment or a payment on account of a warranty claim without HUD approval.

HUD response: HUD has revised redesignated section 37(m) to exclude warranty claims from providers of goods and services.

Section VII—Enforcement

Section 43—Violations of Agreement

This section is now designated as section 38.

Comment: Violations related to felony criminal convictions or civil judgments is not understandable.

HUD response: The violation in redesignated section 38.c. is not any criminal conviction or civil judgment, but a civil or criminal forfeiture action. As stated in section 38.c., HUD's concern is forfeiture or material impairment of HUD's interest in the Mortgaged Property.

Section 44—Declaration of Default

This section is now designated as section 39.

Comment: This section contains a new requirement that HUD can direct Borrowers to remove their partners. This is a clear violation of the Fifth Amendment and the Taking Clause of the Constitution.

HUD response: Consistent with the reduction of recourse liability on Key Principals from the closing documents, HUD has removed from redesignated section 39 the language that appeared as section 44.g. and that required the removal of partners and other parties.

Section 46—Nonrecourse Debt

This section is now designated as section 41.

Comment: Exception to Owner's nonrecourse liability is unacceptable. Nonrecourse language here needs to be consistent with the nonrecourse provisions in the Note.

HUD response: Consistent with the decision not to impose broad recourse liability on Key Principals, HUD is revising the language that appeared in section 46. Redesignated section 41 now contains language consistent with the recourse provisions of section 17 of the existing Regulatory Agreement that is being replaced by the present document.

Section VIII—Miscellaneous

Section 42—Compliance with Laws, originally section 28, has been moved from Section IV—Project Management to Section VIII—Miscellaneous in order to reflect HUD's intention that Borrower comply with all laws at all times, not just in the context of "Project Management."

Section 47—Binding Effect

This section is now designated as section 43.

Comment: The reference to "such further time as HUD is * * * obligated * * * to protect the tenants of the Project" should be eliminated.

HUD response: HUD agrees that HUD's obligations with respect to the tenants of the Project are independent of the Regulatory Agreement, and the reference noted in the comment is removed from redesignated section 43.

Section 51—Present Assignment

This section is now designated as section 47.

Comment: This merely repeats the present assignment in the loan documents.

HUD response: Redesignated section 47 is necessary to perfect a security interest for HUD. The Regulatory Agreement is designed to be also a security agreement, as per section 53, now designated section 49.

Section 53—Uniform Commercial Code Security Agreement

This section is now designated as section 49.

Comment: What is the reason for HUD to take a separate security interest in the UCC Collateral?

HUD response: HUD takes a separate security interest as a prudent measure to protect HUD's interest in the Mortgaged Property.

Comment: Will this security instrument be subordinate to the Lender's security interest?

HUD response: The UCC financing statement will indicate that HUD's security interest runs to HUD "as HUD's interest appears."

Comment: Will HUD file a form ✖UCC–1?

HUD response: No, Lender is required under section 2 of the Security Instrument to perfect the security interest in the Mortgaged Property, and the Regulatory Agreement is incorporated in the Security Instrument.

Section IX—Section 8 Housing Assistance Payments Contract

Section 58—Incorporation by Reference

This section is now designated as section 54.

Comment: It will not be easy to determine where there is a conflict between the Section 8 contract and the Regulatory Agreement, or where provisions are simply additional.

HUD response: This provision is a continuation of a provision under the existing Regulatory Agreement. The intent is to provide a rule for resolution in the event that a conflict is present. A provision that is merely additional is not a conflicting provision. In any particular case, HUD will make the determination as to whether a conflict is actually present.

Signatures

Comment: HUD has never been clear as to who is an "authorized agent" and how a Borrower knows that a Regulatory Agreement is validly executed.

HUD response: HUD periodically publishes in the **Federal Register** Delegations of Authority that identify what authority is vested in which officials. The most current Delegations of Authority may also be found at HUD's Web site.

Multifamily Note, Form HUD–94001M

Comment: Footnotes should be added to the Note (*e.g.,* in sections 3, 9), which allow for alterations to be made, provided they comply with HUD requirements, for matters traditionally left to negotiations between Borrower and Lender.

HUD response: HUD does not agree that such instructional footnotes would be appropriate because all changes negotiated by Borrower and Lender would have to be approved by HUD.

Comment: In the introductory section of the note, language should be added to recognize that construction loans can have a split rate—one for construction period and one for the permanent loan.

HUD response: This concept is set forth in the Note.

Comment: There should be a section dealing with construction loans that

should include language to reflect standard practice of adjusting principal and interest payments after final endorsement to take into account the fact that the Loan has not been fully advanced. Such language would provide for the payment of interest accrued on the outstanding principal balance plus scheduled principal amortization. There should be language that the Loan will be reamortized if there is a mortgage reduction at final endorsement.

HUD response: HUD does not view such a modification as a standard practice. Notes should be modified after approval in writing by HUD to reflect changes in the terms of the insured loan.

Comment: Language should be added to the Note to comply with the 5-year prepayment prohibition required by Section 223(f)(3) of the National Housing Act.

HUD response: It would be confusing to attempt to place restrictions for all programs in the Note. As has always been the case, the Note will need to be amended to accommodate unique program requirements that are not universal.

Section 3—Payment of Principal and Interest

Comment: Section 3 of the Note should be split into "Alternative A—Permanent Loans" and "Alternative B—Construction Loans."

HUD response: Such a change would be confusing because the Note is structured to cover insured advances during the construction phase and the permanent financing.

Section 7—Late Charge

Comment: The previous uniform charge and grace period were widely accepted, but now have been made negotiable items. Negotiated fees usually mean higher charges for the Borrower, and are a fertile field for litigation.

HUD response: HUD agrees, in part, and has revised section 7 to provide that the Late Charge applies after 10 days. The revision is consistent with industry practice and facilitates compliance by Ginnie Mae issuers with their obligation to make payments to investors. However, HUD is leaving the blank for the amount of the Late Charge to provide flexibility to the parties in negotiating amounts that reflect their preferences and market conditions.

Comment: The late charge provision in section 7 of the Note should be specified as 2 percent after 15 days, which is permitted by HUD.

HUD response: Although HUD believes that it is preferable to leave a blank for the amount of the Late Charge to permit flexibility, HUD agrees that number of days should be standardized. However, a period of 10 days, rather than 15, better reflects current industry practice, especially among Ginnie Mae issuers.

Section 8—Limits on Personal Liability

Comment: Some exceptions are open to interpretation, *i.e.,* why a failure to pay rents claimed by the Lender or the manner of applying insurance proceeds. Personal liability that could make the entire loan come due goes beyond some of the Transfer of Physical Assets requirements.

HUD response: Consistent with HUD's determination not to impose broad recourse liability on Key Principals, the references to Principals and to exceptions to personal liability in addition to those provided in section 8 are removed.

Comment: If the goal of nonrecourse carve-outs is to hold individuals personally liable for certain acts, HUD's current language essentially does that (*see, e.g.,* section 17 of current Regulatory Agreement). Proposed section 8 goes well beyond current language by making a host of Principals liable for actions they did not take or authorize, and for events outside their control.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Comment: The Key Principal Acknowledgement may require Ginnie Mae to adjust its mortgage-backed securities prospectus to the investor community. Any Ginnie Mae secondary mortgage market and investor ramifications must be fully explored.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Comment: Section 8(b)—Minor violations of the Note should not result in recourse, e.g., a failure to timely deliver books and records, statements, schedules, or reports, especially if such failure is cured, or a small mechanic's lien placed upon the Mortgaged Property.

HUD response: Borrower is liable only to the extent of any loss or damage suffered by Lender, which HUD considers to be a fair and reasonable provision.

Comment: Section 8(b)—Failure to pay rents and security deposits to Lender upon demand after default should not result in personal liability.

HUD response: As previously noted, liability is now limited to Borrower not to Principals, and continues to be limited to the extent of any loss or damage suffered by Lender.

Comment: Section 8(b)—The failure of the Borrower to apply proceeds as required by the Security Instrument should be conditioned to cover only proceeds actually received by the Borrower.

HUD response: Borrower's liability is determined by its failure to make required payments, not by its failure to receive proceeds.

Comment: Most of the individuals in the overly broad definition of Principal do not control submission of books and records.

HUD response: As noted previously, HUD has removed Principals from section 8.

Comment: No measure of the liability is provided, suggesting open-ended liability.

HUD response: With the removal of broad recourse liability of Key Principals, liability of Borrower is now limited as provided in section 8: To the extent of the Mortgaged Property and any other collateral held by Lender; to the extent of loss or damage suffered by Lender; to the extent of repayment of all Indebtedness to Lender; and to the extent of indemnification required under redesignated section 48(k) of the Security Instrument—a provision added to section 8 to provide conformity in the documents.

Comment: Section 8(b) should recognize, as Fannie Mae and Freddie Mac do, that a Borrower may be unable to pay due to a valid court order in a bankruptcy, receivership or other judicial proceeding.

HUD response: The Contract of Mortgage Insurance and the Note between the Lender and Borrower require that the Note be paid by Borrower and does not provide for any extenuating circumstances, but HUD will act appropriately in the event of court proceedings.

Comment: Under section 8(b) a Principal's liability should be limited to the individual's own acts or acts the individual has authorized in violation of the applicable documents.

HUD response: As noted previously, HUD has removed Principals from section 8.

Comment: Section 8(c)—Many older partnership agreements flatly prohibit loans that are recourse.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Comment: Section 8(c) creates "springing recourse," since the recourse "springs" from the occurrence of a listed event. Each principal assumes the risk

of repayment of the entire loan, should any of the events occur. This is more extreme than Fannie Mae, which limits liability for some events. Springing recourse should be eliminated.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Comment: Section 8(c)—Does HUD really want to approve every acquisition of any sort of property, *e.g.,* office supplies?

HUD response: The Security Agreement and Regulatory Agreement have been revised to address such issues. HUD approval is not required for payment of Reasonable Operating Expenses under the Regulatory Agreement.

Comment: Section 8(c)—Imposition of personal liability for liens, cross-citing section 18 of the Security Instrument, goes too far. The negative effect of the lien is already significant.

HUD response: Liability will be imposed on Borrower only when the granting of a lien or encumbrance results in an Event of Default under the Security Instrument.

Comment: Section 8(c)—It is far more serious and inappropriate to make an unauthorized transfer a basis of personal liability as opposed to an event of default. Under the revised Uniform Limited Partnership Act, parties can generally leave, retire, become bankrupt, and sell their assets without incurring personal liability.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Comment: Section 8(c)—If a principal commits fraud, investors become twice victimized by suffering the fraud and then becoming personally liable for repayment of the entire indebtedness for the actions of another.

HUD response: As noted previously, HUD has removed the concept of broad recourse liability on Key Principals; therefore, the example of liability cited in the comment is no longer relevant.

Comment: The GSEs permit their borrowers to have unlimited transfers of limited partner interests. If HUD is seeking the enforcement remedies of the GSE transfer provisions, HUD should adopt the transfer rules and other approaches, such as a willingness to negotiate, taken by the GSEs.

HUD response: HUD is no longer seeking the enforcement remedies of GSE transfer provisions.

Comment: This section imposes liability on all principals, not just "Key Principals."

HUD response: As noted previously, HUD has removed Principals from section 8.

Section 9—Voluntary and Involuntary Prepayments

Comment: The references to prepayment premium under section 9 should be removed from the list of amounts that become due and payable under a Class A Event of Default.

HUD response: This suggested change was made to achieve uniformity.

Comment: The references to prepayment premium under section 9 should be removed from the list of amounts that become due and payable under a Class A Event of Default.

HUD response: This suggested change was made to achieve uniformity.

Comment: Section 9 of the Note should include two alternatives: "Alternative A—Base Form," based upon the existing form Note and to be used in those circumstances where Alternative B is not available; and "Alternative B," based on language from several lenders, available as permitted in section 12.1.4H of the MAP Guide.

HUD response: Section 9 has been revised to comport with current HUD policy in Program Obligations.

Comment: Section 9(1) allows a Borrower to prepay up to 15 percent each year without penalty. Section 3(b) provides no prepayment premium is due if prepayment is made within some number of days before the maturity date. It is not clear if there is a lockout period at all, and HUD should clarify this issue.

HUD response: Lockouts are permitted in accordance with Program Obligations, and an alternative paragraph providing for a rider to address prepayment restrictions has been added to section 9.

Comment: Section 9, Prepayments, is incomplete in numerous respects. The use of a prepayment prohibition is not contemplated and there is no insert language for a prepayment premium per Mortgagee Letter 87–9, entitled, "Mortgage Prepayment Provisions for HUD–Insured and Coinsured Multifamily Projects," issued February 10, 1987, which allows private participants to negotiate prepayment terms and language within bounds established by HUD.

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues.

Comment: Section 9, while implying a prepayment lockout period and corresponding prepayment premium periods, does not clearly address these issues and could lead to litigation over its intent. There should be a clear statement that the note may not be prepaid in whole or in part, except as provided.

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues.

Comment: The last sentence in section 9(a)(1) ["No default shall exist by reason of nonpayment of any required installment of principal so long as the amount of optional additional prepayments of principal already made pursuant to the privilege of prepayment set forth in this Note equals or exceeds the amount of such required installment of principal."] is inconsistent with Ginnie Mae programs and bond rating requirements and should be removed, or a footnote added authorizing deletion whenever the loan is funded with Ginnie Mae securities, bonds, or other methods that are inconsistent with this sentence.

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues. The rider would override any provision such as that noted in the comment.

Comment: Section 9(a)(2) requiring Borrower to pay the prepayment premium even if the loan is accelerated makes good business sense and protects the investor community.

HUD response: The provision that was previously found in section 9(a)(2) has been removed to accommodate the flexibility provided by the addition of an alternative paragraph in section 9(a)(1). Previous section 9(a)(3) has been redesignated section 9(a)(2).

Comment: The reference in section 9(a)(2)(ii) to the prepayment calculated pursuant to 9(a)(1) is incorrect, since no prepayment premium is calculated in 9(a)(1).

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues.

Comment: Section 9(b) provision mandating no prepayment premium prior to the Maturity Date is contrary to Mortgagee Letter 87–9, unless HUD is changing its policy to allow longer prepayment restrictions.

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues.

Comment: There should be an express prohibition on prepayments other than as expressly permitted.

HUD response: There is not currently an express prohibition against prepayment, and HUD does not consider such a prohibition to be necessary.

Comment: Prepayments without penalty should be permitted when required by HUD due to a cost certification or similar report or if amortization is advanced under applicable HUD regulations.

HUD response: A reduction in the amount of the mortgage as a result of cost certification should occur prior to the commencement of amortization and, therefore, should not be applicable. In other circumstances, the requirements of 24 CFR 200.87(b) would govern the terms of the prepayment.

Comment: The right of HUD to override a prepayment penalty or lockout is missing.

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues.

Comment: Can a Lender impose a prepayment premium and, if so, how high, if the Loan is accelerated during the lockout period.

HUD response: The concerns of the comment have been addressed by the addition of an alternative paragraph in section 9 to address such issues.

Comment: Is HUD's permission required to prepay the loan?

HUD response: The loan is designed not to require HUD approval. A rider may be added where HUD approval would be appropriate.

Section 10—Costs and Expenses

Comment: The Borrower should not be required to pay all costs and attorney's fees if there is any default. Fees and costs should be determined by a court having jurisdiction.

HUD response: This provision provides an incentive for Lender to pursue collection and to enforce the provisions of the Loan Documents. When HUD acts in a nonjudicial foreclosure, there is no court to determine costs.

Section 13—Loan Charges

Comment: This section is not necessary since the Lender should be able to determine if the loan is usurious, and the Lender and HUD require an opinion from Borrower's counsel to that effect. In rare instances where charges are usurious, the Lender should bear the consequences, and the Borrower should have the right to recover costs and expenses in enforcing penalties.

HUD response: HUD disagrees with the comment. This section clarifies the rights and responsibilities of Borrower and Lender in this situation, and how the "excess" is to be applied. Application of the excess to reduce the unpaid principal balance best serves the public interest by reducing HUD's exposure to risk.

Section 16—Governing Law

Comment: The language in the Note conferring exclusive jurisdiction on the state or federal courts located in the Property Jurisdiction should be removed. There may be circumstances where it may be necessary to bring an action against the borrower in a court outside the Property Jurisdiction; for example, if a Borrower files bankruptcy in a jurisdiction outside the Property Jurisdiction.

HUD response: Section 16 provides: "This Note shall be governed by the law of the Property Jurisdiction, except as such local law may be preempted by federal law." This language is adequate to cover the concern iterated in the comment. If, for example, Borrower files for bankruptcy outside the Property Jurisdiction, a filing in a federal court would be governed by federal law, and a filing in a state court would be governed by the law of the property jurisdiction as to matters that arise under the Note.

Section 20—Waiver of Jury Trial

Comment: Why should HUD, a federal agency, follow the lead of commercial banks that insist on these unfair provisions to Borrowers by denying them the fundamental right of a jury trial? This provision should be eliminated.

HUD response: HUD has made a conscious effort to adopt current commercial practices in revising the closing documents, and this is a current commercial practice.

Acknowledgement and Agreement by Key Principal

Comment: There has been litigation, which HUD is inviting here, over the form and validity of guaranties, whether or not there is consideration for the guaranty.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Comment: The liability of the guarantor should be limited to monies withdrawn from the project in violation of the Regulatory Agreement.

HUD response: As noted previously, HUD has determined not to impose broad recourse liability on Key Principals.

Social Security and Tax Identification Numbers for Signatories

Comment: Unlike Fannie Mae and Freddie Mac, HUD is subject to the Freedom of Information Act, and requiring Social Security and tax identification numbers for signatories may result in the dissemination of highly sensitive personal material.

HUD response: Although HUD considers the information identified by the comment to be exempt from disclosure under exemption 6 of the Freedom of Information Act, HUD is removing the requirement that this information be provided by the signatory.

Agreement and Certification, Form HUD–93305M

Section 4

Comment: In section 4, the list of Principals should include "managers" and "members."

HUD response: HUD agrees with this comment and has added this language.

Section 14—Bar Against Undisclosed Side Agreements

Comment: The current permissibility of certain undisclosed side agreements with contractors is abolished. Such agreements provide necessary flexibility and additional funding where required and are a sound business practice that should not be abandoned. The ability of project principals to have their rights and obligations recorded in side agreements should not be disallowed or delayed by an unnecessary HUD review and/or approval process. HUD's interests will be adequately protected by a certification that there are no side agreements, except "Permitted Side Agreements," defined as agreements relating to construction of the project that meet certain requirements, including that the borrower shall not be a party thereto or have obligations thereunder, and that HUD's requirements prevail in the event of a conflict.

HUD response: HUD has removed this section completely from this document. These disclosures are now covered in section 8 of the Regulatory Agreement.

Comment: In section 14, the Construction Contract does not include costs of offsite work and certain types of demolition work. This is work typically performed on the Project or related property.

Section 14 also should provide for "Permitted Side Agreements" defined as "an agreement which relates to the construction of the Project and which meets each of the following requirements:

(i) The Borrower shall not be a party thereto or have any obligation there under; and

(ii) The Permitted Side Agreement shall include the substance of the following provisions:

In the event of any conflict between this Section and any other provisions of the Agreement, the provisions of this Section shall be controlling. In the event of any conflict between any provision and this Agreement and any applicable HUD rule, regulation or requirement, such HUD rule, regulation or requirement shall be controlling. [the Borrower] shall have no obligations under this Agreement. Contractor agrees that it will not assert any claim under this Agreement against [the Borrower], the Project, proceeds of the HUD-insured loan on the Project and/or the interests of [third-Party Obligator] in the Project for any obligations of [Third-Party Obligor] under this Agreement. The obligations of Contractor under the Construction Contract between [the Borrower] and Contractor are and shall be separate and independent of the rights and obligations of [Third-Party Obligor] and Contractor under this Agreement. Without limiting the generality of the foregoing, Contractor shall fully perform its obligations under the Construction Contract in accordance with its terms regardless of whether or not [Third-Party Obligor] has performed its obligations under this Agreement."

Finally, with respect to section 14, the suggestion was made that HUD not prohibit or review "side agreements," which most often address the amount and means of payment of the General Contractor's profit. Side agreements may also address other issues such as: The profit on change orders; penalties or rewards for meeting a staged completion schedule; the time frame for delivery of the General Contractor's cost certification; cooperation in release of the retainage consistent with HUD requirements; requiring the General Contractor to fund HUD-required escrows for incomplete construction items; payment of interest on the retainage to the General Contractor for some or all of the period between construction completion and final endorsement; and requiring the General Contractor to comply with the 50 to 75 percent Rule.

HUD response: HUD has removed this clause completely from this document. These disclosures are now covered in section 8 of the Regulatory Agreement.

Escrow Agreement for Noncritical Deferred Repairs, Form HUD–92476.1M

Responsibility for Approval Not Clear

Comment: The proposed document removes HUD's signature, removes any reference to HUD's approval rights, and makes no reference to the revised Request for Approval of Advance of Escrow Funds, which continues to provide for HUD approval for withdrawals. If the Lender alone is authorized to approve funds withdrawals, the form should provide for a reasonable fee. If HUD intends to retain withdrawal approval authority, the document must be revised.

HUD response: HUD has amended the document to clarify HUD's approval authority over the release of funds from the escrow portion of the loan proceeds.

Escrow Agreement for Working Capital, Form HUD–92412M

Comment: The language in the third introductory section should be removed, which states that the working capital deposit has not been included in the Mortgage Loan proceeds, and that the deposit could be funded from excess cash available to the Borrower, and that the requirement applies to both for-profit and nonprofit Borrowers.

HUD response: Although HUD has revised the term "mortgage loan proceeds" to "Loan proceeds," HUD disagrees with the commenter that this provision should be removed.

Section 1

Comment: Since this agreement may be executed and dated before the date of initial endorsement, section 1 should be revised to reflect that the deposit shall be made at or before initial endorsement.

HUD response: HUD believes that the language as currently contained in the agreement is appropriate. If the deposit is made before initial endorsement, the deposit is therefore available at endorsement.

Comment: Since the Lender may sign the Agreement and the Agreement may be dated before initial endorsement, the Lender should not be expected to acknowledge receipt of the deposit.

HUD response: The Agreement contemplates that the Lender will not sign unless the Borrower has made the deposit.

Comment: The Deposit should be permitted to be partially in the form of cash and partially in one or more letters of credit, rather than cash or a letter of credit.

HUD response: HUD agrees with this suggestion. In section 1, HUD has added "and/or" after the checkbox for "cash" to show HUD's new policy of allowing a mixture of cash and a letter of credit.

Section 3—Interest to Borrower

Comment: Although the creation of the Escrow Agreement is applauded, section 3 requires return to Borrower of any balance of funds, together with interest earned. Continuation of current HUD policy is urged: The Replacement Reserve Account is only an escrow account subject to interest payment to Borrower and only if the Borrower specifically requests such payment.

HUD response: HUD agrees with the comment to continue current HUD policy, and the reference to interest has been removed.

Comment: In section 3, under current HUD requirements, the working capital escrow is released one year after the construction completion date if the mortgage is not in default, and this date should be maintained. The new form provides for release after the date of sustaining occupancy. This change brings HUD into the administration of an escrow that has always been Lender's responsibility. The change will likely result in the earlier release of the deposit, since most projects exceed sustaining occupancy in less than one year after construction completion and those that have not achieved this by that time have often exhausted their working capital escrows well before the end of the one-year period.

HUD response: HUD agrees with the commenter and has revised the language of section 3 to provide that any funds remaining in the deposit the later of: (a) One year after construction, or (b) after the date of sustaining occupancy as determined by HUD, will be returned to the Borrower.

Comment: In section 3, adding "interest earned on funds" is not appropriate because HUD is not relying on interest earnings in its underwriting and no interest earnings would exist if letters of credit are used. References to interest should also be dropped from sections 5 and 6.

HUD response: HUD agrees with this comment and has removed references to interest earned in sections 3 and 6, which deal with the disbursement of the Deposit. The reference in section 5, which provides how the Deposit is held, is retained.

Section 4

Comment: In section 4, it is unclear how a borrower "certifies at firm commitment" that it will apply the balance in the escrow in a certain way. This is a firm commitment condition imposed by HUD following subsidy layering review.

HUD response: HUD disagrees with this comment. The borrower in fact certifies at firm commitment that it will apply any balance of funds to the reserve for replacement or other restricted account specified by HUD.

Section 5

Comment: In section 5, language that allows Lender to draw upon a letter of credit at any time and convert it to cash should be added to make it more difficult for a borrower to interfere with a draw upon a letter of credit, and to

make the section more consistent with HUD's requirement that such letters of credit be unconditional and irrevocable.

HUD response: HUD agrees with this comment and has added language that provides that the Lender may, for purposes of the Escrow Agreement for Working Capital, draw upon any letter of credit included in the Deposit and convert the same to cash.

Building Loan Agreement, Form HUD–92441M

Section 4—Advances

Comment: Under section 4(a), advances should include the value of materials and equipment purchased but stored off-site.

HUD response: HUD agrees with the commenter and has revised the language in section 4(a) to include the value of materials and equipment purchased but stored off-site.

Comment: HUD should add to section 4(c), "In any event, disbursement of mortgage proceeds in an amount sufficient to satisfy a GNMA requirement for good delivery of mortgage-backed securities at initial endorsement is permissible."

HUD response: HUD has revised section 4(c), but has not incorporated the language requested by the commenter.

Section 5—"Soft" Costs Disbursed by Lender to Borrower

Comment: The line items listed in section 5 should not be interpreted as limiting, with no allowance for adding such typical items as architectural fees for design and supervisory services, contingency in a rehabilitation project, and Mortgagor's "other fees." Section 5 should be tailored to the deal at hand.

HUD response: HUD agrees with the comment and has revised section 5 to remove the list of items eligible for payment and has substituted a reference to an Exhibit B, in which the parties will itemize applicable charges or items.

Section 7—Insured Advances

Comment: Rather than an extension of the title policy for each insured advance, the alternative of current mechanic lien reports should suffice in a state where the insured loan has continued priority over liens.

HUD response: HUD disagrees with this comment. The alternative of a mechanic's lien report is a lesser standard. The extension of the title policy best protects HUD's interest.

Section 14—Wages

Comment: The end of section 14(b)(ii) should be revised to read, "* * * which may be published as of the date the firm commitment was first issued."

HUD response: The language in section 14(b)(ii) is consistent with the Department of Labor regulations at 29 CFR 1.6(a)(3)(N).

Section 19—Liability for Advances

Comment: Personal liability is an extreme remedy when there could be numerous instances where the agreement is violated involuntarily or unintentionally by the Borrower; for example, by the owner's contractor or if the insured advance is paid out in a way that violates Davis-Bacon requirements. Personal liability should be limited to knowing and deliberate violations. Another comment suggested that such violations should only be events of default not resulting in personal liability of the Borrower.

HUD response: HUD agrees and has removed section 19 concerning personal liability.

Section 20—HUD not a Party

Comment: This section should state that HUD has an obligation to perform all of its duties in a timely manner.

HUD response: HUD declined to adopt this comment. HUD is not a party to the Building Loan Agreement.

Guide for Opinion of Borrower's Counsel, Form HUD–91725M

Preamble

Comment: The phrase, "The Borrower has requested that we deliver this opinion and has consented to reliance by Lender's counsel in rendering its opinion to Lender * * *" should be changed to, "The Borrower has requested that we deliver this opinion and has consented to reliance by Lender's counsel in its representation of Lender * * *." Lender's counsel does not typically render an opinion to the Lender in connection with the Loan transaction.

HUD response: HUD agrees in part with this comment and has revised the Preamble accordingly.

American Bar Association (ABA) Guidelines

Comment: HUD fails to acknowledge the ABA Guidelines for Preparation of Closing Opinions.

HUD response: HUD disagrees with this statement. To the extent that HUD departs from the ABA Guidelines, it is because HUD needs the information to manage prudently the risk to public resources being made available. The Opinion is the most appropriate source for the information HUD needs.

Increased Cost

Comment: Changes will substantially increase the cost of an opinion letter and reduce the number of competent attorneys willing to provide it.

HUD response: The substantive changes made to the Guide from the one in use were minimal and were responsive to suggested changes. The changes were largely directed to clarifying changes and some updates in terminology where appropriate and have not imposed any stricter standards inconsistent with what had been done previously. Some sections concerning actions or knowledge of the Lender have been moved to the Lender's Certificate. These types of changes will not result in a substantial increase in cost or reduce the number of competent attorneys willing to provide the opinion.

Not an Opinion

Comment: One commenter stated that the Certification/Warning is inconsistent with the nature of an opinion—an opinion certified to be true is not an opinion but a guarantee. Two other commenters stated that requiring an Opinion and a Certification/Warning is redundant, overkill, and insulting.

HUD response: HUD agrees in part with these comments. The language of the Certification/Warning has been revised to provide: "This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD." Additionally, the heading "Certification/Warning" has been removed.

Comment: The Guidelines require counsel to opine as to the future acts and behavior of individuals or entities a lawyer does not and may never represent. Such an opinion would not be covered by malpractice insurance.

HUD response: HUD has revised the Guidelines to ensure the scope of counsel's opinion is appropriate to the transaction and to the individuals or entities that counsel represents.

Deviations

Comment: The certification regarding unapproved deviations from the form opinion letter would require a corresponding certification from HUD counsel as to the approved deviations.

HUD response: HUD disagrees that a corresponding certification is needed. The purpose of the certification regarding unapproved deviations from the form opinion letter is to identify and disclose changes. HUD's continuation with the closing, in light of the changes made to the opinion letter and disclosed to HUD, constitutes HUD's approval.

Scope of Opinion Letter

Comment: While Fannie Mae and Freddie Mac have reduced the scope of their opinion letters, HUD is going in the opposite direction, which may place HUD at a competitive disadvantage.

HUD response: The scope of HUD's opinion letter is not the same as the scope of Fannie Mae's and Freddie Mac's opinion letters, because the scope of the transactions carried out by HUD, Fannie Mae, and Freddie Mac are not the same. HUD provides mortgage insurance on construction advances, and neither Fannie Mae nor Freddie Mac provides construction advances. The scope of HUD's opinion letter protects the scope of HUD's interests in the transaction.

Comment: It is impracticable to demand that Borrower's Counsel personally explain the Regulatory Agreement to each Principal.

HUD response: HUD agrees and has removed that language, which appeared as paragraph (g) under the heading, "We [I] confirm that:" in the Opinion.

Reliance Language

Comment: Reliance language should state that the subsequent note holder may only rely on the Opinion to the same extent as, not greater than, the addressee.

HUD response: HUD disagrees with this recommendation. The reliance language is consistent with modern opinion practice.

Comment: It is presumptuous of HUD to disregard case law and to continue to demand that Borrower's Counsel's Opinion be addressed to and relied upon by both HUD and Lender.

HUD response: HUD disagrees with this view. HUD has a significant interest in the loan, and therefore HUD must be able, same as the Lender, to rely upon Borrower's Counsel's Opinion.

Financial Interest in Project

Comment: Certification of no financial interest needs to be reevaluated in light of structures of today's transactions. A lawyer's holdings in mutual funds, real estate investment trusts (REITS), and public companies could all be technically indirect and impermissible holdings.

HUD response: In order to protect HUD's interest, the attorney must confirm that he or she has no financial interest, direct or indirect, in the Project, the Property, or the Loan, other than as specified in paragraph (c) of the opinion Guide. However, in recognition of the concerns expressed in the comment, HUD has revised the language in paragraph (d) of the opinion Guide regarding undisclosed interests, to state that the attorney has no interest in the subject matters of the opinion other than as previously disclosed and approved by HUD, and has added the phrase "Except as provided in paragraph (d)" to paragraph (c).

HUD Resources

Comment: HUD's failure to have adequate staff should not be a reason for failure to negotiate an opinion acceptable to different law firms and their liability insurers.

HUD response: The opinion represents HUD's current practice and is not related to any resource or staffing issues. It is HUD's intent to establish and maintain a uniform set of documents for multifamily property transactions to provide stability and predictability for such transactions, and to minimize, as much as possible, negotiations and the potential for inconsistencies and unanticipated consequences.

Identity of Interest

Comment: Identity of interest between Lender and Borrower, if disclosed, should be permitted in projects not covered by the MAP Guide.

HUD response: HUD agrees and has removed the limiting language, which appeared as paragraph (e).

Joint Opinion

Comment: The opinion should affirmatively take into consideration that transactional counsel for Borrower may choose to rely on local or specialty counsel with respect to certain issues within the opinion.

HUD response: HUD agrees with this suggestion, and the Opinion includes language to designate either general or special counsel for matters that may require a separate opinion by specialty counsel.

Signatory

Comment: It is the practice to have a signature of the law firm on an Opinion, rather than the name and signature of a particular attorney at the firm.

HUD response: It is also still the practice, however, to have the signature of an attorney authorized to sign on behalf of the law firm. HUD prefers this practice and, therefore, has not changed the document as suggested by the commenters.

Liens, Encumbrances

Comment: Most institutional Lenders do not release their liens until they have been paid. In requiring that there "cannot be any liens and encumbrances on the Mortgaged Property when HUD endorses the Note for insurance," HUD has created a "Catch-22" that no other Lender in the country insists upon when making a new secured loan that pays off an existing secured loan. The normal practice is to process releases after closing.

HUD response: The requirement of a first lien reflects the requirement of the National Housing Act. The National Housing Act requires that HUD insure a first lien.

Section M

Comment: The correct name of the escrow (Escrow Agreement for Working Capital) should be used in section M, and Lender should be included in addition to Borrower as a signatory.

HUD response: HUD agrees with the comment, and the revision has been made to section M.

Section N

Comment: The section should include form 92412M and signatory parties (Borrower, Lender, the General Contractor, and HUD) to the Agreement and Certification.

HUD response: HUD agrees in part and has revised section N to include an instruction to insert the appropriate parties.

Section Q

Comment: The defined term "Filing Offices" should be used in place of general language ("county and Property Jurisdiction [and Organizational Jurisdiction].")

HUD response: HUD agrees in part with the comment and has revised section Q to require the insertion of the appropriate UCC filing office(s).

Section T—Evidence of Zoning Compliance

Comment: HUD must recognize that some jurisdictions no longer issue Zoning Letters.

HUD response: HUD does recognize this, and the Guide and Opinion account for such local law variations.

Section W—Survey

Comment: The phrase "showing completed project" should be eliminated or followed by "if any."

HUD response: The "or" in the language of section W makes the inclusion of "if any" unnecessary.

New Article 9

Comment: The new Article 9 has revised the rules as to perfection of security interests in personalty owned by debtors that are registered entities. Instead of filing in the jurisdictions where the personalty is physically

located and where the debtor's chief executive office is located, perfection is achieved by filing with the Secretary of State in the jurisdiction where the debtor is formed. This section should be required only for debtors that are individuals and unregistered entities, such as general partnerships.

HUD response: As a result of comments pertaining to the UCC, HUD has reviewed all provisions in all documents and has made revisions as necessary.

Section 4

Comment: The first sentence is unqualified and too broad, and the second sentence is rendered redundant by the first. A single sentence should state that the Borrower has obtained all necessary approvals for the execution of the loan documents and the ownership and operation of the property.

HUD response: Section 4 has been removed because HUD agrees that certain representations in the section should be made by Lender. The Lender's Certificate has been expanded to include them.

Section 5—Loan Documents Subject to Qualifications

This section is now designated section 4.

Comment: It is unreasonable to require an opinion as to the enforceability of an unenforceable provision.

HUD response: HUD agrees that would be unreasonable, but the document does not require enforceability of an unenforceable provision.

Section 7—Loans Involving Construction or Rehabilitation

This section is now designated section 6.

Comment: It is unreasonable to require an opinion as to "proposed" changes of law or ordinance.

HUD response: The language with respect to proposed changes in (now designated) section 6 is qualified by the phrase "to our knowledge."

Section 13

This section is now designated section 11.

Comment: This section should be revised consistent with section G regarding revised Article 9.

HUD response: HUD agrees with this comment and has revised section 11, for example, by adding "as its interests appear" following the reference to HUD.

Instructions to Opinion, Form HUD–91725M

Section OO—Docket Search

Comment: The statement that a docket search in the jurisdiction where the Borrower is located is not necessary if a sole-asset Borrower is being created should be clarified to indicate the time frame in which the sole-asset Borrower is created, i.e., not more than 90 days preceding initial endorsement.

HUD response: HUD agrees and this clarification has been made for the docket search provision, which is now section NN.

Comment: Does the requirement for a docket search of a general partner of a mortgagor mean that a search of a managing member of a limited liability company mortgagor is not required?

HUD response: The language has been revised to clarify that the search is limited to the location of the project, unless the Borrower is created or located in a jurisdiction other than the project, in which case record searches in both jurisdictions will be necessary. HUD believes this revised language addresses the commenter's concern.

Certification of Borrower, Form HUD–91725M (Exhibit A)

Section 3 Location of Secured Property

Comment: This section should be updated to comply with revised Article 9.

HUD response: HUD agrees and has updated accordingly.

Section 7—Source of Funds

Comment: The first sentence should be clarified to read, "The source(s) of any funds advanced by Borrower for purposes of meeting any equity requirement, including second debt, of HUD or contributing to the * * *."

HUD response: This section was removed completely from the Certification of the Borrower. Source of funds is now addressed in the Lender's Certification.

Construction Contract, Form HUD–92422M

Contractor's Progress Schedule

Comment: It would make sense to require integration of a Contractor's Progress Schedule into the Construction Contract with conditions for reasonable extensions to prevent amending the Schedule without HUD consent.

HUD response: HUD disagrees with this recommendation. The Contractor's Progress Schedule is used as an underwriting tool and therefore not appropriate to insert into a legally binding document.

Article 2—Identification of Contract Documents

Comment: In section A(2) of Article 2, excepting the mandatory arbitration provisions contained in AIA A201–1997, General Conditions, would be to exclude standard industry practice for resolving numerous construction complaints, issues, and disputes.

HUD response: HUD disagrees. This provision assists in maintaining the appropriate level of flexibility, and it is necessary to protect HUD's interest.

Comment: In section A(2) of Article 2, the present contract references only the current form of General Conditions; is there a reason for requiring the 1997 edition?

HUD response: The 1997 edition represents the latest revision that HUD has approved.

Comment: The list of Contract documents should include, "All Change Orders (as defined in section D below)."

HUD response: HUD agrees in part with the comment and has revised the list to include the following language: "Any change orders approved by HUD after the execution of this Contract."

Article 3—Time

Comment: The requirement that completion of all punch list items and the otherwise open nature of the prerequisites for execution of the final Trip Report is potentially counterintuitive and could cause delay.

HUD response: HUD disagrees. The requirement is not a new requirement, and HUD has no information to indicate that the execution of the final Trip Report is potentially counterintuitive and could cause delay.

Article 7—Obligations of Contractor

Comment: In section C of Article 7, the introductory language should read: "Upon completion of construction, the Contractor shall furnish at the Contractor's expense a survey map meeting HUD requirements * * *."

HUD response: HUD disagrees and did not revise the introductory language as suggested by the commenter. However, HUD has revised this provision to include the following language: "To the extent such data shows that the Contractor has deviated from the Plans and Specifications, Contractor shall be responsible, at its own expense, for correcting such deviations."

Comment: In section 7C, rather than attempt to enumerate all survey requirements in the Construction Contract, it would be much more economical from a drafting standpoint simply to require the Contractor to

produce an as-built survey and Surveyor's Report in accordance with HUD requirements and otherwise acceptable to Lender and HUD.

HUD response: HUD does not generally agree with the comment but has amended section 7C to indicate that the survey has to be prepared in accordance with ALTA–ACSM standards.

Article 9—Waiver of Lien or Claim

Comment: With respect to section A of Article 9, requiring lien waivers from subcontractors should be eliminated. It would be impossible in some states (e.g., California) to obtain such waivers from subcontractors or suppliers.

HUD response: HUD prefers to address this issue on a case-by-case basis. This provision is important and HUD, therefore, is not removing it completely from this contract.

Comment: In section B of Article 9, the second sentence should also be prefaced by "In jurisdictions where permitted by law * * *"

HUD response: HUD does not consider the recommended change to be necessary.

Comment: Article 9 should state that a contractor lien will likely result in termination of further advances under the Building Agreement.

HUD response: The contractor is not a party to the Building Agreement, and the recommendation is not adopted.

Signature Page

Comment: Rather than specifying "six (6) counterparts," the signature line should refer to "multiple" counterparts.

HUD response: HUD considered the issue raised by the comment and determined that at least six counterparts are required in all cases. Therefore, "at least" language has been added to cover any contingency where more will be required.

Lease Addendum, Form HUD–92070M

Section (b) (HUD acquires title)

Comment: This provision giving HUD an option to purchase fee simple title to a leasehold estate where HUD acquires title to the leasehold estate will not be acceptable to a Ground Lessor and will eliminate HUD-insured loans secured by a ground leasehold. The reference back to section (b) in section (e)(1) should also be removed.

HUD response: The option is not new, but represents a longstanding HUD policy.

Section (f) (Lease Termination)

Comment: Sixty days for notice of monetary default from Lender to a Tenant is too long and will be unacceptable to most landlords.

HUD response: HUD disagrees. HUD believes that 60 days presents a reasonable time frame.

Comment: The 180-day cure period is too long and a commercially unreasonable requirement to impose upon a Ground Lessor.

HUD response: HUD disagrees. HUD believes that 180 days presents a reasonable time frame.

Comment: Where a Ground Lessor gives HUD or a Lender additional rights, it will want to be paid all monetary obligations to be kept whole, and will want to be assured that HUD or the Lender pays property taxes, insurance, and other obligations of the tenant.

HUD response: If there is a default on the Mortgage, Lender is obligated to pay costs such as taxes and insurance to preserve the property.

Section (g) (Possession of Property)

Comment: A Landlord will never agree, after termination of the Ground Lease and retaking possession of the Property, to give Landlord or HUD an additional 6 months to enter into a new Lease with the Landlord.

HUD response: HUD considers this a reasonable time to enter into a new Lease. This period is also the maximum allowed, and is not expected to be the norm.

Section (h) (Landlord Joining Tenant in Applications)

Comment: This section should allow modifications in the event the Landlord is a public agency, as HUD has previously permitted, for example, providing the public agency/Landlord 30 days to join the tenant, and adding a qualification "to the extent that it may within the exercise of its municipal powers and responsibilities." Further a public agency cannot irrevocably appoint the Tenant as its attorney-in-fact to execute papers.

HUD response: HUD has added the suggested qualification to this paragraph.

Request for Endorsement of Credit Instrument, Form HUD–92455M

Comment: The Lender should be required to submit a Security Agreement only for Personalty that state licensing officials mandate to be maintained at a Facility for licensing purposes.

HUD response: The Lender is required to submit a Security Agreement for Personalty necessary for operation of the project. This requirement, which appeared in an unnumbered paragraph, is now included in a paragraph designated as section 2.

Section 2—Impounds

This section is now designated as section 8.

Comment: A statement should be added that impound accounts for taxes and insurance (excluding mortgage insurance premiums) if collected by a first mortgagee may be deferred until the first mortgage is paid in full.

HUD response: HUD disagrees with the suggestion. These requirements apply only to the first mortgage.

Section 8—Reserve Fund for Replacements

Comment: A statement should be added that reserves for replacement should be allowed to remain with the first mortgagee until payment in full of the first mortgage. Thereafter, the second mortgagee would begin collecting replacement reserves.

HUD response: HUD disagrees with the suggestion. This requirement applies only to the first mortgage. However, this provision has been removed from the Request for Endorsement form.

Section 19—Approval of Transfer of Project

This section is now designated as section 13.

Comment: Rather than limit the Lender's fee for reviewing a transfer to actual expenses incurred, Borrower should reimburse Lender for reasonable, actual, and necessary expenses.

HUD response: HUD disagrees, and has not adopted this recommendation.

Comment: Section 19 is part of a document that is probably not binding on successor mortgagees; its provisions should be made part of the Deed of Trust.

HUD response: The requirement has been removed from the Request for Endorsement form and is included in the Lender's Certification, which has been clarified to apply to successors and assigns.

Residual Receipts Note (Limited Dividend Mortgagors), Form HUD–91712M

Section 3—Prepayments

Comment: This section prohibits prepayment of interest prior to maturity of the note. Why is prepayment of principal permitted, but not prepayment of interest?

HUD response: Prepayment of principal is permitted only from residual receipts and only upon obtaining prior written approval from HUD. This is longstanding HUD policy, and HUD considers it an appropriate limitation for Limited Dividend Mortgagors. If a Limited Dividend

Mortgagor were permitted to take interest, which generally would occur after several years when interest would be compounded, this would make it possible for the mortgagor to exhaust the funds that would otherwise be available to the Project and could have the effect of increasing distributions if interest prepayment were permitted.

Surplus Cash Note, Form HUD–92223M

General

Comment: HUD should allow payments to be made semi-annually since surplus cash may be distributed semi-annually.

HUD response: HUD agrees and has clarified the undesignated introductory paragraph to provide that payment may be made semi-annually.

Comment: A section should be added to allow for principal payments from surplus cash.

HUD response: HUD does not restrict the owner's discretion on the use of surplus cash. The owner retains the discretion to use surplus cash.

Comment: A section should be added that allows for other provisions that are not inconsistent to be added to the document.

HUD response: HUD does seek consistency in the use of its form documents, and does not consider open-ended documents to be appropriate. However, where necessary, other provisions would be included, consistent with section 29 of the Lender's Certificate, which addresses changes in the closing forms.

Section 2—Payment From Surplus Cash

Comment: It is unreasonable for the Maker/Owner to be in default for not making payments even in instances when surplus cash is not available.

HUD response: HUD disagrees. Payments would not be made if surplus cash were not available.

Comment: The language "to the extent of available Surplus Cash" should be added to the end of section 2, as follows: The restriction on payment imposed by this section shall not excuse any default caused by the failure of the maker to pay the indebtedness evidenced by the Note to the extent of available Surplus Cash."

HUD response: As HUD noted in a response to an earlier comment, HUD does not restrict the owner's discretion on the use of surplus cash. The owner retains the discretion to use surplus cash prudently.

Section 4—Prepayment

Comment: This section allows Maker to pay principal on Note "on any interest payment date," but the Note provides that interest is payable annually, so that principal can only be paid once a year. The first sentence should be revised to read, "Maker may pay any part or all of the principal and interest on this note without penalty at any time.

HUD response: HUD has not adopted the change recommended by the commenter.

Section 5—Payment From Other Than Project Assets

Comment: This is inconsistent with section 2, which limits payments to surplus cash. In addition, section 5 is inconsistent with the new Regulatory Agreement.

HUD response: There is no inconsistency with section 2 or the Regulatory Agreement because section 5 pertains to payments from sources other than Project Assets.

Section 7

Comment: Section 7 should also be cited as "Notwithstanding" in section 5. Section 7 should be modified so that prepayments from non-Project sources (often tax credit syndication proceeds) are permitted prior to final closing.

HUD response: The modifications requested to be made to section 7 were not adopted, because they would nullify the certification requirements pertaining to all sources of income.

Section 8

Comment: Section 8 should remove language that does not allow the note to be sold, transferred, assigned, or pledged without HUD's prior written approval. HUD does not evaluate the original payee of a surplus cash note, so why would evaluation of a successor payee be necessary? HUD approval would place an unnecessary burden on the payee and HUD field offices.

HUD response: The information required by section 8 is necessary to protect HUD's interest.

Section 9

Comment: Section 9 should be removed. HUD should allow for the compounding of interest in order to give the parties to the surplus cash note more flexibility. Since HUD does not regulate the interest on surplus cash notes, it should not matter to HUD that such interest is compounded.

HUD response: HUD does not allow interest to compound because it would create an insurmountable amount of debt owed by Mortgagor, since the Surplus Cash Note becomes due upon the payoff of the HUD-insured mortgage.

Performance Bond—Form 92452M

Comment: Generally, many provisions extend the surety's risk beyond what is normally contemplated in the surety's underwriting and premium. Such an expansion of risk ultimately results in greater construction costs for the project owner.

HUD response: HUD has not made any substantive changes to the Performance Bond document from the existing version currently in use, which has performed satisfactorily.

Section 3—Increase of Obligation

Comment: Increasing the obligation of Obligors by any approved increase in the contract price would increase the surety's exposure beyond typical levels, which is normally limited by the penal sum of the bond. This provision should be eliminated or subject to negotiation by the surety, particularly since section 9 waives the Surety's notice of any increase.

HUD response: Section 3 reflects the language of the Performance Bond currently in use. The cost of any increase in Surety's exposure may be addressed in a rider to the Performance Bond, which specifically provides a check-off for whether or not there are riders to the bond.

Section 4—Contractor's Indemnification

Comment: This form lacks the AIA A311 (1970) provision that requires a Contractor to be formally declared by the Owner to be in default under the Contract.

HUD response: HUD considers this issue to be sufficiently covered by the document. Section 2 states that Lender desires protection in event of default by Contractor under the Contract. Section 4 refers to all expenses that any Obligee may incur in making good any such default. AIA A311 (1970) is no longer published; it has been replaced by AIA A312–1984.

Comment: The wording "all costs and damages" is substantially broader than industry standard forms.

HUD response: As noted previously, HUD has not made any substantive changes to the Performance Bond document from the version currently in use.

Comment: There is no requirement that costs incurred by the Obligee are "reasonable," and it could be construed to include such items as attorney's fees.

HUD response: HUD considers that the law of the Property Jurisdiction would govern as to what costs are indemnified.

Comment: The four options that a Surety traditionally has in the event of

a declared default under the Contract are severely limited.

HUD response: As noted previously, HUD has not made any substantive changes to the Performance Bond document from the version currently in use, which has performed satisfactorily.

Section 5—Surety's Liability to Obligee

Comment: The requirement that Surety only, not the Principal, notify Obligee in writing if Obligee fails to make payments or perform obligations under the Contract, and giving the Obligee a reasonable period of time to cure such failure, deviates from industry standard in AIA A311.

HUD response: As noted previously, HUD has not made any substantive changes to the Performance Bond document from the version currently in use. AIA A311 no longer is published.

Comment: This provision eliminates the incentive to make timely payments.

HUD response: Rather than eliminating the incentive to make timely payment, HUD considers Section 5 to provide Owner and Lender a period to cure their failure to make payments, consistent with HUD regulations that provide a 30-day grace period before declaration of a default.

Comment: The last sentence, which requires Surety to monitor the Obligee's performance, should be removed.

HUD response: Providing Obligees with an opportunity to cure a failure to pay or perform before a Surety shall be liable under the Performance Bond protects the Project from premature and unintended default. HUD insists on a grace period to avoid such outcomes. Given the involvement and possible economic loss to the Surety coupled with the defense available to the Surety, the Surety would be in the best position to monitor the payments made by the Obligees.

Section 7—Surety's Subrogation Rights

Comment: Provision that "No amounts paid to the Owner without the written consent of the Lender shall reduce the liability of Surety to Lender under this Performance Bond" is unusual and deviates from the industry standard. What happens if the Lender refuses or unreasonably delays to give written consent?

HUD response: As noted previously, HUD has not made any substantive changes to the Performance Bond document from the existing version currently in use. Surety makes payments that are not in accordance with the terms of the Bond at its own risk.

Comment: This provision could place the Surety in the middle of Lender-Owner disputes and increase the bond penalty amount above the limit stated in the bond. This may result in the Surety's violation of various regulatory mandates.

HUD response: HUD disagrees with the comment. The intended effect of the provision is to allow Surety to wait until Lender and Owner settle their disputes before making payment.

Comment: This provision wrongly places on the Surety the responsibility to manage the flow of funds between Lender and Owner.

HUD response: Rather than requiring management of the flow of funds by Surety, this provision requires no action by Surety, other than to obtain Lender's consent before making payment to owner.

Section 9—Waiver of Notice

Comment: This section should be revised to provide notice of more than 10 percent change in price and requiring Surety's consent to increase penal sum in Bond for increases exceeding 25 percent.

HUD response: As noted previously, the cost of any increase in Surety's exposure may be addressed in a rider to the Performance Bond.

Payment Bond, Form HUD—92452M

Prefer Current Document

Comment: The existing Payment Bond closely parallels AIA A311 (1970), which is an industry standard, and should continue to be used.

HUD response: As noted previously, AIA A311 is no longer published.

Missing Provisions

Comment: Provisions that would constitute a statutory payment bond under California law are missing.

HUD response: HUD acknowledges that the closing documents when used in different states may require amendment for purpose of compliance with different state laws. Such a process is contemplated in section 29 of the Lender's Certificate, which addresses changes in the closing forms.

Comment: There is no express requirement that labor, materials, and equipment furnished for use be directly applicable to the Contract.

HUD response: Section 2 expressly provides that the sum, as noted, is to pay for labor, materials, and equipment furnished for use in the performance of the Contract.

Comment: There is no express requirement that the Surety has waived notice of changes to the Contract.

HUD response: Such a waiver appears in section 7 of the Payment Bond.

Comment: There is no express requirement that no amounts paid to the Owner without the written consent of the Lender shall reduce the liability of the Surety to the Lender under the Bond.

HUD response: Such a requirement appears in section 6 of the Payment Bond.

Comment: The definition of Claimant is broader in the existing form.

HUD response: The term Claimant is not used in the current form HUD–92452A.

Contrary Provisions

Comment: A number of the bond provisions (*e.g.,* statute of limitations, what constitutes a claimant, release of bond provisions) are contrary to the rights of claimants under California law.

HUD response: As noted previously, HUD acknowledges that the closing documents when used in different states may require amendment for purpose of compliance with different state laws. Such a process is contemplated in section 29 of the Lender's Certificate, which addresses changes in the closing forms.

Comment: Provisions for adding obligees are unnecessary, as payment bond runs only to claims qualifying as mechanic's lien (at least in California).

HUD response: Adjustments to the documents may be made as required to meet the legal requirements of different jurisdictions.

Additional Surety Rider

Comment: The requirement of prior HUD approval for an additional surety is contrary to statute (31 U.S.C. 9304–9305) and implementing regulations of the Department of the Treasury that address the parameters of a surety's authority to write bonds required by U.S. law. Under 31 CFR 223.10, a surety may write a bond in excess of its underwriting limitation if a co-surety joins the bond and the bond amount is no more than the combined underwriting limitations of the co-sureties. This regulation does not provide an agency the ability to foreclose this option.

HUD response: The fact that law permits an additional Surety does not prevent HUD from exercising its authority to approve the additional Surety. HUD must be apprised when the required bond exceeds the underwriting authority of the Surety.

Section 2

Comment: Section 2 is similar to section 3 of the Performance Bond, and the same comments are applicable.

HUD response: The same HUD comments, respectively, are applicable.

Section 6

Comment: Section 6 is similar to section 7 of the Performance Bond, and the same comments are applicable.

HUD response: The same HUD comments, respectively, are applicable.

Comment: A provision regarding payment to the owner under the Payment Bond is not applicable, because Claimants would be the exclusive recipients of payments under the Bond.

HUD response: An Owner would qualify as a Claimant under section 9, which generally defines a Claimant as one having a direct contract with Contractor or with a subcontractor of Contractor for labor, materials, or equipment used in the performance of the Contract.

Off-Site Bond, Form HUD–92479M

Comment: Several provisions (e.g., Surety waives all notices of changes, any increase in the Off-Site Contract price increases accordingly the monetary obligation of Obligors, and the amount of time the Owner can pursue damages) deviate from industry standard.

HUD response: The issues noted have been addressed in the context of the HUD responses to comments on the Performance Bond and the Payment Bond.

Escrow Agreement for Latent Defects, Form HUD–92414M

Comment: This agreement leaves out the contractor, whose money or letter of credit funds the escrow in most cases, who was responsible for the work, and who has the contractual relationship with the subcontractors and material suppliers who would be called upon to correct the problem.

HUD response: HUD does not intend to rely exclusively upon the original Contractor, who may no longer be extant when the latent defects need to be addressed.

Escrow Agreement: Additional Contribution by Sponsors for Operating Deficit, Form HUD–92476a–M

General

Comment: The name of the document should be changed to "Escrow Agreement for Operating Deficit," to reflect that the escrow may not be funded by the sponsor.

HUD response: HUD agrees with the commenter and has changed the name of the document accordingly.

Comment: The language should be made consistent, wherever possible, with the Escrow Agreement for Working Capital.

HUD response: HUD has reviewed both documents in final form and does not believe that the two documents are inconsistent with each other. They are different documents with different purposes and therefore to the extent terminology is different, such difference is appropriate.

Section 5

Comment: A section should be added that the Lender may draw against any letter of credit and convert it to cash to be held and disbursed as part of the Deposit.

HUD response: Section 5 of the document already contains the language recommended by the commenter.

Comment: The requirement in section 5 that the Lender provide cash to cover a letter of credit, which cannot be converted to cash, is a matter between HUD and the Lender, addressed in the Mortgagee's Certificate. This language is not included in the current form, is inappropriate, and should be removed.

HUD response: HUD disagrees and believes that this provision is appropriate for the Escrow Agreement for Operating Deficit.

Comment: The language in section 5 regarding bonds is obsolete and should be removed.

HUD response: HUD agrees with this comment and has removed the reference to bonds in section 5.

Comment: The language of section 5 should be replaced with language that allows for the lender to hold and disburse the Deposit at the sole direction of HUD.

HUD response: HUD disagrees and believes that the language, which provides for the Depository to hold and disburse the escrow at the sole discretion of HUD, is appropriate.

HUD Amendment to AIA Document B181, HUD–92408M

Heading

Comment: The document heading should be changed. This document will typically be signed before an application for mortgage insurance is submitted to HUD. Therefore, it is impractical to include the HUD Project number.

HUD response: HUD did not adopt this recommendation. Although AIA Document B181 will typically be signed before an application for mortgage insurance is submitted to HUD, the HUD Amendment would not be executed at that time. The HUD Amendment is part of the insurance application process. It is important, and not impractical, to include the HUD Project number at that point.

Section 1

Comment: In section 1, a definition of "Original Owner" should be added and used in the document to reflect that the Owner-Architect Agreement is often signed by an affiliate of the Borrower. A definition of "HUD" also should be added.

HUD response: HUD considers a definition of Original Owner not to be necessary and has not adopted this recommendation. HUD also believes that the acronym "HUD" does not require a definition, since the header for the document states "U.S. Department of Housing and Urban Development." In addition, the prefatory section now specifies the definitions in the "Regulatory Agreement" and "Security Instrument" are applicable.

Section 3

This section has been redesignated as section 4.

Comment: In section 3, language should be added to allow Agreement to be assigned from the Original Owner to Borrower without HUD consent.

HUD response: As the insurer of the mortgage, it is important for HUD to be apprised of and approve any changes in circumstances that would affect HUD's interest. HUD declines to adopt this change.

Comment: Language requiring Owner not to contract with disbarred individuals/firms should be removed. Requirements of this type applicable to the Borrower should be included in the mortgage insurance application or regulatory agreement rather than as an addendum to an agreement between two private parties.

HUD response: HUD disagrees with this comment. At the time this document is executed as part of the mortgage insurance application, Owner is Borrower, and it is important to retain this language in this document.

Section 4

This section has been redesignated as section 5.

Comment: Sections 4 and 12 should include language to provide that the Architect cannot withhold documents due to nonpayment for reimbursable expenses, termination expenses, and fees for additional services, collectively referred to as "additional payments."

HUD response: HUD disagrees with this comment. This concern is adequately addressed in section 12, and additional clarification is not necessary.

Section 8

This section has been redesignated as section 9.

Comment: Section 8 is too broad. It is not accurate to say that "any action or determination by either the Owner or the Architect is subject to acceptance by the Mortgagee and by HUD," particularly during the period prior to initial closing.

HUD response: HUD disagrees with this suggested change. Redesignated section 9, as currently worded, is necessary to protect the interest of the Lender and HUD. In addition, the introductory language of the HUD Amendment, now redesignated as section 2, specifically provides that, "The provisions of this Amendment supersede and void all inconsistent provisions that may exist between this Amendment and the Agreement."

Section 10

This section has been redesignated as section 11.

Comment: In section 10, the parties identified for identity-of-interest purposes should include "managers" and "members."

HUD response: HUD agrees with this comment and has made this change in all documents where the identity-of-interest provisions appear.

Section 12

This section has been redesignated as section 13.

Comment: In section 12, the references to Section 202/811 should be removed.

HUD response: HUD disagrees, because this document is frequently used in Section 202/811 transactions.

Certification

Comment: The separate certification has no purpose.

HUD response: HUD disagrees. The certification in the Amendment is needed to verify the validity of representations made and provides an enforcement tool if such representations are not in fact true.

Comment: There is no reason to have HUD sign a certification.

HUD response: HUD agrees with this recommendation, and a HUD representative no longer appears as a signatory.

V. Findings and Certifications

Paperwork Reduction Act

The proposed new information collection requirements contained in this notice have been submitted to OMB for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a valid control number.

The public reporting burden for this new collection of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided in the following table: Estimated burden hours and costs to the respondents:

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost	Total annual cost
HUD–91710M	600	1.00	600	0.5	300	$26	$7,800
HUD–91712M	600	1.00	600	0.5	300	26	7,800
HUD–92023M	600	1.00	600	1	600	26	15,600
HUD–92070M	600	1.00	600	0.5	300	26	7,800
HUD–92223M	600	1.00	600	0.5	300	26	7,800
HUD–92408M	600	1.00	600	0.5	300	26	7,800
HUD–92412M	600	1.00	600	0.5	300	26	7,800
HUD–92413M	600	1.00	600	0.5	300	26	7,800
HUD–92414M	600	1.00	600	0.5	300	26	7,800
HUD–92450M	600	1.00	600	0.5	300	26	7,800
HUD–92452A–M	600	1.00	600	0.5	300	26	7,800
HUD–92452M	600	1.00	600	0.5	300	26	7,800
HUD–92455M	600	1.00	600	1	600	26	15,600
HUD–92456M	600	1.00	600	0.5	300	26	7,800
HUD–92457A–M	600	1.00	600	0.5	300	26	7,800
HUD–9257M	600	1.00	600	0.5	300	26	7,800
HUD–9464M	600	1.00	600	1	600	46	27,600
HUD–92476.1M	600	1.00	600	0.5	300	26	7,800
HUD–92476A–M	600	1.00	600	0.5	300	26	7,800
HUD–92477M	600	1.00	600	0.5	300	26	7,800
HUD–92478M	600	1.00	600	0.5	300	26	7,800
HUD–92479M	600	1.00	600	0.5	300	26	7,800
HUD–91725M	600	1.00	600	1	600	125	75,000
HUD–91725M–CER	600	1.00	600	1	600	46	27,600
HUD–91725M–INST	0	0	0	0	0	0	0
HUD–92434M	600	1.00	600	1	600	26	7,800
HUD–92441M–SUPP	600	1.00	600	0.75	450	26	11,700
HUD–92441M	600	1.00	600	0.75	450	26	11,700
HUD–92442M	600	1.00	600	1	600	58	34,800
HUD–92466M	600	1.00	600	1	600	58	34,800
HUD–92466M–HCFRA	600	1.00	600	0.75	450	26	11,700
HUD–92554M	600	1.00	600	0.5	300	26	7,800
HUD–94000M	600	1.00	600	0.75	450	26	11,700
HUD–94001M	600	1.00	600	1	600	26	15,600
HUD–93305M	600	1.00	600	0.5	300	26	7,800
Totals					13,500.00		$433,831.00

The hourly rate is an estimate based on an average annual salary of $62,000 for developers and mortgagees.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by *March 22, 2010.* Comments must refer to the proposal by name and docket number (FR–5354–N–01) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: (202) 395–6947; and Leroy McKinney Jr., Paperwork Reduction Act Program Manager, Office of the Chief Information Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410.

VI. Solicitation of Public Comments

Section IV of this preamble, which discusses and presents HUD's responses to public comments, highlights the many changes that HUD made to the closing documents in response to public comment. HUD welcomes public comments from industry and other interested members of the public on this most recent issuance of revised closing documents, posted at *http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm.*

Dated: January 12, 2010.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2010–957 Filed 1–20–10; 8:45 am]

BILLING CODE 4210–67–P

Federal Register

Thursday,
January 21, 2010

Part III

Securities and Exchange Commission

17 CFR Part 242
Concept Release on Equity Market Structure; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–61358; File No. S7–02–10]

RIN 3235–AK47

Concept Release on Equity Market Structure

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Securities and Exchange Commission ("Commission") is conducting a broad review of the current equity market structure. The review includes an evaluation of equity market structure performance in recent years and an assessment of whether market structure rules have kept pace with, among other things, changes in trading technology and practices. To help further its review, the Commission is publishing this concept release to invite public comment on a wide range of market structure issues, including high frequency trading, order routing, market data linkages, and undisplayed, or "dark," liquidity. The Commission intends to use the public's comments to help determine whether regulatory initiatives to improve the current equity market structure are needed and, if so, the specific nature of such initiatives.

DATES: Comments should be received on or before April 21, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. S7–02–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. S7–02–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Arisa Tinaves, Special Counsel, at (202) 551–5676, Gary M. Rubin, Attorney, at (202) 551–5669, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The secondary market for U.S.-listed equities has changed dramatically in recent years. In large part, the change reflects the culmination of a decades-long trend from a market structure with primarily manual trading to a market structure with primarily automated trading. When Congress mandated the establishment of a national market system for securities in 1975, trading in U.S.-listed equities was dominated by exchanges with manual trading floors. Trading equities today is no longer as straightforward as sending an order to the floor of a single exchange on which a stock is listed. As discussed in section III below, the current market structure can be described as dispersed and complex: (1) Trading volume is dispersed among many highly automated trading centers that compete for order flow in the same stocks; and (2) trading centers offer a wide range of services that are designed to attract different types of market participants with varying trading needs.

A primary driver and enabler of this transformation of equity trading has been the continual evolution of technologies for generating, routing, and executing orders. These technologies have dramatically improved the speed, capacity, and sophistication of the trading functions that are available to market participants. Changes in market structure also reflect the markets' response to regulatory actions such as Regulation NMS, adopted in 2005,[1] the Order Handling Rules, adopted in 1996,[2] as well as enforcement actions, such as those addressing anti-competitive behavior by market makers in NASDAQ stocks.[3]

The transformation of equity trading has encompassed all types of U.S.-listed stocks. In recent years, however, it is perhaps most apparent in stocks listed on the New York Stock Exchange ("NYSE"), which constitute nearly 80% of the capitalization of the U.S. equity markets.[4] In contrast to stocks listed on the NASDAQ Stock Market LLC ("NASDAQ"), which for more than a decade have been traded in a highly automated fashion at many different trading centers,[5] NYSE-listed stocks were traded primarily on the floor of the NYSE in a manual fashion until October 2006. At that time, NYSE began to offer

[1] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) ("Regulation NMS Release").

[2] Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) ("Order Handling Rules Release").

[3] *See, e.g.,* In the Matter of National Association of Securities Dealers, Inc., Administrative Proceeding File No. 3–9056, Securities Exchange Act Release No. 37538 (August 8, 1996).

[4] In November 2009, for example, NYSE-listed stocks represented approximately 78% of the market capitalization of the Wilshire 5000 Total Market Index. Wilshire Associates, *http://wilshire.com/Indexes/Broad/Wilshire5000/Characteristics.html* (November 17, 2009).

[5] NASDAQ itself offered limited automated execution functionality until the introduction of SuperMontage in 2002. *See* Securities Exchange Act Release No. 46429 (August 29, 2002), 67 FR 56862 (September 5, 2002) (Order with Respect to the Implementation of NASDAQ's SuperMontage Facility). Prior to 2002, however, many electronic communication networks ("ECNs") and market makers trading NASDAQ stocks provided predominantly automated executions.

fully automated access to its displayed quotations.[6] An important impetus for this change was the Commission's adoption of Regulation NMS in 2005, which eliminated the trade-through protection for manual quotations that nearly all commenters believed was seriously outdated.[7]

The changes in the nature of trading for NYSE-listed stocks have been extraordinary, as indicated by the comparisons of trading in 2005 and 2009 in Figures 1 through 5 below:

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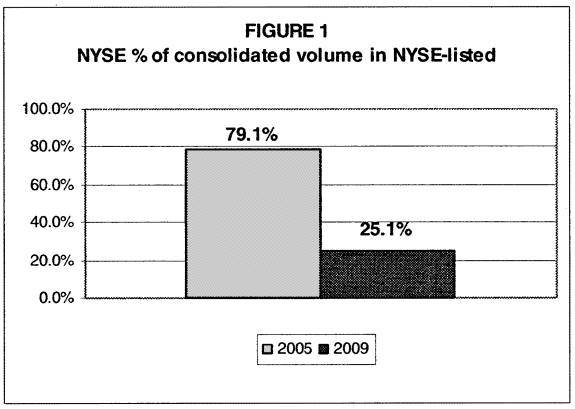

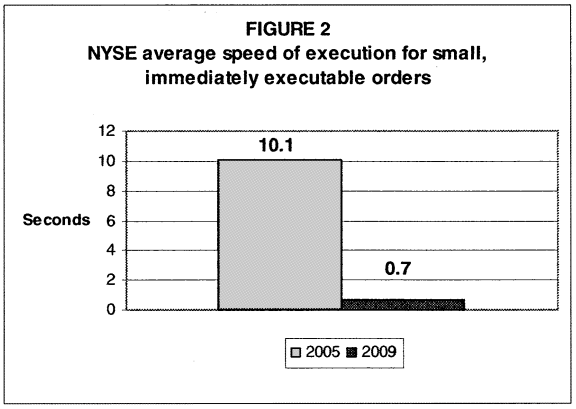

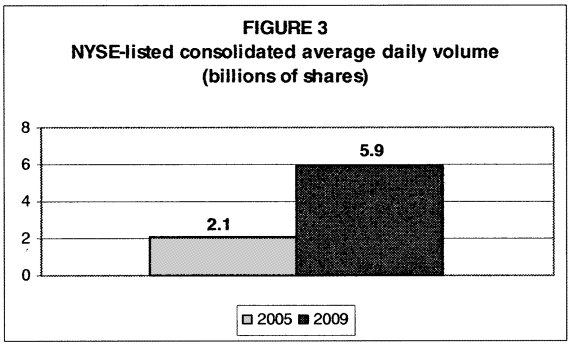

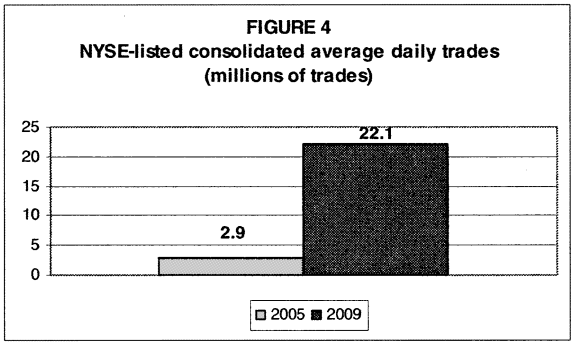

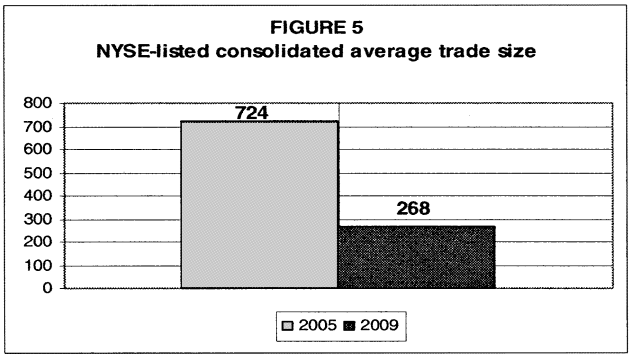

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Figure 1—NYSE executed approximately 79.1% of the consolidated share volume in its listed stocks in January 2005, compared to 25.1% in October 2009.[8]

Figure 2—NYSE's average speed of execution for small, immediately executable (marketable) orders was 10.1

[6] *See* Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (File No. SR–NYSE–2004–05) (approving proposal to create a "Hybrid Market" by, among other things, increasing the availability of automated executions); Pierre Paulden, *Keep the Change,* Institutional Investor (December 19, 2006) ("Friday, October 6, was a momentous day for the New York Stock Exchange. That morning the Big Board broke with 214 years of tradition when it began phasing in a new hybrid market structure that can execute trades electronically, bypassing face-to-face auctions on its famed floor."). Prior to the Hybrid Market, NYSE offered limited automated executions.

[7] Regulation NMS Release, 70 FR at 37505 n. 55 ("Nearly all commenters, both those supporting and opposing the need for an intermarket trade-through rule, agreed that the current ITS trade-through provisions are seriously outdated and in need of reform. They particularly focused on the problems created by affording equal protection against trade-throughs to both automated and manual quotations.").

[8] NYSE Euronext, "NYSE Euronext Announces Trading Volumes for October 2009 (November 6, 2009) ("Tape A matched market share for NYSE was 25.1% in October 2009, above the 24.5% market share reported in October 2008") (available at *http://www.nyse.com/press/1257419178l4.html*); Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782 (December 9, 2008) (File No. SR–NYSEArca–2006–21) ("Given the competitive pressures that currently characterize the U.S. equity markets, no exchange can afford to take its market share percentages for granted—they can change significantly over time, either up or down. * * * For example, the NYSE's reported market share of trading in NYSE-listed stocks declined from 79.1% in January 2005 to 30.6% in June 2008.") (citations omitted).

seconds in January 2005, compared to 0.7 seconds in October 2009.[9]

Figure 3—Consolidated average daily share volume in NYSE-listed stocks was 2.1 billion shares in 2005, compared to 5.9 billion shares (an increase of 181%) in January through October 2009.[10]

Figure 4—Consolidated average daily trades in NYSE-listed stocks was 2.9 million trades in 2005, compared to 22.1 million trades (an increase of 662%) in January through October 2009.[11]

Figure 5—Consolidated average trade size in NYSE-listed stocks was 724 shares in 2005, compared to 268 shares in January through October 2009.[12]

The foregoing statistics for NYSE-listed stocks are intended solely to illustrate the sweeping changes that are characteristic of trading in all U.S.-listed equities, including NASDAQ-listed stocks and other equities such as exchange-traded funds ("ETFs"). They are *not* intended to indicate whether these changes have led to a market structure that is better or worse for long-term investors—an important issue on which comment is requested in section IV.A.1 below. Rather, the statistics for NYSE-listed stocks provide a useful illustration simply because the changes occurred both more rapidly and more recently for NYSE-listed stocks than other types of U.S.-listed equities.

To more fully understand the effects of these and other changes in equity trading, the Commission is conducting a comprehensive review of equity market structure. It is assessing whether market structure rules have kept pace with, among other things, changes in trading technology and practices. The review already has led to several rulemaking proposals that address particular issues and that are intended primarily to preserve the integrity of longstanding market structure principles. One proposal would eliminate the exception for flash orders from the Securities Exchange Act of 1934 ("Exchange Act") quoting requirements.[13] Another would address certain practices associated with non-public trading interest, including dark pools of liquidity.[14] In addition, the Commission today is proposing for public comment an additional market structure initiative to address the risk management controls of broker-dealers with market access.[15]

The Commission is continuing its review. It recognizes that market structure issues are complex and require a broad understanding of statutory requirements, economic principles, and practical trading considerations. Given this complexity, the Commission believes that its review would be greatly assisted by receiving the benefit of public comment on a broad range of market structure issues. It particularly is interested in hearing the views of all types of investors and other market participants and in receiving as much data and analysis as possible in support of commenters' views.

Commenters' views on both the strengths and weaknesses of the current market structure are sought. Views on both strengths and weaknesses can help identify new initiatives that would enhance the strengths or improve on the weaknesses, avoid changes that would unintentionally cause more harm than good, and suggest whether any current rules are no longer necessary or are counterproductive to the objectives of the Exchange Act. As discussed in section II below, Congress mandated that the national market system should achieve a range of objectives—efficient execution of transactions, fair competition among markets, price transparency, best execution of investor orders, and the interaction of investor orders when consistent with efficiency and best execution. Additionally, the Commission's mission includes the protection of investors and the facilitation of capital formation. Appropriately achieving each of these objectives requires a balanced market structure that can accommodate a wide range of participants and trading strategies.

This release is intended to facilitate public comment by first giving a basic overview of the legal and factual elements of the current equity market structure and then presenting a wide range of issues for comment. The Commission cautions that it has not reached any final conclusions on the issues presented for comment. The discussion and questions in this release should not be interpreted as slanted in any particular way on any particular issue. The Commission intends to consider carefully all comments and to complete its review in a timely fashion. At that point, it will determine whether there are any problems that require a regulatory initiative and, if so, the nature of that initiative. Moreover, a new regulatory requirement would first be published in the form of a proposal that would give the public an opportunity to comment on the specifics of the proposal prior to adoption.

II. Exchange Act Requirements for a National Market System

In Section 11A of the Exchange Act,[16] Congress directed the Commission to facilitate the establishment of a national market system in accordance with specified findings and objectives. The initial Congressional findings were that the securities markets are an important national asset that must be preserved and strengthened, and that new data processing and communications techniques create the opportunity for more efficient and effective market operations. Congress then proceeded to mandate a national market system composed of multiple competing markets that are linked through technology. In particular, Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure five objectives:

(1) Economically efficient execution of securities transactions;

(2) Fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets;

(3) The availability to brokers, dealers, and investors of information with respect to quotations and transactions in securities;

(4) The practicability of brokers executing investors' orders in the best market; and

(5) An opportunity, consistent with efficiency and best execution, for investors' orders to be executed without the participation of a dealer.

The final Congressional finding was that these five objectives would be fostered by the linking of all markets for qualified securities through communication and data processing facilities. Specifically, Congress found that such linkages would foster efficiency; enhance competition;

[9] NYSE Euronext, Rule 605 Reports for January 2005 and October 2009 (available at *http://www.nyse.com/equities/nyseequities/1201780422054.html*) (NYSE average speed of execution for small (100–499 shares) market orders and marketable limit orders was 10.1 seconds in January 2005 and 0.7 seconds in October 2009).

[10] NYSE Euronext, Consolidated Volume in NYSE Listed Issues 2000–2009 (available at *http://www.nyxdata.com/nysedata/NYSE/FactsFigures/tabid/115/Default.aspx*).

[11] NYSE Euronext, Consolidated Volume in NYSE Listed Issues 2000–2009 (available at *http://www.nyxdata.com/nysedata/NYSE/FactsFigures/tabid/115/Default.aspx*).

[12] NYSE Euronext, Consolidated Volume in NYSE Listed Issues 2000–2009 (available at *http://www.nyxdata.com/nysedata/NYSE/FactsFigures/tabid/115/Default.aspx*).

[13] Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632 (September 23, 2009) ("Flash Order Release").

[14] Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009) ("Non-Public Trading Interest Release").

[15] Securities Exchange Act Release No. [citation unavailable] ("Market Access Release").

[16] 15 U.S.C. 78k–1.

increase the information available to brokers, dealers, and investors; facilitate the offsetting (matching) of investors' orders; and contribute to the best execution of investors' orders.

Over the years, these findings and objectives have guided the Commission as it has sought to keep market structure rules up-to-date with continually changing economic conditions and technology advances. This task has presented certain challenges because, as noted previously by the Commission, the five objectives set forth in Section 11A can, at times, be difficult to reconcile.[17] In particular, the objective of matching investor orders, or "order interaction," can be difficult to reconcile with the objective of promoting competition among markets. Order interaction promotes a system that "maximizes the opportunities for the most willing seller to meet the most willing buyer."[18] When many trading centers compete for order flow in the same stock, however, such competition can lead to the fragmentation of order flow in that stock. Fragmentation can inhibit the interaction of investor orders and thereby impair certain efficiencies and the best execution of investors' orders. Competition among trading centers to provide specialized services for investors also can lead to practices that may detract from public price transparency. On the other hand, mandating the consolidation of order flow in a single venue would create a monopoly and thereby lose the important benefits of competition among markets. The benefits of such competition include incentives for trading centers to create new products, provide high quality trading services that meet the needs of investors, and keep trading fees low.

The Commission's task has been to facilitate an appropriately balanced market structure that promotes competition among markets, while minimizing the potentially adverse effects of fragmentation on efficiency, price transparency, best execution of investor orders, and order interaction.[19] An appropriately balanced market structure also must provide for strong investor protection and enable businesses to raise the capital they need to grow and to benefit the overall economy. Given the complexity of this task, there clearly is room for reasonable disagreement as to whether the market structure at any particular time is, in fact, achieving an appropriate balance of these multiple objectives. Accordingly, the Commission believes it is important to monitor these issues and, periodically, give the public, including the full range of investors and other market participants, an opportunity to submit their views on the matter. This concept release is intended to provide such an opportunity.

III. Overview of Current Market Structure

This section provides a brief overview of the current equity market structure. It first describes the various types of trading centers that compete for order flow in NMS stocks[20] and among which liquidity is dispersed. It then describes the primary types of linkages between or involving these trading centers that are designed to enable market participants to trade effectively. This section attempts to highlight the features of the current equity market structure that may be most salient in presenting issues for public comment and is not intended to serve as a full description of the U.S. equity markets.

A. Trading Centers

A good place to start in describing the current market structure is by identifying the major types of trading centers and giving a sense of their current share of trading volume in NMS stocks. Figure 6 below provides this information with estimates of trading volume in September 2009:[21]

Figure 6

Trading Centers and Estimated % of Share Volume in NMS Stocks September 2009

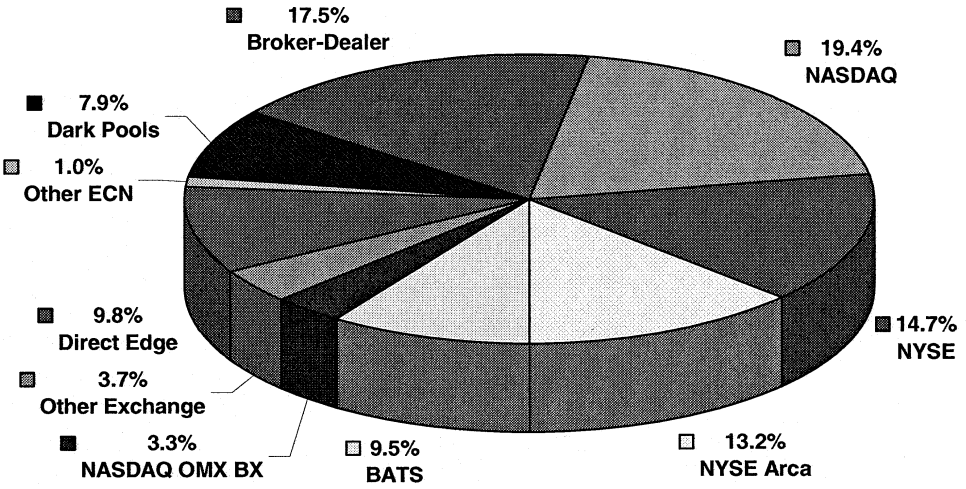
[17] *See, e.g.,* Securities Exchange Act Release No. 42450 (February 3, 2000), 65 FR 10577, 10580 (February 28, 2000) ("Fragmentation Concept Release") ("[A]lthough the objectives of vigorous competition on price and fair market center competition may not always be entirely congruous, they both serve to further the interests of investors and therefore must be reconciled in the structure of the national market system.").

[18] H.R. Rep. 94–123, 94th Cong., 1st Sess. 50 (1975).

[19] *See* S. Rep. 94–75, 94th Cong., 1st Sess. 2 (1975) ("S. 249 would lay the foundation for a new and more competitive market system, vesting in the SEC power to eliminate all unnecessary or inappropriate burdens on competition while at the same time granting to that agency complete and effective powers to pursue the goal of centralized trading of securities in the interest of both efficiency and investor protection."); Regulation NMS Release, 70 FR at 37499 ("Since Congress mandated the establishment of an NMS in 1975, the Commission frequently has resisted suggestions that it adopt an approach focusing on a single form of competition that, while perhaps easier to administer, would forfeit the distinct, but equally vital, benefits associated with both competition among markets and competition among orders.").

[20] Rule 600(b)(47) of Regulation NMS defines "NMS stock" to mean any NMS security other than an option. Rule 600(b)(46) defines "NMS security" to mean any security for which trade reports are made available pursuant to an effective transaction reporting plan. In general, NMS stocks are those that are listed on a national securities exchange.

[21] Sources of estimated trading volume percentages: NASDAQ; NYSE Group; BATS; Direct Edge; data compiled from Forms ATS for 3d quarter 2009.



	Percent
Registered Exchanges	
NASDAQ	19.4
NYSE	14.7
NYSE Arca	13.2
BATS	9.5
NASDAQ OMX BX	3.3
Other	3.7
Total Exchange	63.8
ECNs	
2 Direct Edge	9.8
3 Others	1.0
Total ECN	10.8
Total Displayed Trading Center	74.6
Dark Pools	
Approximately 32[22]	7.9
Broker-Dealer Internalization	
More than 200[23]	17.5
Total Undisplayed Trading Center	25.4

Figure 6 identifies two types of trading centers that display quotations in the consolidated quotation data that is widely distributed to the public—registered exchanges and ECNs.[24] These displayed trading centers execute approximately 74.6% of share volume. Figure 6 also identifies two types of undisplayed trading centers—dark pools and broker-dealers that execute trades internally—that execute approximately 25.4% of share volume. These four types of trading centers are described below.

1. Registered Exchanges

Registered exchanges collectively execute approximately 63.8% of share volume in NMS stocks, with no single exchange executing more than 19.4%. Registered exchanges must undertake self-regulatory responsibility for their members and file their proposed rule changes for approval with the Commission. These proposed rule changes publicly disclose, among other things, the trading services and fees of exchanges.

The registered exchanges all have adopted highly automated trading systems that can offer extremely high-speed, or "low-latency," order responses and executions. Published average response times at some exchanges, for example, have been reduced to less than 1 millisecond.[25] Many exchanges offer individual data feeds that deliver information concerning their orders and trades directly to customers. To further reduce latency in transmitting market data and order messages, many exchanges also offer co-location services that enable exchange customers to place their servers in close proximity to the exchange's matching engine. Exchange data feeds and co-location services are discussed further in section IV.B.2. below.

Registered exchanges typically offer a wide range of order types for trading on their automated systems. Some of their order types are displayable in full if they are not executed immediately. Others are undisplayed, in full or in part. For example, a reserve order type will display part of the size of an order at a particular price, while holding the balance of the order in reserve and refreshing the displayed size as needed. In general, displayed orders are given execution priority at any given price over fully undisplayed orders and the undisplayed size of reserve orders.[26]

In addition, many exchanges have adopted a "maker-taker" pricing model in an effort to attract liquidity providers. Under this model, non-marketable,

[22] Data compiled from Forms ATS submitted to Commission for 3d quarter 2009.

[23] More than 200 broker-dealers (excluding ATSs) have identified themselves to FINRA as market centers that must provide monthly reports on order execution quality under Rule 605 of Regulation NMS (list available at *http://apps.finra.org/datadirectory/1/marketmaker.aspx*).

[24] Consolidated quotation data is described in section III.B.1. below.

[25] *See, e.g.*, BATS Exchange, Inc., *http://batstrading.com/resources/features/bats_exchange_Latency.pdf* (June 2009) (average latency (time to accept, process, and acknowledge or fill order) of 320 microseconds; NASDAQ, *http://www.nasdaqtrader.com/trader.aspx?id=inet* (December 12, 2009) (average latency (time to accept, process, and acknowledge or fill order) of 294 microseconds).

[26] *See, e.g.*, BATS Exchange, Inc., Rule 11.12 (equally priced trading interest executed in time priority in the following order: (1) Displayed size of limit orders; (2) non-displayed limit orders; (3) pegged orders; (4) mid-point peg orders; (5) reserve size of orders; and (6) discretionary portion of discretionary orders); NASDAQ Rule 4757(a)(1) (book processing algorithm executes trading interest in the following order: (1) Displayed orders; (2) non-displayed orders and the reserve portion of quotes and reserve orders (in price/time priority among such interest); and (3) the discretionary portion of discretionary orders.

resting orders that offer (make) liquidity at a particular price receive a liquidity rebate if they are executed, while incoming orders that execute against (take) the liquidity of resting orders are charged an access fee. Rule 610(c) of Regulation NMS caps the amount of the access fee for executions against the best displayed prices of an exchange at 0.3 cents per share. Exchanges typically charge a somewhat higher access fee than the amount of their liquidity rebates, and retain the difference as compensation. Sometimes, however, exchanges have offered "inverted" pricing and pay a liquidity rebate that exceeds the access fee.

Highly automated exchange systems and liquidity rebates have helped establish a business model for a new type of professional liquidity provider that is distinct from the more traditional exchange specialist and over-the-counter ("OTC") market maker. In particular, proprietary trading firms and the proprietary trading desks of multi-service broker-dealers now take advantage of low-latency systems and liquidity rebates by submitting large numbers of non-marketable orders (often cancelling a very high percentage of them), which provide liquidity to the market electronically. As discussed in section IV.B. below, these proprietary traders often are labeled high-frequency traders, though the term does not have a settled definition and may encompass a variety of strategies in addition to passive market making.

2. ECNs

The five ECNs that actively trade NMS stocks collectively execute approximately 10.8% of share volume. Almost all ECN volume is executed by two ECNs operated by Direct Edge, which has submitted applications for registration of its two trading platforms as exchanges.[27] ECNs are regulated as alternative trading systems ("ATSs"). Regulation of ATSs is discussed in the next section below in connection with dark pools, which also are ATSs. The key characteristic of an ECN is that it provides its best-priced orders for inclusion in the consolidated quotation data, whether voluntarily or as required by Rule 301(b)(3) of Regulation ATS. In general, ECNs offer trading services (such as displayed and undisplayed order types, maker-taker pricing, and data feeds) that are analogous to those of registered exchanges.

3. Dark Pools

Dark pools are ATSs that, in contrast to ECNs, do not provide their best-priced orders for inclusion in the consolidated quotation data. In general, dark pools offer trading services to institutional investors and others that seek to execute large trading interest in a manner that will minimize the movement of prices against the trading interest and thereby reduce trading costs.[28] There are approximately 32 dark pools that actively trade NMS stocks, and they executed approximately 7.9% of share volume in NMS stocks in the third quarter of 2009.[29] ATSs, both dark pools and ECNs, fall within the statutory definition of an exchange, but are exempted if they comply with Regulation ATS. Regulation ATS requires ATSs to be registered as broker-dealers with the Commission, which entails becoming a member of the Financial Industry Regulatory Authority ("FINRA") and fully complying with the broker-dealer regulatory regime. Unlike a registered exchange, an ATS is not required to file proposed rule changes with the Commission or otherwise publicly disclose its trading services and fees. ATSs also do not have any self-regulatory responsibilities, such as market surveillance. The regulatory differences between registered exchanges and ATSs are addressed further in section IV.C.3. below.

Dark pools can vary quite widely in the services they offer their customers. For example, some dark pools, such as block crossing networks, offer specialized size discovery mechanisms that attempt to bring large buyers and sellers in the same NMS stock together anonymously and to facilitate a trade between them. The average trade size of these block crossing networks can be as high as 50,000 shares.[30] Most dark pools, though they may handle large orders, primarily execute trades with small sizes that are more comparable to the average size of trades in the public markets, which was less than 300 shares in July 2009.[31] These dark pools that primarily match smaller orders (though the matched orders may be "child" orders of much larger "parent" orders) execute more than 90% of dark pool trading volume.[32] The majority of this volume is executed by dark pools that are sponsored by multi-service broker-dealers. These broker-dealers also offer order routing services, trade as principal in the sponsored ATS, or both.

4. Broker-Dealer Internalization

The other type of undisplayed trading center is a non-ATS broker-dealer that internally executes trades, whether as agent or principal. Notably, many broker-dealers may submit orders to exchanges or ECNs, which then are included in the consolidated quotation data. The internalized executions of broker-dealers, however, primarily reflect liquidity that is not included in the consolidated quotation data. Broker-dealer internalization accordingly should be classified as undisplayed liquidity. There are a large number of broker-dealers that execute trades internally in NMS stocks—more than 200 publish execution quality statistics under Rule 605 of Regulation NMS.[33] Broker-dealer internalization accounts for approximately 17.5% of share volume in NMS stocks.

Broker-dealers that internalize executions generally fall into two categories—OTC market makers and block positioners. An OTC market maker is defined in Rule 600(b)(52) of Regulation NMS as "any dealer that holds itself out as being willing to buy and sell to its customers, or others, in the United States, an NMS stock for its own account on a regular or continuous basis otherwise than on a national securities exchange in amounts of less than block size." "Block size" is defined in Rule 600(b)(9) as an order of at least 10,000 shares or for a quantity of stock having a market value of at least $200,000. A block positioner generally means any broker-dealer in the business of executing, as principal or agent, block size trades for its customers. To facilitate trades, block positioners often commit their own capital to trade as principal with at least some part of the customer's block order.

Broker-dealers that act as OTC market makers and block positioners conduct

[27] Securities Exchange Act Release No. 60651 (September 11, 2009), 74 FR 47827 (September 17, 2009) (Notice of filing of applications for registration as national securities exchanges by EDGX Exchange, Inc. and EDGA Exchange, Inc.).

[28] *See* Non-Public Trading Interest Release, 74 FR at 61208–61209.

[29] Data compiled from Forms ATS submitted to Commission for 3d quarter 2009. Some OTC market makers offer dark liquidity primarily in a principal capacity and do not operate as ATSs. For purposes of this release, these trading centers are not defined as dark pools because they are not ATSs. These trading centers may, however, offer electronic dark liquidity services that are analogous to those offered by dark pools.

[30] *See, e.g., http://www.liquidnet.com/about/liquidStats.html* (average U.S. execution size in July 2009 was 49,638 shares for manually negotiated trades via Liquidnet's negotiation product); *http://www.pipelinetrading.com/AboutPipeline/CompanyInfo.aspx* (average trade size of 50,000 shares in Pipeline).

[31] *See, e.g., http://www.nasdaqtrader.com/trader/aspx?id=marketshare* (average size of NASDAQ matched trades in July 2009 was 228 shares); *http://nyxdata.com/nysedata/asp/factbook* (NYSE Group average trade size in all stocks traded in July 2009 was 267 shares).

[32] Data compiled from Forms ATS submitted to Commission for 3d quarter 2009.

[33] *See supra* note 23.

their business primarily by directly negotiating with customers or with other broker-dealers representing customer orders. OTC market makers, for example, appear to handle a very large percentage of marketable (immediately executable) order flow of individual investors that is routed by retail brokerage firms. A review of the order routing disclosures required by Rule 606 of Regulation NMS of eight broker-dealers with significant retail customer accounts reveals that nearly 100% of their customer market orders are routed to OTC market makers.[34] The review also indicates that most of these retail brokers either receive payment for order flow in connection with the routing of orders or are affiliated with an OTC market maker that executes the orders. The Rule 606 Reports disclose that the amount of payment for order flow generally is 0.1 cent per share or less.[35]

B. Linkages

Given the dispersal of liquidity across a large number of trading centers of different types, an important question is whether trading centers are sufficiently linked together in a unified national market system. Thus far in this release, the term "dispersed" has been used to describe the current market structure rather than "fragmented." The term "fragmentation" connotes a negative judgment that the linkages among competing trading centers are insufficient to achieve the Exchange Act objectives of efficiency, price transparency, best execution, and order interaction. Whether fragmentation is in fact a problem in the current market structure is a critically important issue on which comment is requested in section IV below in a variety of contexts. This section will give an overview of the primary types of linkages that operate in the current market structure—consolidated market data, trade-through protection, and broker routing services.

1. Consolidated Market Data

When Congress mandated a national market system in 1975, it emphasized that the systems for collecting and distributing consolidated market data would "form the heart of the national market system."[36] As described further below, consolidated market data includes both: (1) Pre-trade transparency—real-time information on the best-priced quotations at which trades may be executed in the future ("consolidated quotation data"); and (2) post-trade transparency—real-time reports of trades as they are executed ("consolidated trade data"). As a result, the public has ready access to a comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the trading day. This information serves an essential linkage function by helping assure that the public is aware of the best displayed prices for a stock, no matter where they may arise in the national market system. It also enables investors to monitor the prices at which their orders are executed and assess whether their orders received best execution.

Consolidated market data is collected and distributed pursuant to a variety of Exchange Act rules and joint-industry plans. With respect to pre-trade transparency, Rule 602 of Regulation NMS requires exchange members and certain OTC market makers that exceed a 1% trading volume threshold to provide their best-priced quotations to their respective exchanges or FINRA, and these self-regulatory organizations ("SROs"), in turn, are required to make this information available to vendors. Rule 604 of Regulation NMS requires exchange specialists and OTC market makers to display certain customer limit orders in their best-priced quotations provided under Rule 602. In addition, Rule 301(b)(3) of Regulation ATS requires an ATS that displays orders to more than one person in the ATS and exceeds a 5% trading volume threshold to provide its best-priced orders for inclusion in the quotation data made available under Rule 602.[37]

Importantly, the Commission's rules do not require the display of a customer limit order if the customer does not wish the order to be displayed.[38] Customers have the freedom to display or not display depending on their trading objectives. On the other hand, the selective display of orders generally is prohibited in order to prevent the creation of significant private markets and two-tiered access to pricing information.[39] Accordingly, the display of orders to some market participants generally will require that the order be included in the consolidated quotation data that is widely available to the public.

With respect to post-trade transparency, Rule 601 of Regulation NMS requires the equity exchanges and FINRA to file a transaction reporting plan regarding transactions in listed equity securities. The members of these SROs are required to comply with the relevant SRO rules for trade reporting. FINRA's trade reporting requirements apply to all ATSs that trade NMS stocks, both ECNs and dark pools, as well as to broker-dealers that internalize. FINRA currently requires members to report their trades as soon as practicable, but no later than 90 seconds.[40] FINRA has proposed to reduce the reporting time period to 30 seconds, noting that more than 99.9% of transactions are reported to FINRA in 30 seconds or less.[41]

Finally, Rule 603(b) of Regulation NMS requires the equity exchanges and FINRA to act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including an NBBO, on quotations for and transactions in NMS stocks. It also requires that consolidated information for each NMS stock be disseminated through a single plan processor.

To comply with these requirements, the equity exchanges and FINRA participate in three joint-industry plans ("Plans").[42] Pursuant to the Plans, three

[34] Review of Rule 606 Reports for 2d quarter 2009 of eight broker-dealers with substantial number of retail customer accounts.

[35] *Id.*

[36] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 93 (1975).

[37] The Commission has proposed lowering the trading volume threshold for order display obligations from 5% to 0.25%. Non-Public Trading Interest Release, 74 FR at 61213.

[38] Rule 604 of Regulation NMS, for example, explicitly recognizes the ability of customers to control whether their limit orders are displayed to the public. Rule 604(b)(2) provides an exception from the limit order display requirement for orders that are placed by customers who expressly request that the order not be displayed. Rule 604(b)(4) provides an exception for all block size orders unless the customer requests that the order be displayed.

[39] *See, e.g.*, Rule 301(b)(3) of Regulation ATS; Rule 602(a)(1) of Regulation NMS; Order Handling Rules Release, 61 FR at 48307 ("Although offering benefits to some market participants, widespread participation in these hidden markets has reduced the completeness and value of publicly available quotations contrary to the purposes of the NMS.").

[40] Securities Exchange Act Release No. 60960 (November 6, 2009), 74 FR 59272, 59273 (November 17, 2009) (File No. SR–FINRA–2009–061) (in its description of the proposed rule change, FINRA stated that "[a]lthough members would have 30 seconds to report, FINRA reiterates that—as is the case today—members must report trades as soon as practical and cannot withhold trade reports, *e.g.*, by programming their systems to delay reporting until the last permissible second").

[41] *Id.* (from February 23, 2009 through February 27, 2009, 99.90% of trades submitted to a FINRA Facility for public reporting were reported in 30 seconds or less).

[42] The three joint-industry plans are: (1) The CTA Plan, which is operated by the Consolidated Tape Association and disseminates transaction information for securities with their primary listing on exchanges other than NASDAQ; (2) the CQ Plan, which disseminates consolidated quotation information for securities with their primary listing on exchanges other than NASDAQ; and (3) the NASDAQ UTP Plan, which disseminates consolidated transaction and quotation information for securities with their primary listing on NASDAQ. The CTA Plan and CQ Plan are available at *http://www.nyxdata.com/nysedata/*

separate networks distribute consolidated market data for NMS stocks: (1) Network A for securities with their primary listing on the NYSE; (2) Network B for securities with their primary listing on exchanges other than the NYSE or NASDAQ; and (3) Network C for securities with their primary listing on NASDAQ. The three Networks establish fees for the data, which must be filed for Commission approval. The three Networks collect the applicable fees and, after deduction of Network expenses (which do not include the costs incurred by SROs to generate market data and provide such data to the Networks), allocate the remaining revenues to the SROs. The revenues, expenses, and allocations for each of the three Networks are set forth in Table 1 below:[43]

TABLE 1—2008 FINANCIAL INFORMATION FOR NETWORKS A, B, AND C

	Network A	Network B	Network C	Total
Revenues	$209,218,000	$119,876,000	$134,861,000	$463,955,000
Expenses	6,078,000	3,066,000	5,729,000	14,873,000
Net Income	203,140,000	116,810,000	129,132,000	449,082,000
Allocations:				
NASDAQ	47,845,000	34,885,000	60,614,000	143,343,000
NYSE Arca	37,080,000	38,235,000	26,307,000	101,622,000
NYSE	68,391,000	0	0	68,391,000
FINRA	24,325,000	16,458,000	20,772,000	61,555,000
NSX	7,100,000	11,575,000	17,123,000	35,798,000
ISE	15,260,000	1,477,000	1,883,000	18,620,000
NYSE Amex	1,000	9,760,000	14,000	9,775,000
BATS	2,356,000	2,770,000	1,538,000	6,664,000
CBOE	80,000	1,046,000	433,000	1,559,000
CHX	565,000	574,000	298,000	1,437,000
Phlx	134,000	30,000	146,000	310,000
BSE	3,000	.....	4,000	7,000

In addition to providing quotation and trade information to the three Networks for distribution in consolidated data, many exchanges and ECNs offer individual data feeds directly to customers that include information that is provided in consolidated data. The individual data feeds of exchanges and ECNs also can include a variety of other types of information, such as "depth-of-book" quotations at prices inferior to their best-priced quotations. Rule 603(a) of Regulation NMS requires all exchanges, ATSs, and other broker-dealers that offer individual data feeds to make the data available on terms that are fair and reasonable and not unreasonably discriminatory. Exchanges, ATSs, and other broker-dealers are prohibited from providing their data directly to customers any sooner than they provide their data to the plan processors for the Networks.[44] The fact that trading center data feeds do not need to go through the extra step of consolidation at a plan processor, however, means that such data feeds can reach end-users faster than the consolidated data feeds. The average latencies of the consolidation function at plan processors (from the time the processor receives information from the SROs to the time it distributes consolidated information to the public) are as follows: (1) Network A and Network B—less than 5 milliseconds for quotation data and less than 10 milliseconds for trade data; and (2) Network C—5.892 milliseconds for quotation data and 6.680 milliseconds for trade data.[45] The individual trading center data feeds are discussed below in section IV.B.2.b.

2. Trade-Through Protection

Another important type of linkage in the current market structure is the protection against trade-throughs provided by Rule 611 of Regulation NMS. A trade-through is the execution of a trade at a price inferior to a protected quotation for an NMS stock. A protected quotation must be displayed by an automated trading center, must be disseminated in the consolidated quotation data, and must be an automated quotation that is the best bid or best offer of an exchange or FINRA. Importantly, Rule 611 applies to all trading centers, not just those that display protected quotations. Trading center is defined broadly in Rule 600(b)(78) to include, among others, all exchanges, all ATSs (including ECNs and dark pools), all OTC market makers, and any other broker-dealer that executes orders internally, whether as agent or principal.

Rule 611(a)(1) requires all trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs of protected quotations, subject to the exceptions set forth in Rule 611(b). Protection against trade-throughs is an important linkage among trading centers because it provides a baseline assurance that: (1) Marketable orders will receive at least the best displayed price, regardless of the particular trading center that executes the order or where the best price is displayed in the national market system; and (2) quotations that are displayed at one trading center will not be bypassed by trades with inferior prices at any trading center in the national market system.

Rule 611 also helps promote linkages among trading centers by encouraging them, when they do not have available trading interest at the best price, to route marketable orders to a trading center that is displaying the best price. Although Rule 611 does not directly require such routing services (a trading center can, for example, cancel and return an order when it does not have the best price), competitive factors have

default.aspx?tabid=227. The NASDAQ UTP Plan is available at *http://www.utpplan.com.*

[43] The Network financial information for 2008 is preliminary and unaudited.

[44] Regulation NMS Release, 70 FR at 37567 ("Adopted Rule 603(a) will not require a market center to synchronize the delivery of its data to end-users with delivery of data by a Network processor to end-users. Rather independently distributed data could not be made available on a more timely basis than core data is made available to a Network processor. Stated another way, adopted Rule 603(a) prohibits an SRO or broker-dealer from transmitting data to a vendor or user any sooner than it transmits the data to a Network processor."). The plan processor for the CTA Plan and CQ Plan is the Securities Industry Automation Corporation ("SIAC"). The plan processor for the NASDAQ UTP Plan is NASDAQ.

[45] *Sources:* SIAC for Network A and Network B; NASDAQ for Network C.

led many trading centers to offer routing services to their customers. Prior to Rule 611, exchanges routed orders through an inflexible, partially manual system called the Intermarket Trading System ("ITS").[46] With Regulation NMS, however, the Commission adopted a "private linkages" approach that relies exclusively on brokers to provide routing services, both among exchanges and between customers and exchanges. These broker routing services are discussed next.

3. Broker Routing Services

In a dispersed and complex market structure with many different trading centers offering a wide spectrum of services, brokers play a significant role in linking trading centers together into a unified national market system. Brokers compete to offer the sophisticated technology tools that are needed to monitor liquidity at many different venues and to implement order routing strategies. To perform this function, brokers may monitor the execution of orders at both displayed and undisplayed trading centers to assess the availability of undisplayed trading interest. Brokers may, for example, construct real-time "heat maps" in an effort to discern and access both displayed and undisplayed liquidity at trading centers throughout the national market system.

Using their knowledge of available liquidity, many brokers offer smart order routing technology to access such liquidity. Many brokers also offer sophisticated algorithms that will take the large orders of institutional investors and others, divide a large "parent" order into many smaller "child" orders, and route the child orders over time to different trading centers in accordance with the particular trading strategy chosen by the customer. Such algorithms may be "aggressive," for example, and seek to take liquidity quickly at many different trading centers, or they may be "passive," and submit resting orders at one or more trading centers and await executions at favorable prices.

To the extent they help customers cope with the dispersal of liquidity among a large number of trading centers of different types and achieve the best execution of their customers' orders, the routing services of brokers can contribute to the broader policy goal of promoting efficient markets.

Under the private linkages approach adopted by Regulation NMS, market participants obtain access to the various trading centers through broker-dealers that are members or subscribers of the particular trading center.[47] Rule 610(a) of Regulation NMS, for example, prohibits an SRO trading facility from imposing unfairly discriminatory terms that would prevent or inhibit any person from obtaining efficient access through an SRO member to the displayed quotations of the SRO trading facility. Rule 610(c) limits the fees that a trading center can charge for access to its displayed quotations at the best prices. Rule 611(d) requires SROs to establish, maintain, and enforce rules that restrict their members from displaying quotations that lock or cross previously displayed quotations.

Section 6(a)(2) of the Exchange Act requires registered exchanges to allow any qualified and registered broker-dealer to become a member of the exchange—a key element in assuring fair access to exchange services. In contrast, the access requirements that apply to ATSs are much more limited. Regulation ATS includes two distinct types of access requirements: (1) order display and execution access in Rule 301(b)(3); and (2) fair access to ATS services in general in Rule 301(b)(5). An ATS must meet order display and execution access requirements if it displays orders to more than one person in the ATS and exceeds a 5% trading volume threshold.[48] An ATS must meet the general fair access requirement if it exceeds a 5% trading volume threshold. If an ATS neither displays orders to more than one person in the ATS nor exceeds a 5% trading volume threshold, Regulation ATS does not impose access requirements on the ATS.

An essential type of access that should not be overlooked is the fair access to clearance and settlement systems required by Section 17A of the Exchange Act. If brokers cannot efficiently clear and settle transactions at the full range of trading centers, they will not be able to perform their linkage function properly.

The linkage function of brokers also is supported by a broker's legal duty of best execution. This duty requires a broker to obtain the most favorable terms reasonably available when executing a customer order.[49] Of course, this legal duty is not the only pressure on brokers to obtain best execution. The existence of strong competitive pressure to attract and retain customers encourages brokers to provide high quality routing services to their customers. In this regard, Rules 605 and 606 of Regulation NMS are designed to support competition by enhancing the transparency of order execution and routing practices. Rule 605 requires market centers to publish monthly reports of statistics on their order execution quality. Rule 606 requires brokers to publish quarterly reports on their routing practices, including the venues to which they route orders for execution. As the Commission emphasized when it adopted the rules in 2000, "[b]y increasing the visibility of order execution and routing practices, the rules adopted today are intended to empower market forces with the means to achieve a more competitive and efficient national market system for public investors."[50] In section IV.A.1.b. below, comment is requested on whether Rules 605 and 606 should be updated for the current market structure.

IV. Request for Comments

This section will focus on three categories of issues that the Commission particularly wishes to present for comment—the performance of the current market structure, high frequency trading, and undisplayed liquidity. The Commission emphasizes, however, that it is interested in receiving comments on all aspects of the equity market structure that the public believes are important. The discussion in this release should not be construed as in any way limiting the scope of comments that will be considered.

This concept release focuses on the structure of the equity markets and does not discuss the markets for other types of instruments that are related to equities, such as options and OTC derivatives. The limited scope of this release is designed to focus on a discrete set of issues that have gained increased prominence in the equity markets. Comment is requested, however, on the extent to which the issues identified in this release are intertwined with other markets. For example, market participants may look to alternative instruments if they believe the equity markets are not optimal for their trading

[46] *See* Regulation NMS Release, 70 FR at 37538–37539 ("Although ITS promotes access among participants that is uniform and free, it also is often slow and limited.").

[47] *See* Regulation NMS Release, 70 FR at 37540 ("[M]any different private firms have entered the business of linking with a wide range of trading centers and then offering their customers access to those trading centers through the private firms' linkages. Competitive forces determine the types and costs of these private linkages.").

[48] The Commission has proposed reducing the threshold for order display and execution access to 0.25%. Non-Public Trading Interest Release, 74 FR at 61213. It has not proposed to change the threshold for fair access in general.

[49] *See, e.g.*, Regulation NMS Release, 70 FR at 37537–37538 (discussion of duty of best execution).

[50] Securities Exchange Act Release No. 43590 (November 17, 2000), 65 FR 75414, 75415 (December 1, 2000) (Disclosure of Order Execution and Routing Practices).

objectives. Should the Commission consider the extent to which instruments substitute for one another in evaluating equity market structure?

In addition, comment is requested on the impact of globalization on market structure. How does global competition for trading activity impact the U.S. market structure? Should global competition affect the approach to regulation in the U.S.? Will trading activity and capital tend to move either to the U.S. or overseas in response to different regulation in the U.S.? How should the Commission consider these globalization issues in its review of market structure?

A. Market Structure Performance

The secondary markets for NMS stocks are essential to the economic success of the country and to the financial well-being of individual Americans. High quality trading markets promote capital raising and capital allocation by establishing prices for securities and by enabling investors to enter and exit their positions in securities when they wish to do so.[51] The Commission wishes to request comment broadly on how well or poorly the current market structure is performing its vital economic functions.

In recent months, the Commission has heard a variety of concerns about particular aspects of the current market structure, as well as the view that recent improvements to the equity markets have benefitted both individual and institutional investors. The concerns about market structure often have related to high frequency trading and various types of undisplayed liquidity. Prior to discussing these particular areas of concern in this release, the Commission believes it is important to assess more broadly the performance of the market structure, particularly for long-term investors and for businesses seeking to raise capital. Assessing overall market structure performance should help provide context for particular concerns, as well as the nature of any regulatory response that may be appropriate to address concerns.

1. Long-Term Investors

In assessing the performance of the current equity market structure and whether it is meeting the relevant Exchange Act objectives, the Commission is particularly focused on the interests of long-term investors. These are the market participants who provide capital investment and are willing to accept the risk of ownership in listed companies for an extended period of time. Unlike long-term investors, professional traders generally seek to establish and liquidate positions in a shorter time frame. Professional traders with these short time frames often have different interests than investors concerned about the long-term prospects of a company.[52] For example, short-term professional traders may like short-term volatility to the extent it offers more trading opportunities, while long-term investors do not. The net effect of trading strategies pursued by various short-term professional traders, however, may not increase volatility and may work to dampen volatility.

Nevertheless, the interests of investors and professional traders may at times be aligned. Indeed, the collective effect of professional traders competing to profit from short-term trading strategies can work to the advantage of long-term investors. For example, as just noted, short-term trading strategies may work to dampen short-term volatility. Professional traders with an informed view of prices can promote efficient pricing. Professional traders competing to provide liquidity may narrow spreads and give investors the benefit of better prices when they simply want to trade immediately at the best available price.

Given the difference in time horizons, however, the trading needs of long-term investors and short-term professional traders often may diverge. Professional trading is a highly competitive endeavor in which success or failure may depend on employing the fastest systems and the most sophisticated trading strategies that require major expenditures to develop and operate. Such systems and strategies may not be particularly useful, in contrast, for investors seeking to establish a long-term position rather than profit from fleeting price movements. Where the interests of long-term investors and short-term professional traders diverge, the Commission repeatedly has emphasized that its duty is to uphold the interests of long-term investors.[53]

Comment is requested on the practicality of distinguishing the interests of long-term investors from those of short-term professional traders when assessing market structure issues. In what circumstances should an investor be considered a "long-term investor"? If a time component is needed to define this class of investor, how should the Commission determine the length of expected ownership that renders an investor "long-term"? Under what circumstances would a distinction between a long-term investor and a short-term professional trader become unclear, and how prevalent are these circumstances? To the extent that improved market liquidity and depth promote the interests of long-term investors by leading to reduced transaction costs, what steps should the Commission consider taking to promote market liquidity and depth?

Long-term investors include individuals that invest directly in equities and institutions that invest on behalf of many individuals. The Commission is interested in hearing how all types of individual investors and all sizes of institutional investors—small, medium, and large—are faring in the current market structure. For example, has the current market structure become so dispersed and complex that only the largest institutions can afford to deploy their own highly sophisticated trading tools? If so, are smaller institutions able to trade effectively? Some broker-dealers offer sophisticated trading tools, such as smart routing and algorithmic trading. How accessible are these trading tools to smaller institutions? Are the costs of paying for these tools so high that they are effectively inaccessible? Moreover, to the extent that a competitive advantage flows from these trading

[51] *See, e.g.*, S. Report 94–75 at 3 ("The rapid attainment of a national market system as envisaged by this bill is important, therefore, not simply to provide greater investor protection and bolster sagging investor confidence but also to assure that the country maintains a strong, effective and efficient capital raising and capital allocating system in the years ahead. The basic goals of the Exchange Act remain salutary and unchallenged: to provide fair and honest mechanisms for the pricing of securities, to assure that dealing in securities is fair and without undue preferences or advantages among investors, to ensure that securities can be purchased and sold at economically efficient transaction costs, and to provide, to the maximum degree practicable, markets that are open and orderly.").

[52] *See* Regulation NMS Release, 70 FR at 37500 ("The Commission recognizes that it is important to avoid false dichotomies between the interests of short-term traders and long-term investors, and that many difficult line-drawing exercises can arise in precisely defining the difference between the two terms. For present purposes, however, these issues can be handled by simply noting that it makes little sense to refer to someone as 'investing' in a company for a few seconds, minutes, or hours.") (citation omitted).

[53] *See, e.g.*, Flash Order Release, 74 FR at 48635–48636; Regulation NMS Release, 70 FR at 37499–37501; Fragmentation Concept Release, 65 FR at 10581 n. 26; *see also* S. Rep. No. 73–1455, 73rd Cong., 2d Sess. 5 (1934) ("Transactions in securities on organized exchanges and over-the-counter are affected with the national public interest. * * * In former years transactions in securities were carried on by a relatively small portion of the American people. During the last decade, however, due largely to the development of means of communication * * * the entire Nation has become acutely sensitive to the activities on the securities exchanges. While only a fraction of the multitude who now own securities can be regarded as actively trading on the exchanges, the operations of these few profoundly affect the holdings of all.").

tools, does that competitive advantage help to promote and enable competition, beneficial innovation, and, ultimately, enhanced market quality? Is there a risk that certain competitive advantages may reduce competition or lead to detrimental innovations? To what extent is it important for market participants to be allowed to gain competitive advantages, such as by using more sophisticated trading tools?

In addition, the Commission recognizes that there is wide variation in types of equity securities and that there may be important differences in market performance among the different types. With respect to corporate equities, for example, the Commission is interested in how market structure impacts stocks of varying levels of market capitalization (for example, top tier, large, middle, and small). A vital function of the equity markets is to support the capital raising function, including capital raising by small companies. The Commission recognizes that small company stocks may trade differently than large company stocks and requests comment specifically on how the market structure performs for smaller companies and whether it supports the capital raising function for them.

a. Market Quality Metrics

Given these broad concerns for all types of long-term investors and the full range of equities, what are useful metrics for assessing the performance of the current market structure? In the past, the Commission and its staff have considered a wide variety of metrics, most of which have applied to smaller orders (such as 10,000 shares or less).[54] These metrics have included measures of spreads—the difference between the prices that buyers pay and sellers receive when they are seeking to trade immediately at the best prices. Spread measures include quoted spreads, effective spreads (which reflects whether investors receive prices that are better than, equal to, or worse than quoted spreads), and realized spreads (which reflects how investors are affected by subsequent price movements in a stock). Another often used metric has been speed of execution.[55]

Short-Term Volatility. Spreads and speed of execution may not, however, give a full picture of execution quality, even for the small orders of individual investors that generally will be fully executed in one transaction (unlike the large orders of institutional investors that may require many smaller executions). For example, short-term price volatility may harm individual investors if they are persistently unable to react to changing prices as fast as high frequency traders. As the Commission previously has noted, long-term investors may not be in a position to assess and take advantage of short-term price movements.[56] Excessive short-term volatility may indicate that long-term investors, even when they initially pay a narrow spread, are being harmed by short-term price movements that could be many times the amount of the spread.

The Commission has used a variety of measures of short-term volatility, including variance ratios (for example, 5 minute return variance to 60 minute return variance, 1 day return variance to 1 week return variance, and 1 day return variance to 4 week return variance).[57] Variance ratios are useful because they focus on short-term volatility that may be directly related to market structure quality, as opposed to long-term volatility that may be much more affected by fundamental economic forces that are independent of market structure quality. Another possible metric for assessing whether investors are harmed by short-term volatility is realized spread, which indicates whether prices moved for or against the submitter of the order after the order was executed. Rule 605, for example, measures realized spreads based on quotations 5 minutes after the time of order execution.

Finally, the Commission has evaluated various measures of the depth that is immediately available to fill orders. These metrics include fill rates for limit orders, quoted size at the inside prices, the effect of reserve size and undisplayed size at the inside prices or better, and quoted depth at prices away from the inside.

Metrics for Smaller Orders. Comment is requested on whether these metrics that focus on the execution of smaller orders continue to be useful. Which metrics are most useful in today's market structure? Are there other useful metrics not listed above? Are there other relevant metrics that reflect how individual investors are likely to trade? For example, a significant number of individual investor orders are submitted after regular trading hours when such investors have an opportunity to evaluate their portfolios. These orders typically are executed at opening prices. What are the best metrics for assessing whether individual investor orders are executed fairly and efficiently at the opening? Are there other particular times or contexts in which retail investors often trade and, if so, what are the best metrics for determining whether they are treated fairly and efficiently in those contexts as well?

Measuring Institutional Investor Transaction Costs. Most of the Commission's past analyses of market performance have focused on the execution of smaller orders (for example, less than 10,000 shares), rather than attempting to measure the overall transaction costs of institutional investors to execute large orders (for example, greater than 100,000 shares). Measuring the transaction costs of institutional investors that need to trade in large size can be extremely complex.[58] These large orders often are

[54] *See, e.g.,* Memorandum to File from Office of Economic Analysis dated December 15, 2004 regarding comparative analysis of execution quality on NYSE and NASDAQ based on a matched sample of stocks ("Comparative Analysis of Execution Quality") (available at *http://www.sec.gov/spotlight/regnms.htm*); Memorandum to File from Office of Economic Analysis dated December 15, 2004 regarding Analysis of Volatility for Stocks Switching from Nasdaq to NYSE (available at *http://www.sec.gov/spotlight/regnms.htm*); Office of Economic Analysis, Report on Comparison of Order Executions Across Equity Market Structures (January 8, 2001) ("Report on Comparison of Order Executions") (available at *http://www.sec.gov/news/studies/ordrxmkt.htm*); Commission, Report on the Practice of Preferencing (April 15, 1997) (available at *http://www.sec.gov/news/studies/studiesarchive/1997archive.shtml*).

[55] When assessing market structure during the development of Regulation NMS, for example, Commission staff used Rule 605 data to measure quoted spreads, effective spreads, realized spreads, price impact, net price improvement, execution speed, and fill rates. All of the cost values were calculated both in terms of absolute value (cents) and in terms of proportional costs as a percentage of stock prices. Comparative Analysis of Execution Quality at 8–9.

[56] Fragmentation Concept Release, 65 FR at 10581 n. 26 ("In theory, short-term price swings that hurt investors on one side of the market can benefit investors on the other side of the market. In practice, professional traders, who have the time and resources to monitor market dynamics closely, are far more likely than investors to be on the profitable side of short-term price swings (for example, by buying early in a short-term price rise and selling early before the price decline).").

[57] Variance ratios are calculated by comparing return variances for a short time period with return variances for a longer time period. One of the advantages of this measure of volatility is that "there is a built-in control for the underlying uncertainty as to the 'true' value of the stock. For example, the high variance of returns on technology stocks is to be expected given the high uncertainty as to their future cash flows. The point is that this uncertainty will manifest itself in *both* the daily and weekly return variances. When [Commission staff] divide the weekly return by the daily return, the natural uncertainty associated with the stock 'washes out' and [Commission staff] are left with a measure associated with transaction costs or some other form of inefficiency." Report on Comparison of Order Executions, *supra* note 54, at 18.

[58] *See generally* Investment Company Act Release No. 26313 (December 18, 2003), 68 FR 74820, 74821 (December 24, 2003) (Request for Comments on Measures to Improve Disclosure of Mutual Fund Transaction Costs) ("The Commission is aware of the need for transparency of mutual fund fees and expenses and committed to improving disclosure of

broken up into smaller child orders and executed in a series of transactions. Metrics that apply to small order executions may miss how well or poorly the large order traded overall. Direct measures of large order transaction costs typically require access to institutional order data that is not publicly available. In this regard, a few trading analytics firms with access to institutional order data publish periodic analyses of institutional investor transaction costs.[59] These analyses allow such costs to be tracked over time to determine whether they are improving or worsening. Comment is requested on these published analyses generally and whether they accurately reflect the transaction costs experienced by institutional investors. Are there other studies or analyses of institutional trading costs that the Commission should consider? Comment is requested in general on other means for assessing the transaction costs of institutional investors in the current market structure. For example, are any of the measures of short-term volatility discussed above useful for assessing the transactions costs of larger orders and, if so, how?

Trend of Market Quality Metrics. With respect to all of the metrics that are useful for assessing market structure performance for long-term investors, the Commission is interested in whether commenters believe they show improvement or worsening in recent years. For example, do the relevant metrics indicate that market quality has improved or worsened over the last ten years and the last five years? Have markets improved or worsened more recently, since January 2009? Which of the recent developments in market structure do you consider to have the greatest effect on market quality? The Commission wishes to hear about any current regulations that may be harming, rather than improving, market quality. Specifically, how could any current regulations be modified to fit more properly with the current market?

Recognizing that there is no such thing as a perfect market structure that entirely eliminates transaction costs, the Commission believes that an understanding of trends is important because they provide a useful, pragmatic touchstone for assessing the goals with respect to market structure performance.[60]

Effect of Broad Economic Forces. The Commission notes that many metrics of market performance may be affected by broad economic forces, such as the global financial crisis during the Autumn of 2008, that operate independently of market structure. Periods of high volatility may be associated with high intermediation costs. This may reflect both compensation for risk assumed by liquidity providers and the higher demand for immediacy by long-term investors. How should the effect of these economic forces be adjusted for in assessing the performance of market structure over the last ten years, five years, and the last year? For example, the CBOE Volatility Index ("VIX") reached record levels during 2008.[61] The VIX is sometimes referred to as the "fear index" because it measures expected volatility of the S&P 500 Index over the next 30 calendar days.[62] To what extent are metrics of market structure performance correlated with the VIX or other analogous measures of volatility? Is the level of the VIX largely independent of market structure quality or are the level of the VIX and market structure quality interdependent? Given that the VIX measures expected volatility over the next 30 days, how important is the VIX to long-term investors?

b. Fairness of Market Structure

The Commission requests comment on whether the current market structure is fair for long-term investors. For example, the speed of trading has increased to the point that the fastest traders now measure their latencies in microseconds. Is it necessary or economically feasible for long-term investors to expend resources on the very fastest and most highly sophisticated systems or otherwise obtain access to these systems? If not, does the fact that professional traders likely always will be able to trade faster than long-term investors render the equity markets unfair for these investors? Or do the different trading needs and objectives of long-term investors mean that the disparities in speed in today's market structure are not significant to the interests of such investors? In addition, what standards should the Commission apply in assessing the fairness of the equity markets? For example, is it unfair for market participants to obtain a competitive advantage by investing in technology and human resources that enable them to trade more effectively and profitably than others?

Rules 605 and 606 and Other Tools to Protect Investor Interests. In assessing the fairness of the current market structure, the Commission is interested in whether long-term investors and their brokers have the tools they need to protect their own interests in a dispersed and complex market structure. Do, for example, broker-dealers provide routing tools to their agency customers that are as powerful and effective as the routing tools they may use for their proprietary trading? If not, is this difference in access to technology unfair to long-term investors? Or is a broker-dealer's ability to develop and use more powerful and effective trading tools a competitive advantage that spurs competition and beneficial innovation?

In addition, comment is requested on Rules 605 and 606, which were adopted in 2000. Do these rules need to be updated and, if so, in what respects? Do Rule 605 and Rule 606 reports continue to provide useful information for investors and their brokers in assessing the quality of order execution and routing practices? The Commission

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the costs that are borne by mutual fund investors; but it is mindful of the complexities associated with identifying, measuring, and accounting for transaction costs.").

[59] *See, e.g.,* U.S. Government Accountability Office, "Securities Markets: Decimal Pricing Has Contributed to Lower Trading Costs and a More Challenging Trading Environment," at 96 (May 2005) ("We obtained data from three leading firms that collect and analyze information about institutional investors' trading costs. These trade analytics firms * * * obtain trade data directly from institutional investors and brokerage firms and calculate trading costs, including market impact costs (the extent to which the security changes in price after the investor begins trading), typically for the purpose of helping investors and traders limit costs of trading. These firms also aggregate client data so as to approximate total average trading costs for all institutional investors. Generally, the client base represented in aggregate cost data can be used to make generalizations about the institutional investor industry."); *see also* Pam Abramowitz, *Technology Drives Trading Costs,* Institutional Investor (November 4, 2009) (13th annual survey of transaction costs conducted for Institutional Investor Magazine by Elkins/McSherry); Elkins McSherry LLC, "Trading Cost Averages and Volatility Continued to Decline in 3Q09" (November 2009) (available at *https://www.elkinsmcsherry.com/em/pdfs/Newsletters/Nov_2009_newsletter.pdf*); Investment Technology Group, Inc., "ITG Global Trading Cost Review: 2009 Q2" (September 15, 2009) (available at *http://www.itg.com/news_events/papers/ITGGlobalTradingCostReview_2009Q2.pdf*).

[60] A very recent study, for example, examined trading activity trends through the end of 2008. Chordia, Tarun, Richard Roll, & Avanidar Subrahmanyam, *Why Has Trading Volume Increased?* (January 6, 2010). It focused on comparisons of pre- and post-decimal trading in NYSE-listed stocks (subperiods from 1993–2000 and 2001–2008). Among the study's findings are that average effective spreads decreased significantly (from 10.2 cents to 2.2 cents for small trades (<$10,000) and from 10.7 cents to 2.7 cents for large trades (>$10,000)), while average depth available at the inside bid and offer declined significantly (from 11,130 shares to 2797 shares).

[61] *See infra* note 81 and accompanying text.

[62] *See* Chicago Board Options Exchange, "The CBOE Volatility Index—VIX," at 1, 4 ("VIX measures 30-day expected volatility of the S&P 500 Index. The components of VIX are near- and next-term put and call options, usually in the first and second SPX contract months.") (available at *http://www.cboe.com/micro/vix/vixwhite.pdf*).

notes that Rule 606 statistics reveal that brokers with significant retail customer accounts send the great majority of non-directed marketable orders to OTC market makers that internalize executions, often pursuant to payment for order flow arrangements.[63] Do individual investors understand and pay attention to Rule 605 and 606 statistics? If not, what market participants, if any, make decisions based on this data? Are those decisions beneficial to individual investors?

Rule 605 currently requires that the speed of execution for immediately executable orders (market orders and marketable limit orders) be disclosed to the tenth of a second. Do investors and brokers need more finely tuned statistics, such as hundredths or thousandths of a second? For non-marketable limit orders with prices that render them not immediately executable at the best displayed prices, the shortest time category is 0–9 seconds. Would a shorter time period be useful for investors that use non-marketable limit orders? In addition, Rule 605 does not include any statistics measuring the execution quality of orders submitted for execution at opening or closing prices. Would such statistics be helpful to investors? Rule 605 also does not include any statistics measuring commission costs of orders, access fees, or liquidity rebates. Would such statistics be helpful to investors?

Rule 605 does not require disclosure of the amount of time that canceled non-marketable orders are displayed in the order book of trading center before cancellation. Considering the high cancellation percentage of non-marketable orders, should Rule 605 require the disclosure of the average time that canceled orders were displayed in the order book? Conversely, should Rule 605 exclude or otherwise distinguish canceled orders with a very limited duration (such as less than one second)?

Moreover, Rules 605 and 606 were drafted primarily with the interests of individual investors in mind and are focused on the execution of smaller orders. Orders with large sizes, for example, are excluded from both rules.[64] Should the rules be updated to address the interests of institutional investors in efficiently executing large orders (whether in one large trade or many smaller trades)? If so, what metrics would be useful for institutional investors?

Intermarket sweep orders ("ISOs") are mostly used by institutional traders.[65] Rule 605 disclosures do not report regular orders and ISOs separately.[66] Would a distinction between ISO and non-ISO marketable orders benefit individual and/or institutional investors? Should any other order types be treated differently in Rule 605 reports?

More broadly, are there any approaches to improving the transparency of the order routing and order execution practices for institutional investors that the Commission should consider? For example, do institutional investors currently have sufficient information about the smart order routing services and order algorithms offered by their brokers? Would a regulatory initiative to improve disclosure of these broker services be useful and, if so, what type of initiative should the Commission pursue?

2. Other Measures

The Commission requests comment on any other measures of market structure performance that the public believes the Commission should consider. For example, are there useful metrics for assessing the quality of price discovery in equity markets, such as how efficiently prices respond to new information? In addition, what is the best approach for assessing whether the secondary markets are appropriately supporting the capital-raising function for companies of all sizes?

B. High Frequency Trading

One of the most significant market structure developments in recent years is high frequency trading ("HFT"). The term is relatively new and is not yet clearly defined. It typically is used to refer to professional traders acting in a proprietary capacity that engage in strategies that generate a large number of trades on a daily basis. These traders could be organized in a variety of ways, including as a proprietary trading firm (which may or may not be a registered broker-dealer and member of FINRA), as the proprietary trading desk of a multi-service broker-dealer, or as a hedge fund (all of which are referred to hereinafter collectively as a "proprietary firm"). Other characteristics often attributed to proprietary firms engaged in HFT are: (1) The use of extraordinarily high-speed and sophisticated computer programs for generating, routing, and executing orders; (2) use of co-location services and individual data feeds offered by exchanges and others to minimize network and other types of latencies; (3) very short time-frames for establishing and liquidating positions; (4) the submission of numerous orders that are cancelled shortly after submission; and (5) ending the trading day in as close to a flat position as possible (that is, not carrying significant, unhedged positions overnight). Estimates of HFT volume in the equity markets vary widely, though they typically are 50% of total volume or higher.[67] By any measure, HFT is a dominant component of the current market structure and is likely to affect nearly all aspects of its performance.

The Commission today is proposing an initiative to address a discrete HFT concern that the Commission already has identified. It would address the use of various types of arrangements to obtain the fastest possible market access.[68] This concept release is intended to request comment on the full range of concerns with respect to HFT,

[63] *See supra* note 34 and accompanying text.

[64] Orders with a size of 10,000 shares or greater are exempt from Rule 605 reporting. *See generally* Staff Legal Bulletin 12R: Frequently Asked Questions About Rule 11Ac1–5 (Revised), now Regulation NMS Rule 605, Question 26: Exemption of Block Orders (available at *http://www.sec.gov/divisions/marketreg/disclosure.htm*). Rule 606 requires broker-dealers to report on their routing of "non-directed orders," which is defined in Rule 600(b)(48) as limited to customer orders. "Customer order" is defined in Rule 600(b)(18) of Regulation NMS to exclude an order in NMS stocks with a market value of at least $200,000. *See generally* Staff Legal Bulletin 13A: Frequently Asked Questions About Rule 11Ac1–6, now Regulation NMS Rule 606, Question 6: Definition of Customer Orders—Large Order Exclusion (available at *http://www.sec.gov/divisions/marketreg/disclosure.htm*).

[65] Intermarket sweep orders are exceptions provided in Rule 611(b)(5) and (6) that enable an order router to sweep one or more price levels simultaneously at multiple trading centers without violating trade-through restrictions. As defined in Rule 600(b)(30) of Regulation NMS, intermarket sweep orders must be routed to execute against the full displayed size of any protected quotation that otherwise would be traded through by the orders. In addition, a single ISO can be routed to the best displayed price at the time of routing to help assure an execution even if quotations change after the order is routed. *See* Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS, Question 4.04 (April 4, 2008 Update) (available at *http://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm*).

[66] An ISO is excluded from a Rule 605 report as requiring special handling if it has a limit price that is inferior to the NBBO at the time of order receipt. All other ISOs should be included in a Rule 605 report, absent another applicable exclusion. *Id.* at Question 7.06.

[67] *See, e.g.,* Jonathan Spicer and Herbert Lash, *Who's Afraid of High-Frequency Trading?,* Reuters.com, December 2, 2009 (available at *http://www.reuters.com/article/idUSN173583920091202*) ("High-frequency trading now accounts for 60 percent of total U.S. equity volume, and is spreading overseas and into other markets."); Scott Patterson and Geoffrey Rogow, *What's Behind High-Frequency Trading,* Wall Street Journal, August 1, 2009 ("High frequency trading now accounts for more than half of all stock-trading volume in the U.S.");

[68] Market Access Release, *supra* note 15.

in contrast to the discrete concerns the Commission already has identified.

The lack of a clear definition of HFT, however, complicates the Commission's broader review of market structure issues. The lack of clarity may, for example, contribute to the widely varying estimates of HFT volume in today's equity markets. Although the term itself clearly implies a large volume of trades, some concerns that have been raised about particular strategies used by proprietary firms may not necessarily involve a large number of trades. Indeed, any particular proprietary firm may simultaneously be employing many different strategies, some of which generate a large number of trades and some that do not. Conceivably, some of these strategies may benefit market quality and long-term investors and others could be harmful.

In sum, the types of firms engaged in professional trading and the types of strategies they employ can vary considerably. Rather than attempt any single, precise definition of HFT, this release will focus on particular strategies and tools that may be used by proprietary firms and inquire whether these strategies and tools raise concerns that the Commission should address.

1. Strategies

Comment generally is requested on the strategies employed by proprietary firms in the current market structure. What are the most frequently used strategies? What are the key features of each strategy? What technology tools and other market structure components (such as exchange fee structures) are necessary to implement each strategy? Have any of these strategies been a competitive response to particular market structure components or to particular problems or challenges in the current market structure? Does implementation of a specific strategy benefit or harm market structure performance and the interests of long-term investors? Is it possible to reliably identify harmful strategies through, for example, such metrics as adding or taking liquidity, or trading with (momentum) or against (contrarian) prevailing price movements? Are there regulatory tools that would address harmful strategies while at the same time have a minimal impact on beneficial strategies?

Do commenters believe that the overall use of harmful strategies by proprietary firms is sufficiently widespread that the Commission should consider a regulatory initiative to address the problem? What type of regulatory initiative would be most effective? For example, should there be a minimum requirement on the duration of orders (such as one second) before they can be cancelled, whether across the board, in particular contexts, or when used by particular types of traders? If so, what would be an appropriate time period? Should the use of "pinging" orders by all or some traders to assess undisplayed liquidity be prohibited or restricted in all or some contexts? [69]

The use of certain strategies by some proprietary firms has, in many trading centers, largely replaced the role of specialists and market makers with affirmative and negative obligations.[70] Has market quality improved or suffered from this development? How important are affirmative and negative obligations to market quality in today's market structure? Are they more important for any particular equity type or during certain periods, such as times of stress? Should some or all proprietary firms be subject to affirmative or negative trading obligations that are designed to promote market quality and prevent harmful conduct? Is there any evidence that proprietary firms increase or reduce the amount of liquidity they provide to the market during times of stress?

As noted above, the Commission wishes to request comment broadly on all strategies used by proprietary firms. To help present issues for comment, but without limiting the broad request, this release next will briefly discuss four broad types of trading strategies that often are associated with proprietary firms—passive market making, arbitrage, structural, and directional. The discussion of directional strategies will focus on two directional strategies that may pose particular problems for long-term investors—order anticipation and momentum ignition. The Commission notes that many of the trading strategies discussed below are not new. What is new is the technology that allows proprietary firms to better identify and execute trading strategies.

a. Passive Market Making

Passive market making primarily involves the submission of non-marketable resting orders (bids and offers) that provide liquidity to the marketplace at specified prices. While the proprietary firm engaging in passive market making may sometimes take liquidity if necessary to liquidate a position rapidly, the primary sources of profits are from earning the spread by buying at the bid and selling at the offer and capturing any liquidity rebates offered by trading centers to liquidity-supplying orders. If the proprietary firm is layering the book with multiple bids and offers at different prices and sizes, this strategy can generate an enormous volume of orders and high cancellation rates of 90% of more. The orders also may have an extremely short duration before they are cancelled if not executed, often of a second or less.

Although proprietary firms that employ passive market making strategies are a new type of market participant, the liquidity providing function they perform is not new. Professional traders with a permanent presence in the marketplace, standing ready to buy and sell on an ongoing basis, are a perennial type of participant in financial markets. Proprietary firms largely have replaced more traditional types of liquidity providers in the equity markets, such as exchange specialists on manual trading floors and OTC market makers that trade directly with customers. In contrast, proprietary firms generally are not given special time and place privileges in exchange trading (nor are they subject to the affirmative and negative trading obligations that have accompanied such privileges). In addition, proprietary firms typically do not trade directly with customer order flow, but rather trade by submitting orders to external trading venues such as exchanges and ATSs.[71]

Proprietary firms participate in the marketplace in some ways that are similar to both exchange specialists and OTC market makers. Indeed, a single firm or its affiliates may operate simultaneously in all three capacities. For example, proprietary traders are like

[69] A "pinging" order is an immediate-or-cancel order that can be used to search for and access all types of undisplayed liquidity, including dark pools and undisplayed order types at exchanges and ECNs. The trading center that receives an immediate-or-cancel order will execute the order immediately if it has available liquidity at or better than the limit price of the order and otherwise will immediately respond to the order with a cancellation. As noted in section IV.B.1.d. below, there is an important distinction between using tools such as pinging orders as part of a normal search for liquidity with which to trade and using such tools to detect and trade in front of large trading interest as part of an "order anticipation" trading strategy.

[70] Affirmative and negative obligations generally are intended to promote market quality. Affirmative obligations might include a requirement to consistently display high quality, two-sided quotations that help dampen price moves, while negative obligations might include a restriction on "reaching across the market" to execute against displayed quotations and thereby cause price moves.

[71] It is possible for a single firm to provide liquidity in a variety of different forms. Some firms, for example, may blur the distinction between proprietary firms and OTC market makers by both trading actively in external trading centers and operating trading centers themselves that offer customers direct electronic access to their liquidity.

exchange specialists in the sense that they transact most of their volume in public markets where their orders will trade with all comers. Unlike the traditional floor specialists, however, they do not have time and place advantages, except insofar as their sophistication and size enables them to employ the fastest, most powerful systems for generating, routing, and cancelling orders and thereby most take advantage of the current highly automated market structure (including such tools as individual trading center data feeds and co-location discussed below in section IV.B.2.). Proprietary traders are analogous to OTC market makers in that they have considerable flexibility in trading without significant negative or affirmative obligations for overall market quality. But unlike an OTC market maker, a proprietary firm typically does not trade directly with customers. The proprietary firm therefore may not have ongoing relationships with customers that can pressure the proprietary trader to provide liquidity in tough trading conditions or less actively traded stocks.

Quality of Liquidity. The Commission requests comment on the passive market making strategies of proprietary firms. To what extent do proprietary firms engage in the types of strategies described above? Do they provide valuable liquidity to the market for top-tier, large, medium, and small capitalization stocks? Has market quality improved or worsened as traditional types of liquidity providers have been replaced by proprietary firms? Does the very brief duration of many of their orders significantly detract from the quality of liquidity in the current market structure? For example, are their orders accurately characterized as phantom liquidity that disappears when most needed by long-term investors and other market participants? Or, is the collective result of many different proprietary firms engaging in passive market making a relatively stable quoted market in which there are many quotation updates (primarily updates to size of the NBBO), but relatively few changes in the price of the NBBO? What types of data are most useful in assessing the quality of liquidity provided by proprietary firms?

Liquidity Rebates. One important aspect of passive market making is the liquidity rebates offered by many exchanges and ECNs when resting orders that add liquidity are accessed by those seeking to trade immediately by taking liquidity. The Commission requests comment on the volume of high frequency trading geared toward earning liquidity rebates and on the benefits or drawbacks of such trading. Are liquidity rebates unfair to long-term investors because they necessarily will be paid primarily to proprietary firms engaging in passive market making strategies? Or do they generally benefit long-term investors by promoting narrower spreads and more immediately accessible liquidity? Do liquidity rebates reward proprietary firms for any particular types of trading that do not benefit long-term investors or market quality? For example, are there risk-free trading strategies driven solely by the ability to recoup a rebate that offer little or no utility to the marketplace? Are these strategies most likely when a trading center offers inverted pricing and pays a liquidity rebate that is higher than its access fee for taking liquidity? Does the distribution of consolidated market data revenues pursuant to the Plans lead to the current trading center pricing schedules? If so, would there be any benefits to restructuring the Plans and, if so, how?

b. Arbitrage

An arbitrage strategy seeks to capture pricing inefficiencies between related products or markets. For example, the strategy may seek to identify discrepancies between the price of an ETF and the underlying basket of stocks and buy (sell) the ETF and simultaneously sell (buy) the underlying basket to capture the price difference. Many of the trades necessary to execute an arbitrage strategy are likely to involve taking liquidity, in contrast to the passive market making strategy that primarily involves providing liquidity. In this respect, it is quite possible for a proprietary firm using an arbitrage strategy to trade with a proprietary firm using a passive market making strategy, and for both firms to end up profiting from the trade. Arbitrage strategies also generally will involve positions that are substantially hedged across different products or markets, though the hedged positions may last for several days or more.

The Commission requests comment on arbitrage strategies and whether they benefit or harm the interests of long-term investors and market quality in general. To what extent do proprietary firms engage in the types of strategies described above? For example, what is the volume of trading attributable to arbitrage involving ETFs (both in the ETF itself and in any underlying securities) and has the increasing popularity of ETFs in recent years significantly affected volume and trading patterns in the equity markets? If so, has the impact of ETF trading been positive or negative for long-term investors and overall market quality?

In addition, to what extent are arbitrage strategies focused on capturing pricing differences among the many different trading centers in NMS stocks? For example, do these arbitrage strategies significantly depend on latencies among trading center data feeds and the consolidated market data feeds? Are these strategies beneficial for long-term investors and market structure quality? If not, how should such strategies be addressed?

c. Structural

Some proprietary firm strategies may exploit structural vulnerabilities in the market or in certain market participants. For example, by obtaining the fastest delivery of market data through co-location arrangements and individual trading center data feeds (discussed below in section IV.B.2.), proprietary firms theoretically could profit by identifying market participants who are offering executions at stale prices. In addition, some market participants offer guarantee match features to guarantee the NBBO up to a certain limit. A proprietary firm could enter a small limit order in one part of the market to set up a new NBBO, after which the same proprietary firm triggers guaranteed match trades in the opposite direction.[72] Are proprietary firms able to profitably exploit these structural vulnerabilities? To what extent do proprietary firms engage in the types of strategies described above? What is the effect of this trading on market quality?

d. Directional

Neither passive market making nor arbitrage strategies generally involve a proprietary firm taking a significant, unhedged position based on an anticipation of an intra-day price movement of a particular direction. There may, however, be a wide variety of short-term strategies that anticipate such a movement in prices. Some "directional" strategies may be as straightforward as concluding that a stock price temporarily has moved away from its "fundamental value" and establishing a position in anticipation that the price will return to such value. These speculative strategies often may contribute to the quality of price discovery in a stock.[73]

[72] The Commission has found that similar conduct is manipulative, in violation of Section 10(b) of the Exchange Act and Rule 10b–5 thereunder. *See* Terrance Yoshikawa, Securities Exchange Act Release No. 53731 (April 26, 2006) (Commission opinion affirming NASD disciplinary action).

[73] *See, e.g.,* Sanford Grossman & Joseph Stiglitz, *On the Impossibility of Informationally Efficient*

The Commission requests comment on two types of directional strategies that may present serious problems in today's market structure—order anticipation and momentum ignition.

Order Anticipation Strategies. One example of an order anticipation strategy is when a proprietary firm seeks to ascertain the existence of one or more large buyers (sellers) in the market and to buy (sell) ahead of the large orders with the goal of capturing a price movement in the direction of the large trading interest (a price rise for buyers and a price decline for sellers).[74] After a profitable price movement, the proprietary firm then may attempt to sell to (buy from) the large buyer (seller) or be the counterparty to the large buyer's (seller's) trading. In addition, the proprietary firm may view the trading interest of the large buyer (seller) as a free option to trade against if the price moves contrary to the proprietary firm's position.

Of course, any proprietary firm or other person that violates a duty to a large buyer or seller or misappropriates their order information and then uses the information for its own trading to the detriment of the large buyer and seller has engaged in misconduct that already is prohibited, such as forms of front running. Regulatory authorities currently examine for, investigate, and prosecute this type of misconduct and will continue to do so. The Commission requests comment on any regulatory change that would limit the potential for proprietary firms to profit from misconduct with respect to the trading activities of large buyers and sellers.

The type of order anticipation strategy referred to in this release involves any means to ascertain the existence of a large buyer (seller) that does not involve violation of a duty, misappropriation of information, or other misconduct. Examples include the employment of sophisticated pattern recognition software to ascertain from publicly available information the existence of a large buyer (seller), or the sophisticated use of orders to "ping" different market centers in an attempt to locate and trade in front of large buyers and sellers.

It is important to recognize the distinction between order anticipation and a normal search for liquidity to implement a trading strategy. When a proprietary firm employs an order anticipation strategy and detects a large buyer (seller), it will first attempt to buy (sell), and the proprietary firm largely will be indifferent to whether the party is a buyer or a seller. In contrast, long-term investors searching for liquidity to trade against will be seeking specifically either to establish a position or to liquidate a position. If buying, the long-term investor will attempt to find large selling interest and buy from it or, if selling, will attempt to find large buying interest and sell to it. Both the long-term investor and the large buyer (seller) benefit from the liquidity seeking strategy, in contrast to the order anticipation strategy where the large buyer (seller) is harmed when the proprietary firm initially trades in front of the large buyer (seller).

Order anticipation is a not a new strategy. Indeed, a 2003 treatise on market structure described order anticipation as follows: "Order anticipators are *parasitic traders.* They profit only when they can prey on other traders. They do not make prices more informative, and they do not make markets more liquid. * * * Large traders are especially vulnerable to order anticipators."[75] An important issue for purposes of this release is whether the current market structure and the availability of sophisticated, high-speed trading tools enable proprietary firms to engage in order anticipation strategies on a greater scale than in the past. Alternatively, is it possible that the widespread use of high-speed trading tools by a variety of proprietary firms and institutions limits the ability of market participants to engage in profitable order anticipation strategies? Does your answer depend on whether top tier, large, medium, or small market capitalization stocks are considered?

The Commission requests comment on all aspects of order anticipation strategies. Do commenters believe that order anticipation significantly detracts from market quality and harms institutional investors (for example, does it represent a substantial transfer of wealth from the individuals represented by institutional investors to proprietary firms)? Do commenters believe that order anticipation has become more or less prevalent in recent years? If more prevalent, is the use of proprietary firm strategies an important factor in this development? If commenters believe order anticipation has become more prevalent, are there ways to distinguish order anticipation from other beneficial trading strategies? Are there regulatory tools that would effectively address concerns about order anticipation, without unintentionally interfering with other strategies that may be beneficial for long-term investors and market quality?

Momentum Ignition Strategies. Another type of directional strategy that may raise concerns in the current market structure is momentum ignition. With this strategy, the proprietary firm may initiate a series of orders and trades (along with perhaps spreading false rumors in the marketplace) in an attempt to ignite a rapid price move either up or down. For example, the trader may intend that the rapid submission and cancellation of many orders, along with the execution of some trades, will "spoof" the algorithms of other traders into action and cause them to buy (sell) more aggressively. Or the trader may intend to trigger standing stop loss orders that would help cause a price decline. By establishing a position early, the proprietary firm will attempt to profit by subsequently liquidating the position if successful in igniting a price movement. This type of strategy may be most harmful in less actively traded stocks, which may receive little analyst or other public attention and be vulnerable to price movements sparked by a relatively small amount of volume.

Of course, any market participant that manipulates the market has engaged in misconduct that already is prohibited. The Commission and other regulatory authorities already employ their examination and enforcement resources to detect violations and bring appropriate proceedings against the perpetrators. This concept release is focused on the issue of whether additional regulatory tools are needed to address illegal practices, as well as any other practices associated with momentum ignition strategies. For example, while spreading false rumors to cause price moves is illegal, such rumors can be hard to find (if not spread in writing), and it can be difficult to ascertain the identity of those who spread rumors to cause price moves.

The Commission requests comment on whether momentum ignition strategies are a significant problem in the current market structure. To what extent do proprietary firms engage in the types of strategies described above?

Markets, American Economic Review (June 1980) ("We propose here a model in which there is an equilibrium degree of disequilibrium: prices reflect the information of informed individuals (arbitrageurs) but only partially, so that those who expend resources do receive compensation. How informed the price system is depends on the number of individuals who are informed, but the number of individuals who are informed is itself an endogenous variable in the model.").

[74] *See* Larry Harris, *Trading and Exchanges: Market Microstructure for Practitioners* (2003) at 222, 245 ("Harris Treatise") ("*Order anticipators* are speculators who try to profit by trading before others trade. They make money when they correctly anticipate how other traders will affect prices or when they can extract option values from the orders that other traders offer to the market.") (emphasis in original).

[75] Harris Treatise at 251 (emphasis in original).

Does, for example, the speed of trading and ability to generate a large amount of orders across multiple trading centers render this type of strategy more of a problem today? If momentum ignition strategies have caused harm, are there objective indicia that would reliably identify problematic strategies? Are there regulatory tools (beyond the currently applicable anti-fraud and anti-manipulation provisions) that would effectively reduce or eliminate the use of momentum ignition strategies while at the same time have a minimal impact on other strategies that are beneficial to long-term investors and market quality?

2. Tools

This section will focus on two important tools that often are used by proprietary firms to implement their short-term trading strategies—co-location and trading center data feeds.

a. Co-Location

Many proprietary firm strategies are highly dependent upon speed—speed of market data delivery from trading center servers to servers of the proprietary firm; speed of decision processing of trading engines of the proprietary firm; speed of access to trading center servers by servers of the proprietary firm; and speed of order execution and response by trading centers. Speed matters both in the absolute sense of achieving very small latencies and in the relative sense of being faster than competitors, even if only by a microsecond. Co-location is one means to save micro-seconds of latency.

Co-location is a service offered by trading centers that operate their own data centers and by third parties that host the matching engines of trading centers. The trading center or third party rents rack space to market participants that enables them to place their servers in close physical proximity to a trading center's matching engine. Co-location helps minimize network and other types of latencies between the matching engine of trading centers and the servers of market participants.

The Commission believes that the co-location services offered by registered exchanges are subject to the Exchange Act. Exchanges that intend to offer co-location services must file proposed rule changes and receive approval of such rule changes in advance of offering the services to customers.[76] The terms of co-location services must not be unfairly discriminatory, and the fees must be equitably allocated and reasonable.[77]

Fairness of Co-Location Services. Beyond these basic statutory requirements, the Commission broadly requests comment on co-location and whether it benefits or harms long-term investors and market quality. For example, does co-location provide proprietary firms an unfair advantage because they generally will have greater resources and sophistication to take advantage of co-location services than other market participants, including long-term investors? If so, specify how this disparity harms long-term investors. Conversely, does co-location offer benefits to long-term investors? For example, do co-location services enable liquidity providers to operate more efficiently and thereby increase the quality of liquidity they provide to the markets? Please quantify any harm or benefits, if possible. Is it fair for some market participants to pay to obtain better access to the markets than is available to those not in a position to pay for or otherwise obtain co-location services? Aside from physical proximity, are there other aspects of services offered by exchanges to co-location participants that may lead to unfair access concerns?

In addition, are brokers generally able to obtain and use co-location services on behalf of their customers? If so, are long-term investors harmed by not being able to use co-location directly? Are co-location fees so high that they effectively create a barrier for smaller firms? Do commenters believe that co-location services fundamentally differ from other respects in which market participants can obtain latency advantages, particularly if co-location services are not in short supply and are available to anyone on terms that are fair and reasonable and not unreasonably discriminatory?

If commenters believe that co-location services create unfair access to trading, should the Commission prohibit or restrict exchanges, and other trading centers, such as ATSs, from offering co-location services? If exchanges and other trading centers were no longer permitted to provide the services, would third parties, who may be outside the Commission's regulatory authority, be encouraged to obtain space close to an exchange's data center and rent such space to market participants? Alternatively, could exchanges and other trading centers batch process all orders each second and, if so, what would be the effect of such a policy on market quality?

The Commission also requests comment on exchanges and other trading centers that place their trading engines in data facilities operated by third parties. Such parties are not regulated entities subject to the access and other requirements of the Exchange Act and Commission rules. Could this disparity create competitive disadvantages among trading centers? Should the third party data centers be considered facilities of the exchange or trading center? Alternatively, should the Commission require trading centers to obtain contractual commitments from third parties to provide any co-location services on terms consistent with the Exchange Act and Commission rules?

With respect to those market participants that purchase co-location services, should exchanges and other trading centers be subject to specific requirements to help assure that all participants are treated in a manner that is not unfairly discriminatory? Latency can arise from a variety of sources, such as cable length and capacity, processing capabilities, and queuing. Is it possible for trading centers to guarantee equal latency across all market participants that use comparable co-location services? Should the Commission require latency transparency—the disclosure of information that would enable market participants to make informed decisions about their speed of access to an exchange or other trading center? Such disclosures could include, for example, periodic public reports on the latencies of the fastest market participants (on an anonymous basis), as well as private reports directly to individual market participants of their specific latencies. If latency disclosure should be required, what information should be disclosed and in what manner?

Affirmative or Negative Trading Obligations. Finally, the Commission requests comment on whether all or some market participants (such as proprietary firms) that obtain co-location services should be subject to any affirmative or negative obligations with respect to their trading behavior. Such obligations historically were applied to exchange specialists that enjoyed a unique time and place advantage on the floor of an exchange. Are co-location services analogous to the specialist advantages? Or does the wider availability of co-location services to many market participants distinguish co-located market participants from

[76] Section 3(a)(27) of the Exchange Act defines "rules of an exchange" as, among other things, a stated policy, practice, or interpretation of the exchange that the Commission has by rule determined to be rules of the exchange. Rule 19b-4(b) under the Exchange Act defines "stated policy, practice, or interpretation" to mean, in part, [a]ny material aspect of the operation of the facilities of the self-regulatory organization." The Commission views co-location services as being a material aspect of the operation of the facilities of an exchange.

[77] Section 6(b)(4) and (5) of the Exchange Act.

exchange specialists? If all or some co-location participants should be subject to trading obligations, what should be the nature of such obligations? For example, should some or all co-location participants be prohibited from aggressively taking liquidity and moving prices always or only under specified circumstances? If only under specified circumstances, what should those include or exclude? Should some or all co-location participants ever be required to provide liquidity on an ongoing basis or in certain contexts?

b. Trading Center Data Feeds

Another important tool widely used by proprietary firms is the individual data feeds offered by many exchanges and ECNs. As discussed in section III.B.1. above, the consolidated data feeds include the best-priced quotations of all exchanges and certain ATSs and all reported trades. The individual data feeds of exchanges and ECNs generally will include their own best-priced quotations and trades, as well as other information, such as inferior-priced orders included in their depth-of-book. When it adopted Regulation NMS in 2005, the Commission did not require exchanges, ATSs, and other broker-dealers to delay their individual data feeds to synchronize with the distribution of consolidated data, but prohibited them from independently transmitting their own data any sooner than they transmitted the data to the plan processors.[78]

Given the extra step required for SROs to transmit market data to plan processors, and for plan processors to consolidate the information and distribute it the public, the information in the individual data feeds of exchanges and ECNs generally reaches market participants faster than the same information in the consolidated data feeds. The extent of the latency depends, among other things, on the speed of the systems used by the plan processors to transmit and process consolidated data and on the distances between the trading centers, the plan processors, and the recipients. As noted above,[79] the Commission understands that the average latency of plan processors for the consolidated data feeds generally is less than 10 milliseconds. This latency captures the difference in time between receipt of data by the plan processors from the SROs and distribution of the data by the plan processors to the public.

Latency of Consolidated Data. The Commission requests comment on all aspects of the latency between consolidated data feeds and individual trading center data feeds. What have market participants experienced in terms of the degree of latency between trading center and consolidated data? Is the latency as small as possible given the necessity of the consolidation function, or could plan processor systems be improved to significantly reduce the latency from current levels, while still retaining the high level of reliability required of plan processors?

More broadly, is the existence of any latency, or the disparity in information transmitted, fair to investors or other market participants that rely on the consolidated market data feeds and do not use individual trading center data feeds? If so, should the unfairness be addressed by a requirement that trading center data be delayed for a sufficient period of time to assure that consolidated data reaches users first? Would such a mandated delay adequately address unfairness? Would a mandatory delay seriously detract from the efficiency of trading and harm long-term investors and market quality? Should the Commission require that additional information be included in the consolidated market data feeds?

Odd-Lot Transactions. Finally, the consolidated trade data currently does not include reports of odd lot orders or odd lot transactions (transactions with sizes of less than 1 round lot, which generally is 100 shares). It appears that a substantial volume of trading (approximately 4%) may be attributable to odd lot transactions. Why is the volume of odd lots so high? Should the Commission be concerned about this level of activity not appearing in the consolidated trade data? Has there been an increase in the volume of odd lots recently? If so, why? Do market participants have incentives to strategically trade in odd lots to circumvent the trade disclosure or other regulatory requirements? Would these trades be important for price discovery if they were included in the consolidated trade data? Should these transactions be required to be reported in the consolidated trade data? Why?

3. Systemic Risks

Stepping back from the particular strategies and tools used by proprietary traders, comment is requested more broadly on whether HFT poses significant risks to the integrity of the current equity market structure. For example, do the high speed and enormous message traffic of automated trading systems threaten the integrity of trading center operations? Also, many proprietary firms potentially could engage in similar or connected trading strategies that, if such strategies generated significant losses at the same time, could cause many proprietary firms to become financially distressed and lead to large fluctuations in market prices. To the extent that proprietary firms obtain financing for their trading activity from broker-dealers or other types of financial institutions, the significant losses of many proprietary firms at the same time also could lead to more widespread financial distress.[80]

Comment also is requested on whether proprietary traders help promote market integrity by providing an important source of liquidity in difficult trading conditions. The Commission notes that, from an operational standpoint, the equity markets performed well during the world-wide financial crisis in the Autumn of 2008 when volume and volatility spiked to record highs.[81] Unlike some financial crises in the past, the equity markets continued to operate smoothly and participants generally were able to trade at currently displayed prices (though most investors likely suffered significant losses from the general decline of market prices). Does

[78] Regulation NMS Release, 70 FR at 37567.

[79] *See supra* note 45 and accompanying text.

[80] A broker-dealer conducting a general securities business that is required to register with the Commission under Section 15(b) of the Exchange Act must comply with the Commission's net capital rule, Exchange Act Rule 15c3–1. Under Rule 15c3–1, broker-dealers are required to maintain, at all times, a minimum amount of net capital. This means that firms must be able to demonstrate that they have sufficient net capital for intra-day positions. In addition, if a broker-dealer is engaged in proprietary trading on margin, it may be subject to certain provisions of Regulation T, 12 CFR 220.1, *et seq.*, as well as SRO margin rules applicable to broker-dealers. *See, e.g.,* NYSE Rule 431(e)(5) (specialists' and market makers' accounts), (e)(6)(A) (broker/dealer accounts), (e)(6)(B) (Joint Back Office Arrangements) and NASD Rule 2520(e)(5), (e)(6)(A) and (e)(6)(B). Moreover, high frequency traders who are not broker-dealers must comply with the SRO day trading rules if they meet the definition of "pattern day trader." NYSE Rule 431(f)(8)(B) and NASD Rule 2520(f)(8)(B).

[81] *See, e.g.,* NYSE Euronext, Consolidated Volume in NYSE Listed Issues 2000–2009 (available at *http://www.nyxdata.com/nysedata/NYSE/FactsFigures/tabid/115/Default.aspx*) (consolidated average daily volume in NYSE-listed stocks reached a then-record high of 7.1 billion shares in October 2008, compared to an average of 3.4 billion shares for the year 2007); Pam Abramowitz, *Technology Drives Trading Costs,* Institutional Investor (November 4, 2009) ("[V]olatility has fallen substantially over the past six to nine months as equity markets have rallied. * * * [The] VIX, which hit an all-time high of 89.53 in October 2008, averaged 25.49 in the third quarter of 2009, close to its precrisis historical average of 20.3"); Tom Lauricella, *Volatility Requires New Strategies,* Wall Street Journal (October 20, 2008) ("The stock market's collapse and unprecedented daily price swings are forcing investors of all stripes to rethink their strategies, all the while looking for any hints that the financial markets will stabilize. * * * So far this month, there have been 10 days where the Dow Jones Industrial Average ricocheted in a range of more than 5% * * *").

the 2008 experience indicate that systemic risk is appropriately minimized in the current market structure? If not, what further steps should the Commission take to address systemic risk? Should, for example, all proprietary firms be required to register as broker-dealers and become members of FINRA to help assure that their operations are subject to full regulatory oversight? Moreover, does the current regulatory regime adequately address the particular concerns raised by proprietary firms and their trading strategies and tools?

C. Undisplayed Liquidity

As noted in section III.A. above, undisplayed liquidity is trading interest that is available for execution at a trading center, but is not included in the consolidated quotation data that is widely disseminated to the public. Undisplayed liquidity also is commonly known as "dark" liquidity. The Commission recently published proposals to address certain practices with respect to undisplayed liquidity. These include the use of actionable indications of interest, or "IOIs," to attract order flow, the lowering of the trading volume threshold that would trigger ATS order display obligations, and the real-time disclosure of the identity of ATSs on the public reports of their executed trades.[82] This release is intended to request comment on a wide range of issues with respect to undisplayed liquidity in all of its forms.

Undisplayed liquidity in general is not a new phenomenon. Market participants that need to trade in large size, such as institutional investors, always have faced a difficult trading dilemma. On the one hand, if they prematurely reveal the full extent of their large trading interest to the market, then market prices are likely to run away from them (a price rise for those seeking to buy and a price decline for those seeking to sell), which would greatly increase their transaction costs and reduce their overall investment returns. On the other hand, if an institutional investor that wants to trade in large size does nothing, then it will not trade at all. Finding effective and innovative ways to trade in large size with minimized transaction costs is a perennial challenge for institutional investors, the brokers that represent their orders in the marketplace, and the trading centers that seek to execute their orders.

A primary source of dark liquidity for many years was found on the manual trading floors of exchanges. The floor brokers "worked" the large orders of their customers by executing such orders in a number of smaller transactions without revealing to potential counterparties the total size of the order. One consequence of the decline in market share of the NYSE floor in recent years is that this historically large undisplayed liquidity pool in NYSE-listed stocks appears to have largely migrated to other types of venues. As discussed in section III.A.3. above, a recent form of undisplayed liquidity is the dark pool—an ATS that does not display quotations in the consolidated quotation data. Other sources of undisplayed liquidity are broker-dealers that internalize orders [83] and undisplayed order types of exchanges and ECNs.

Although they offer liquidity that is not included in the consolidated quotation data, dark pools and OTC market makers generally trade with reference to the best displayed quotations and execute orders at prices that are equal to or better than the NBBO. Indeed, all dark pools and OTC market makers are covered by the trade-through restrictions of Rule 611 and, subject to limited exceptions, cannot execute transactions at prices that are inferior to the best displayed prices.

The Commission requests comment on all forms of undisplayed liquidity in the current market structure. It particularly wants to present three issues for comment—the effect of undisplayed liquidity on order execution quality, the effect of undisplayed liquidity on public price discovery, and fair access to sources of undisplayed liquidity.

1. Order Execution Quality

It appears that a significant percentage of the orders of individual investors are executed at OTC market makers, and that a significant percentage of the orders of institutional investors are executed in dark pools. Comment is requested on the order execution quality provided to these long-term investors. Given the strong Exchange Act policy preference in favor of price transparency and displayed markets, do dark pools and OTC market makers offer substantial advantages in order execution quality to long-term investors? If so, do these advantages justify the diversion of a large percentage of investor order flow away from the displayed markets that play a more prominent role in providing public price discovery? If investors were limited in their ability to use undisplayed liquidity, how would trading behavior change, if at all? What types of activity might evolve to replace undisplayed liquidity if its use were constrained?

Individual Investors. Liquidity providers generally consider the orders of individual investors very attractive to trade with because such investors are presumed on average to not be as informed about short-term price movements as are professional traders. Do individual investor orders receive high quality executions when routed to OTC market makers? For example, does competition among OTC market makers to attract order flow lead to significantly better prices for individual investor orders than they could obtain in the public markets? Do OTC market makers charge access fees comparable to those charged by public markets? Does the existence of payment for order flow arrangements between routing brokers and OTC market makers (and internalization arrangements when the routing broker and OTC market maker are affiliated) detract from the quality of executions for investor orders? If more individual investor orders were routed to public markets, would it promote quote competition in the public markets, lead to narrower spreads, and ultimately improve order execution quality for individual investors beyond current levels? Finally, are a significant number of individual investor orders executed in dark pools and, if so, what is the execution quality for these orders?

Institutional Investors. An important objective of many dark pools is to offer institutional investors an efficient venue in which to trade in large size (often by splitting a large parent order into many child orders) with minimized market impact. To what extent do dark pools meet this objective of improving execution quality for the large orders of institutional investors? Does execution quality vary across different types of dark pools and, if so, which types? If so, does this difference depend on the characteristics of particular securities (such as market capitalization and security price)?

As noted above in section IV.C., many dark pools execute orders with reference to the displayed prices in public markets. Does this reference pricing create opportunities for institutional investors to be treated unfairly by improper behavior (such as placing a small order to change the NBBO for a

[82] *See* Non-Public Trading Interest Release, 74 FR at 61209–61210.

[83] As noted in section III.A.2. above, many broker-dealers may submit orders to exchanges or ECNs, which then are included in the consolidated quotation data. The internalized executions of broker-dealers, however, primarily reflect liquidity that is not included in the consolidated quotation data and are appropriately classified as undisplayed liquidity.

very short period and quickly submitting orders to dark pools for execution at prices affected by the new NBBO)?[84] If so, to what extent does gaming occur? Do all types of dark pools employ anti-gaming tools? How effective are such tools?

Finally, are institutional investors able to trade more efficiently using undisplayed liquidity at dark pools and broker-dealers than they are using the undisplayed liquidity at exchanges and ECNs? What are the advantages and disadvantages of each form of undisplayed liquidity? If the use of undisplayed liquidity at dark pools and broker-dealers were curtailed in any way, could institutional investors adjust by using undisplayed liquidity on exchanges and ECNs without incurring higher transaction costs?

2. Public Price Discovery

Comment is requested on whether the trading volume of undisplayed liquidity has reached a sufficiently significant level that it has detracted from the quality of public price discovery and execution quality. For example, has the level of undisplayed liquidity led to increased spreads, reduced depth, or increased short-term volatility in the displayed trading centers? If so, has such harm to public price discovery led to a general worsening of execution quality for investors in undisplayed markets that execute trades with reference to prices in the displayed markets?

It appears that a significant percentage of the orders of long-term investors are executed either in dark pools or at OTC market makers, while a large percentage of the trading volume in displayed trading centers is attributable to proprietary firms executing short-term trading strategies. Has there in fact been an increase in the proportion of long-term investor orders executed in undisplayed trading centers? If so, what is the reason for this tendency and is the practice beneficial or harmful to long-term investors and to market quality? With respect to undisplayed order types on exchanges and ECNs, do commenters believe that these order types raise similar concerns about public price discovery as undisplayed liquidity at dark pools and broker-dealers?

If commenters do not believe the current level of undisplayed liquidity has detracted from the quality of public price discovery, is there any level at which they believe the Commission should be concerned? In this regard, it appears that the overall percentage of trading volume between undisplayed trading centers and displayed trading centers has remained fairly steady for many years between 70% and 80%.[85] Does this overall percentage accurately reflect the effect of undisplayed liquidity on public price discovery or does it mask potentially important changes in the routing of underlying types of order flow? For example, the NYSE captures a smaller percentage of trading in NYSE-listed stocks, while the overall volume in NYSE stocks has increased dramatically.[86] Should this change in market share be interpreted to mean that a greater percentage of long-term individual investor and long-term institutional investor order flow in NYSE-listed stocks has shifted to dark pools and OTC market makers, while the public markets are executing an expanding volume of trading that is primarily attributable to HFT strategies? If so, does this underlying shift in order flow affect the quality of public price discovery in NYSE-listed stocks and what are the reasons for this development? Do similar order flow patterns affect the quality of public price discovery in stocks listed on other exchanges as well?

Trade-At Rule. If commenters believe that the quality of public price discovery has been harmed by undisplayed liquidity, are there regulatory tools that the Commission should consider to address the problem? Should the Commission consider a "trade-at" rule that would prohibit any trading center from executing a trade at the price of the NBBO unless the trading center was displaying that price at the time it received the incoming contra-side order? Under this type of rule, for example, a trading center that was not displaying the NBBO at the time it received an incoming marketable order could either: (1) Execute the order with significant price improvement (such as the minimum allowable quoting increment (generally one cent)); or (2) route ISOs to full displayed size of NBBO quotations and then execute the balance of the order at the NBBO price.

The Commission requests comment on all aspects of a trade-at rule. Would it help promote pre-trade public price discovery by preventing the diversion of a significant volume of highly valuable marketable order flow away from the displayed trading centers and to undisplayed trading centers? If so, to what extent would the increased routing of this marketable order flow to displayed trading centers create significantly greater incentives for market participants to display quotations in greater size or with more aggressive prices?

Given the order-routing and trading system technologies currently in place to prevent trade-throughs, would it be feasible for market participants to comply with a trade-at rule at reasonable cost? Should a trade-at rule apply to all types of trading centers (*e.g.,* exchanges, ECNs, OTC market makers, and dark pools) or only to some of them? If so, which ones and why? In addition, if the Commission were to consider such a rule, how should it treat the issue of displayed markets that charge access fees? Should it, for example, condition the "trade-at" protection of a displayed quotation on there being no access fee or an access fee that is much smaller than the current 0.3 cent per share cap in Rule 610(c) of Regulation NMS?

Depth-of-Book Protection. Rule 611 currently provides trade-through protection only to quotations that reflect the best, "top-of-book," prices of a trading center.[87] Should Rule 611 be expanded to provide trade-through protection to the displayed "depth-of-book" quotations of a trading center? Would depth-of-book protection significantly promote the greater display of trading interest? Is depth-of-book protection feasible under current trading conditions and could the securities industry implement depth-of-book protection at reasonable cost?

Low-Priced Stocks. There may be greater incentives for broker-dealer internalization in low-priced stocks than in higher priced stocks. In low-priced stocks, the minimum one cent per share pricing increment of Rule 612 of Regulation NMS is much larger on a percentage basis than it is in higher-priced stocks. For example, a one cent spread in a $20 stock is 5 basis points, while a one cent spread in a $2 stock is 50 basis points—10 times as wide on a percentage basis. Does the larger percentage spread in low-price stocks lead to greater internalization by OTC market makers or more trading volume in dark pools? If so, why? Should the Commission consider reducing the minimum pricing increment in Rule 612 for lower priced stocks?

[84] The Commission has found that similar conduct is manipulative. *See supra* note 72.

[85] *See supra* note 21 and accompanying text (estimated 25.4% of share volume in NMS stocks executed in undisplayed trading centers in September 2009).

[86] *See supra* notes 8 and 10 and accompanying text.

[87] *See* Regulation NMS Release, 70 FR at 37529–37530 (discussion of decision not to adopt a "Voluntary Depth Alternative" that would have provided trade-through protection to depth-of-book quotations that a market voluntarily included in the consolidated quotation data).

3. Fair Access and Regulation of ATSs

A significant difference between the undisplayed liquidity offered by exchanges and the undisplayed liquidity offered by dark pools and broker-dealers is the extent of access they allow to such liquidity. As noted in section III.B.3. above, registered exchanges are required to offer broad access to broker-dealers. As ATSs that are exempt from exchange registration, dark pools are not required to provide fair access unless they reach a 5% trading volume threshold in a stock, which none currently do.[88] Broker-dealers that internalize also are not subject to fair access requirements. As a result, access to the undisplayed liquidity of dark pools and broker-dealers is determined primarily by private negotiation.

The Commission requests comment on whether trading centers offering undisplayed liquidity are subject to appropriate regulatory requirements for the type of business they conduct. For example, should the trading volume threshold in Regulation ATS that triggers the fair access requirement be lowered from its current 5%? If so, what is the appropriate threshold?

If an ATS exceeds the trading volume threshold, Regulation ATS requires that the ATS have access standards that do not unreasonably prohibit or limit any person in respect to access services, and prohibits the ATS from applying such standards in an unfair or discriminatory manner. Do commenters believe that all types of dark pools can comply with this fair access requirement, yet still achieve the objective of enabling institutional investors to trade in large size with minimized price impact? Can dark pool restrictions designed to prevent predatory trading behavior[89] be drafted in an objective fashion that would comply with the Regulation ATS fair access requirement?

The majority of dark pool volume is executed in ATSs that are sponsored by multi-service broker-dealers.[90] Can a broker-dealer sponsored dark pool apply objective fair access standards reasonably to prevent predatory trading, but without using such standards as a pretext to discriminate based on the competitive self interest of the sponsoring broker?

Finally, do investors have sufficient information about dark pools to make informed decisions about whether in fact they should seek access to dark pools? Should dark pools be required to provide improved transparency on their trading services and the nature of their participants? If so, what disclosure should be required and in what manner should ATSs provide such disclosures?

More broadly, are there any other aspects of ATS regulation that should be enhanced for dark pools or for all ATSs, including ECNs? For example, do ATSs contribute appropriately to the costs of consolidated market surveillance? Currently, FINRA is the SRO for ATSs, and ATSs must pay the applicable FINRA regulatory fees. Do these FINRA fees adequately reflect the significant volume currently executed by ATSs? Should ATSs be required to contribute more directly to the cost of market surveillance? Finally, are there any ways in which Regulation ATS should be modified or supplemented to appropriately reflect the significant role of ATSs in the current market structure?

D. General Request for Comments

The Commission requests and encourages all interested persons to submit their views on any aspect of the current equity market structure. While this release was intended to present particular issues for comment, it was not intended in any way to limit the scope of comments or issues to be considered. In addition, the views of commenters are of greater assistance when they are accompanied by supporting data and analysis.

Dated: January 14, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–1045 Filed 1–20–10; 8:45 am]

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[88] The Commission understands that ECNs, unlike most dark pools, generally offer wide access to their services, including undisplayed liquidity, even if not subject to the fair access requirement of Rule 301(b)(5) of Regulation ATS.

[89] *See, e.g.,* section IV.B.1.d. *supra* (discussion of order anticipation strategies that seek to ascertain the existence of large buyers and sellers).

[90] Data compiled from Forms ATS submitted to Commission for 3d quarter 2009.

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